No. 21-_____

IN THE
SUPREME COURT OF THE UNITED STATES

AMOS MAST, MENNO MAST, SAM MILLER, and AMMON SWARTZENTRUBER,

Petitioners,

vs.

COUNTY OF FILLMORE, and MINNESOTA POLLUTION CONTROL AGENCY,

Respondents.

On Petition for a Writ of Certiorari to
the Minnesota Court of Appeals

APPENDIX

Filed in District Court
State of Minnesota
6/8/2020

STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1375

Amos Mast, et al.,
Appellants,

vs.

County of Fillmore,
Respondent,

Minnesota Pollution Control Agency,
Respondent.

Filed June 8, 2020
Affirmed
Worke, Judge

Fillmore County District Court
File No. 23-CV-17-351

Brian N. Lipford, Law Offices of Southern Minnesota Regional Legal Services, Inc., Rochester, Minnesota; and

Charles H. Thomas, Law Offices of Southern Minnesota Regional Legal Services, Inc., St. Paul, Minnesota (for appellants)

Brett A. Corson, Fillmore County Attorney, Preston, Minnesota (for respondent Fillmore County)

Keith Ellison, Attorney General, Christina M. Brown, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Pollution Control Agency)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellants argue that the district court erred by denying their claims for a declaratory judgment that authorities mandating the installation of subsurface sewage treatment systems (septic systems) violate their freedom of conscience under the Minnesota Constitution, Minn. Const. art. I, § 16, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc-2000cc-5 (2018). We affirm.

FACTS

Appellants Amos Mast, Menno Mast, Ammon Swartzentruber, and Sam Miller (appellants) are all members of an Amish community in Fillmore County. In May 2015, members of the community submitted a letter to respondent Minnesota Pollution Control Agency (MPCA) stating their opposition, on religious grounds, to the requirement that they use gray-water-treatment systems to dispose of their household wastewater.

A septic system is comprised of three main components: a septic tank, a drain field, and oxygenated treatment soil. Gray water first flows out of the house and into the septic tank. The septic tank functions as a settling chamber, wherein heavy solids in the wastewater sink to the bottom of the tank and light oils, greases, and soaps float to the top. After these heavy and light elements are separated, the gray water next flows into the drain field, which is comprised of a series of perforated pipes that distribute the wastewater across the field for absorption by the oxygenated topsoil. The drain field must contain at least three feet of nonsaturated soil above the bedrock so that the oxygen in the soil can

aerobically purify the remaining contaminates in the gray water before it enters the groundwater.

The MPCA is directed to adopt rules for "the design, location, installation, use, maintenance, and closure of [septic systems]." Minn. Stat. § 115.55, subd. 3(a) (2018). The MPCA rules for individual septic systems are set forth in chapter 7080 of the Minnesota Rules. Minn. R. 7080.1050-.2550 (2019). "The proper location, design, installation, use, and maintenance of an individual [septic system] protects the public health, safety, and general welfare by the discharge of adequately treated sewage to the groundwater." Minn. R. 7080.1050.

Sewage is defined as "waste produced by toilets, bathing, laundry, or culinary operations or the floor drains associated with these sources." Minn. R. 7080.1100, subp. 73. Gray water is defined as "sewage that does not contain toilet wastes." *Id.*, subp. 37. "Sewage discharged from a dwelling . . . must be treated according to applicable requirements." Minn. R. 7080.1500, subp. 1.

Counties are required to adopt ordinances that comply with the MPCA rules. Minn. Stat. § 115.55, subd. 2(a) (2018). Respondent Fillmore County adopted the relevant MPCA rules in their entirety. Fillmore County, Minn., Sub-Surface Sewage Treatment System Ordinance (FCO) § 501 (2013).[1]

[1] The ordinance also provides specific alternative standards for members of the local Amish community, which allow for a smaller septic system based on a flat-usage measurement of 100 gallons per day. FCO § 502.

Instead of the generally statutorily prescribed septic systems,[2] appellants implemented their own experimental gray-water-treatment systems on their properties. In appellants' alternative-treatment systems, called mulch basins, the gray water flows from the house, through a pipe, and into a large earthen basin dug into the ground and is filled with wood chips. The wood-chip mulch functions in a manner similar to a septic tank, filtering out solids and grease, and providing surge capacity until the discharged gray water can be absorbed by the soil at the bottom of the basin. The oxygenated soil at the bottom of the mulch basin aerobically purifies the wastewater in a manner similar to the soil beneath a drain field in a septic system.

In April 2016, the MPCA filed administrative enforcement actions against Amish families in Fillmore County. In April 2017, appellants filed a complaint in district court, seeking a declaratory judgment that application of state and county rules generally mandating the installation of septic systems to treat gray water violates appellants' freedom of conscience under the Minnesota Constitution and RLUIPA.[3] [4]

[2] In addition to the septic systems set forth above, gray water can also be treated in what are termed type-five systems. So long as certain minimum standards are met, type-five systems allow a licensed engineer to design a system and bear the risk that it will function properly. *See* Minn. R. 7080.2400. Appellants did not propose that their alternative gray-water-treatment systems satisfied rule 7080.2400, and therefore these types of systems are not implicated on appeal.

[3] Appellants also brought a claim for asserted violations of their rights under the United States Constitution, which they later withdrew.

[4] The county filed a counterclaim seeking an order that appellants bring their properties into compliance with state and local zoning and wastewater-treatment rules, and if they fail to do so within six months, an order that their homes be rendered uninhabitable. By agreement of the parties, the bench trial was limited to appellants' declaratory-judgment claims, and the district court deferred ruling on the county's zoning-enforcement actions.

Following a bench trial, the district court determined that the general statutory mandate for septic systems substantially burdened appellants' sincerely held religious beliefs. However, the district court also concluded that respondents met their burden of establishing that septic systems—not mulch basins—are the least-restrictive means of meeting the government's compelling interest of protecting public health and the environment. The district court therefore denied appellants' request for declaratory relief. This appeal followed.

D E C I S I O N

The interpretation of the constitution is a legal issue that this court reviews de novo. *Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018). This court also reviews the interpretation of a statute de novo. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). "On appeal, a [district] court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous. . . . If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (citation omitted).

Appellants assert that laws generally requiring them to install septic systems violate their freedom of conscience under the Minnesota Constitution and their rights under RLUIPA. Minnesota courts use a four-prong test to determine whether a governmental regulation impermissibly burdens the freedom of conscience: "[1] whether the objector's belief is sincerely held; [2] whether the state regulation burdens the exercise of religious beliefs; [3] whether the state interest in the regulation is overriding or compelling; and [4] whether the state regulation uses the least restrictive means." *Hill-Murray Fed'n of*

Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). Claims for violations of RLUIPA are analyzed under an essentially similar four-prong test. *See Holt v. Hobbs*, 574 U.S. 352, 362, 135 S. Ct. 853, 862-63 (2015); *see also* 42 U.S.C. § 2000cc(a)(1).

The district court found that requiring appellants to install septic systems on their properties substantially burdened their sincerely held religious beliefs. Respondents did not appeal these findings. Under both the Minnesota Constitution and RLUIPA, respondents bore the burden of demonstrating the existence of a compelling state interest and that the regulation at issue is the least-restrictive means of achieving that interest. *See Holt*, 574 U.S. at 363, 135 S. Ct. at 863 (regarding RLUIPA); *State v. Hershberger*, 462 N.W.2d 393, 395 (Minn. 1990) (regarding the Minnesota Constitution).

Appellants argue that the district court erroneously identified the compelling state interest implicated by the state's regulation of household-wastewater treatment. Appellants also assert that the district court made erroneous findings of fact regarding the feasibility of their proposed alternative gray-water-treatment systems, and thus the district court's legal conclusion that the state demonstrated that statutorily mandated septic systems are the least-restrictive means of protecting public health was also incorrect.

Compelling state interest

Appellants first argue that the district court erroneously identified the compelling state interest implicated by the state's regulation of household-wastewater treatment. The district court found that "untreated or inadequately treated gray water presents substantial and serious danger to public health and risk to the environment, and that the [g]overnment

has a compelling interest in protecting against those dangers." Appellants acknowledge that they stipulated to this governmental interest, but assert that they did not stipulate that the government has a compelling interest in imposing the use of septic systems to treat gray water.

During trial, the district court sought to clarify the terms of the parties' stipulation. The district court stated that it was "not sure that [the] stipulation goes so far as to be an agreement . . . that gray water and its treatment pose significant risk to the public safety of our water." Counsel for the MPCA informed the district court that appellants did not stipulate to the fact that "gray water was an imminent threat[,]" but they admitted "that protecting Minnesota's groundwater from contamination and protecting the health of Minnesota citizens are both compelling state interests." Appellants did not object to this characterization of the stipulation.[5]

The district court's finding regarding the government's compelling interest is comprised of two separate clauses. The first clause states that untreated or improperly treated gray water is a threat to public health and the environment. This finding is supported by the record and therefore is not clearly erroneous. *See Fletcher*, 589 N.W.2d at 101. One of the MPCA's experts, Dr. Sara Heger, testified that numerous published studies indicate that there are potentially millions of bacteria and viruses present in 100

[5] The MPCA argues that this issue regarding the proper characterization of the government's compelling interest was not raised below and should be deemed forfeited on appeal in accordance with *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). However, as this on-the-record exchange shows, the district court raised the issue sua sponte and attempted to clarify the contours of the parties' agreement and where additional findings would be required. On this basis, the argument is not forfeited.

milliliters of gray water as indicated by the presence of fecal-coliform bacteria. She characterized gray water as "a contaminant source that needs to be treated[,]" and stated that surface water and groundwater need to be protected from inadequately treated gray water.

The second clause of the district court's finding recites that the government has a compelling interest in protecting against the dangers of untreated or inadequately treated gray water. Appellants stipulated that protecting Minnesota's groundwater from contamination and protecting the health of Minnesota citizens are both compelling state interests. Thus, the district court did not err in its identification of the relevant compelling governmental interest, which was consistent with the terms of the parties' stipulation and based upon a finding that was adequately supported by the record.

Least-restrictive means

Appellants next argue that the district court erred by finding that their mulch-basin system did not provide a less-restrictive means of accomplishing the government's compelling interest. Appellants assert that the district court improperly placed the burden on appellants to demonstrate that their alternative worked, failed to consider appellants' professionally designed mulch-basin system, and made findings that ignored evidence in the record which supported the feasibility of their mulch-basin system.

The burden was on respondents to show that appellants' mulch-basin system did not adequately satisfy the government's compelling interest in protecting public health and the environment. *See Hershberger*, 462 N.W.2d at 399 (stating that the state failed to prove that the white reflective tape and lanterns used by the Amish to mark their slow-moving

buggies did not adequately protect public safety). Here, the district court correctly placed the burden on respondents to demonstrate that the mulch-basin system did not adequately protect public health and the environment. The district court stated that "the burden of proof is on the [g]overnment to establish that its compelling state interest cannot be served by a 'less intrusive alternative.'"

Appellants concede that their experimental mulch basins overflowed. Minn. Stat. § 115.55, subd. 5a(b) (2018), provides that if an inspector finds that sewage discharges to the ground surface, or if sewage backs up, "then the system constitutes an imminent threat to public health or safety." However, appellants maintain that even though their experiments were not successful at preventing sewage from seeping back onto the surface,[6] the evidence at trial established that mulch basins have the potential to provide a less-restrictive alternative to the government's septic systems, and thus respondents failed to meet their burden.

Appellants assert that the district court should have considered the feasibility of their professionally designed mulch-basin system, which utilized an interconnected series of four basins, rather than their homemade experimental single-basin system. Contrary to appellants' assertion, the district court did consider their professionally designed system, finding that even though respondents asserted that they were prejudiced by the late disclosure of the professionally designed system, it was admissible because the new system

[6] Appellants point out that the same statutory provision that identifies a backed-up system as an imminent public-health threat also allows the owner up to ten months to repair, upgrade, or replace their septic system following the receipt of a notice of noncompliance. *See* Minn. Stat. § 115.55, subd. 5a(b).

"is simply an enlarged version" of the experimental system installed on appellants' properties. The record therefore demonstrates that the district court properly placed the burden on respondents to demonstrate that none of appellants' proposed alternative systems, including the professionally designed system, adequately protected public health and the environment.

The remainder of appellants' arguments pertain to their assertion that the district court should have given more credit to the evidence that supported the feasibility of mulch basins to adequately treat gray water and less credit to the evidence that demonstrated that mulch basins were not feasible in Fillmore County. However, when considering whether a district court's findings are clearly erroneous, this court does not reconcile conflicting evidence. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). Similarly, appellants argue that the district court should not have discredited the testimony of their expert witness while finding respondents' experts credible. However, "[t]he assessment of a witness' credibility is the unique function of the trier of fact." *Pelowski v. K-Mart Corp.*, 627 N.W.2d 89, 93 (Minn. 2001).

The district court's findings regarding the unfeasibility of appellants' mulch-basin system are all supported by the record, and therefore are not clearly erroneous. The district court found that Dr. Heger credibly testified that the biggest problem with appellants' proposed alternative "is finding a system that you can put in subsurfacely that has three feet of soil treatment." She added that even if a suitable location with enough separation could be found on appellants' properties, "we'd also have to think about more ingenious

ways to try to spread out the water. . . . [T]he issue is it would seal up relatively quickly across the bottom because . . . there wasn't a septic tank." If the bottom of the basin did seal, the only remedy would be "to move to another location unless you take that soil off, and then there's the risk of smearing and compacting that soil. When you do that, it may not take water as well again." This testimony goes to the general unworkability of mulch basins in Fillmore County, not just the specific failures of appellants' experimental system.

Finally, appellants assert that the acceptability of mulch basins in 20 other states, and under the Uniform Plumbing Code—the relevant portions of which have not been adopted in Minnesota—demonstrates that the district court incorrectly concluded that mulch basins do not provide a less-restrictive means of disposing of gray water in a manner conducive to protecting public health and the environment. *See Holt*, 574 U.S. at 368-69, 135 S. Ct. at 866 ("That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks."). However, the district court set forth the factual bases that support its determination not to rely on the practices of other states.

The district court distinguished the practices in California and Arizona from the situation in Fillmore County, because the climates "are so dissimilar in average temperature and precipitation to Minnesota's, that the [district court] can take little guidance from the experience of those states." Regarding the practices of more environmentally compatible states, such as Montana and Wyoming, the district court found that "little or no evidence was presented about the extent of use, regulation, and performance of mulch systems in

those states. On this record, mulch systems in Montana and Wyoming provide the [district] court no direction." The district court also found that no evidence or information regarding Wisconsin's practices, which may permit mulch systems, was offered at trial. Based on these findings, the district court did not err by declining to rely on the practices of other states as persuasive authority for the feasibility of appellants' proposed system in Fillmore County.

Because the district court's findings of fact are supported by the record, and thus are not clearly erroneous, the district court properly concluded that "even with the capacity expansion and siting improvements to which [appellants] are agreeable, [the mulch basins] would not accomplish the [g]overnment's compelling public health and environmental safety purposes." Therefore, the district court appropriately concluded that respondents met their burden of demonstrating that appellants' mulch-basin system does not provide a less-restrictive means of accomplishing the government's compelling interests of protecting public health and the environment.

Affirmed.

STATE OF MINNESOTA

COUNTY OF FILLMORE

IN THE DISTRICT COURT
CIVIL DIVISION
THIRD JUDICIAL DISTRICT

Amos Mast, Menno Mast,
Sam Miller, and Ammon Swartzentruber,

Plaintiffs,

vs.

County of Fillmore and
Minnesota Pollution Control Agency,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT, AND JUDGMENT

Court File No. 23-CV-17-351

AND

County of Fillmore, a Political
Subdivision of the State of Minnesota,

Plaintiff,

vs.

Ammon J. Swartzentruber
and Sarah J. Swartzentruber,

Defendants.

Court File No. 23-CV-16-844

On November 26-30 and December 14 and 27, 2018, the above matters came before the Honorable Joseph F. Chase, Judge of District Court, for court trial. Attorney Brian N. Lipford, Southern Minnesota Regional Legal Services, Rochester, Minnesota, appeared on behalf of Plaintiffs Amos Mast, Menno Mast, Sam Miller, and Ammon Swartzentruber. Fillmore County Attorney Brent Corson, Preston, Minnesota, appeared on behalf of Fillmore County. Assistant

Attorneys General Christina M. Brown and Janine Kimble, Saint Paul, Minnesota, appeared on behalf of the Minnesota Pollution Control Agency.

(These cases are consolidated; but by agreement of the parties, the matters litigated at trial were limited to determination of the religious liberty question under the Minnesota Constitution and the Religious Land Use and Institutionalized Resources Act. Deferred for future determination were other issues relating to enforcement of Fillmore County's zoning provisions.)

Based upon the evidence heard and the arguments and the written submissions of counsel, the Court makes the following findings of fact, conclusions of law, and order for judgment:

FINDINGS OF FACT

1. All Plaintiffs are members of the Swartzentruber Amish community living in Fillmore County, Minnesota.
2. The State of Minnesota Pollution Control Agency, and Fillmore County (collectively "the Government") require rural residences to have subsurface sewage treatment systems ("SSTS") for disposing of residential wastewater. The Government requires that "gray water"— household wastewater originating from laundry, bathing and kitchen activities—be disposed of through septic systems.
3. Plaintiffs object on religious grounds to installing the Government's required septic systems on their property to dispose of gray water.
4. Plaintiffs' objection to installing gray water septic systems required by the Government is based on a sincerely held religious belief.

5. The Government's regulation—that septic systems be installed on Plaintiffs' properties to dispose of gray water—substantially burdens Plaintiffs' exercise of their sincerely held religious beliefs.

6. The Government has a compelling interest in protecting human health and the environment. Specifically, the Government has a compelling interest in ensuring that gray water is properly treated so as not to transmit disease and introduce into the environment harmful chemicals and nutrients.

7. The Government's requirement that rural residents install gray water septic systems is the least restrictive means of ensuring that gray water is properly treated such that public health and the environment is protected. Plaintiffs' proposed mulch basin system is a less religiously burdensome alternative, but it does not adequately serve the Government's compelling interests in public health and environmental protection.

CONCLUSIONS OF LAW

1. Plaintiffs' Claim under the Minnesota Constitution, art. I, § 16:

- **a.** As the Government has established that there is no less religiously burdensome alternative that serves the Government's compelling interests, Plaintiffs are *not* entitled to relief declaring that the Government's septic system requirement violates Plaintiffs' religious liberties under the Minnesota Constitution.

2. Plaintiffs' Claim under the United States Constitution:

- **a.** During trial, Plaintiffs withdrew Count II, a claim based on the United States Constitution. Pursuant to Minn. R. Civ. P. 41.01(b), it is appropriate for the Court to dismiss this count with prejudice.

3. Plaintiffs' Claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*.:

a. *See* Conclusion of Law § 1.a. The Government's septic system requirement is the least restrictive means of accomplishing its compelling interest in protecting public health and the environment. Plaintiffs' claim fails on this ground.

ORDER:

1. Judgment shall be entered for Defendants Fillmore County and MPCA denying Count I of Plaintiffs' Complaint, which seeks a declaration and injunction against Defendants pursuant to Minn. Const. art. I, § 16.
2. Count II of Plaintiffs' Complaint, which seeks a declaration and injunction against Defendants pursuant to the United States Constitution, is dismissed with prejudice.
3. Judgment shall be entered for Defendants Fillmore County and MPCA denying Count III of Plaintiffs' Complaint, which seeks a declaration and injunction against Defendants pursuant to RLUIPA, 42 U.S.C. § 2000cc *et seq*.
4. Determination of other issues relating to enforcement of Fillmore County's zoning provisions in File No. 23-CV-16-844 is deferred.

The Court's memorandum, filed herewith, is incorporated herein.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: April 22, 2019.

BY THE COURT:

_____

Joseph F. Chase
Judge of District Court

JUDGMENT

I hereby certify that the forgoing Findings of Fact, Conclusions of Law, and Order for Judgment, dated April 22, 2019, by the Honorable Joseph F. Chase constitutes the judgment of this Court.

Dated:

BY THE DEPUTY CLERK

_____

James D. Atwood
Court Administrator

MEMORANDUM

Law

Minnesota

The law that governs the Amish Plaintiffs' constitutional challenge to the Government's "gray water" septic system requirement is largely laid out in two prior Minnesota Supreme Court cases that also involved the religious liberty of Fillmore County Amish. [1] In *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989) ("*Hershberger I*"), the Minnesota Supreme Court ruled on *federal* constitutional grounds that the Amish defendants in that criminal prosecution could not constitutionally be required to display on their buggies the orange and red slow moving vehicle ("SMV") sign mandated by Minn. Stat. § 169.522. The applicable test under the federal constitution was described by the *Hershberger I* court as follows:

> We address the Free Exercise Clause claim by observing that the United States Supreme Court has considered three factors to predominate in an evaluation of a Free Exercise Clause claim: (1) Is the objector's claim based on a sincerely held religious belief? (2) Does the government regulation burden the exercise of that religious belief? and, (3) Is the burden justified by a compelling state interest, which cannot be served by a less intrusive alternative?

Hershberger I, at 285.

In applying this test, the *Hershberger I* court found that the Amish defendants' objection to the display of SMV sign was based on a sincerely held religious belief, despite the fact that the objection was *not* shared "by the [Fillmore County Amish] community as a whole." *Id.* at 285-

[1] I will use the term "Government" herein when I refer to both the State of Minnesota Pollution Control Agency and Fillmore County.

The constitutional dispute at issue here involves the Government's requirement that Plaintiffs install septic systems to treat the "gray water" that comes from their households in Fillmore County. "Gray water" is water that has been used in a home in sinks, washing machines, baths, and showers. The Government calls these systems "subsurface sewage treatment systems" (SSTS). "Sewage," as the Government uses that term, means *any* type of waste water from domestic activities, not just toilet waste water ("black water"), but also gray water. Amish households use outhouses for toilets, a practice that is permitted by law. The dispute here relates solely to gray water.

86. The court found no support for the idea that one asserting rights under the Free Exercise Clause of the First Amendment must "demonstrate that the sincerity of his or her belief comports with a religious tenet or principle uniformly and sincerely held by a religious community of which he or she is a member." *Id.* at 286. In fact, the court found that such a requirement had been "uniformly rejected" in federal constitutional cases.

> For example, in *Thomas* [*v. Review Bd. of Indiana Employment Sec.*], 450 U.S. at 714, 101 S.Ct. at 1430, the Supreme Court specified that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Rather, the Court explained, the focus is on whether the one claiming the right individually has a sincere religious belief.
>
> > We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs * * *.
> >
> > * * * * * *
> >
> > Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and *the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.* Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Hershberger I, at 286, quoting *Thomas*, 450 U.S. at 715-16 (emphasis added by *Hershberger I* court).

The *Hershberger I* court noted that the trial judge had:

> [I]mplicitly determine[d] that application of the statute infringed upon the personal sincere religious beliefs of appellants although not all in the Fillmore County Amish community adhered to those same beliefs. The fact that at least one of the appellants has already actually suffered jail incarceration, and that the others have persistently expressed a willingness to do so rather than comply with the statute, must assuredly

> buttress that implicit finding that the appellants individually possessed a personal sincerity of belief.

Id. at 287. Finding no requirement that "the claimant's belief be shared by the [Amish] community as a whole," the *Hershberger I* court held that:

> [T]hese appellants have met the initial test enunciated in *Thomas* by establishing that their sincerely held religious beliefs protected them from displaying the reflectorized emblem or the alternates required by the statute.

Id.

The *Hershberger I* court also found "without question" that "the second factor of the *Thomas* test" -- that "application of the statute burdens the exercise of the appellants' religious beliefs" -- was satisfied. *Id*. at 287. The *Hershberger I* court based its finding of burden on "the potentiality, if not the certainty, of criminal sanctions including fines or jail time" that the Amish parties would face as the result of "choos[ing]…fidelity to religious belief" over compliance with state law.

> Here, the burden on these Amish appellants is substantial. They face a choice of either adhering to their religious beliefs by refusing to adopt "worldly symbols" bearing "loud colors" and suffering the consequent criminal sanctions therefor, or rejecting those beliefs in order to comply with the SMV statute.

Id.

The *Hershberger I* court then turned to analysis of the third *Thomas* factor:

> Even though a challenger who asserts a Free Exercise claim has succeeded in establishing the existence of a sincerely held belief and that the state's action has substantially burdened the Free Exercise Clause right, the third requirement of a *Thomas* analysis involves an inquiry into whether the burden is justified by a compelling state interest which cannot be served by a less intrusive alternative.

Id. at 287-88.

The *Hershberger I* court "judicially notice[d]" that "the state's concern for safety of the public using the highways, including these appellants, is a legitimate compelling state interest." *Id*. at 288. But the court concluded that the State had "failed to establish that a less restrictive

alternative would not serve its public safety concerns." *Id*. at 289.[2] The Amish defendants in *Hershberger I* had proposed their own less restrictive alternative to the State's SMV sign requirement:

> The appellants here assert that since they do not object on religious grounds to outlining the boxes of their buggies with silver reflective tape — a color they consider acceptable because not "loud" — or to displaying red lit lanterns as a supplement to the silver reflective tape, that there does exist a less restrictive alternative to serve the state's public safety concerns. They further point out that testimony at the hearing established that the silver reflectorized tape was at least as bright, if not brighter than that outlining either triangular emblem mandated by the statute.

Id. The State lost in *Hershberger I* because it failed to prove that the Amish-proposed silver tape/red lights alternative would not work. The court held: "We conclude that the state's public safety interest would not be significantly diminished were it to permit the use at night of silver reflective tape used in connection with the display of lighted red lanterns by these appellants." *Id*.

The *Hershberger I* court summed up its decision as follows:

> [W]e hold that these appellants have established that each has a sincerely-held religious belief that forbids him from displaying the SMV emblems required by Minn. Stat. § 169.522; that state enforcement of Minn. Stat. § 169.522 which subjects these appellants to criminal prosecution, with resultant potential fines or jail incarceration, burdens the appellants' rights under the Free Exercise Clause; that the state has a compelling public safety interest which Minn. Stat. § 169.522 seeks to serve; but that the state's compelling public safety interest can be served by a less restrictive alternative; and that, therefore, Minn. Stat. § 169.522 as applied against

[2] The court first determined that a statutorily authorized "alternate emblem" and mode of marking Amish buggies, allowed via government-issued permit, was also "burdensome to the religious beliefs of these appellants who shun 'worldly ways.'" *Id*.

> The alternate requirement that a black triangular sign be displayed during daylight hours and, as well, that permanently affixed red reflective tape be employed is no less anathema to the appellants and considered by them to be a burden on their personal religious beliefs than the "regular" statutory requirement of display of the emblem as provided in Section 169.522, Subdivision 1(a).

Id.

> these appellants violates the Free Exercise Clause of the First Amendment to the United States Constitution.

Id. at 289.

Hershberger I was appealed to the United States Supreme Court and certiorari was granted. The U.S. Supreme Court then handed down its decision in *Employment Div., Dep't of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990) ("*Smith II*"), which "significantly changed First Amendment Free Exercise Analysis" under the federal constitution. *State v. Hershberger*, 462 N.W.2d 393, 396 (Minn. 1990) ("*Hershberger II*"). The United States Supreme Court vacated the judgment in *Hershberger I* and remanded "for reconsideration in light of" *Smith II*. *Id*. at 395.[3]

On remand in *Hershberger II*, the Minnesota Supreme Court first declined to reconsider its *Hershberger I* findings that the Amish appellants held a sincere religious belief forbidding use of the SMV symbol, and that a less restrictive alternative to use of the symbol existed.

> [T]he record before us remains as it was when we found the Amish appellants to have demonstrated a personal sincere religious belief in conflict with the SMV statute and the state to have failed to demonstrate that use of silver reflective tape

[3] The Minnesota Supreme Court described the change wrought by *Smith II* in the federal constitutional analysis as follows:

> The *Smith II* court held a law of general application, which does not intend to regulate religious belief or conduct, is not invalid because the law incidentally infringes on religious practices. This holding apparently does away with the traditional compelling state interest test for laws burdening the exercise of religion standing alone. 494 U.S. at ___, 110 S.Ct. at 1599-1603. The *Smith II* court limited the compelling state interest test used by this court in *Hershberger I* to claims involving not the free exercise clause alone, but free exercise in conjunction with other constitutional protections. *Id.* at ___, 110 S.Ct. at 1601. These so called "hybrid" cases involve free exercise claims that touch on other constitutional protections ranging from parental rights, *e.g., Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), to freedom of speech and press. *E.g., Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Section 169.522 does not intend to regulate religious conduct or belief. Accordingly, under the first amendment free exercise clause as now interpreted by *Smith II,* whether the compelling state interest test is applicable apparently depends on whether requiring the Amish to comply with the SMV statute infringes on rights other than the free exercise of religion.

Hershberger II at 396.

> in conjunction with lighted red lanterns does not constitute a less restrictive alternative to the SMV symbol.

Hershberger II at 395.

In *Hershberger II* the court reached the same result it had come to in *Hershberger I*. Now, however, the court based its decision entirely on the Minnesota Constitution. The *Hershberger II* court reviewed Article I, Section 16 of the Minnesota Constitution and found that "Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the First Amendment of the federal constitution."[4] *Hershberger II* at 397.

The *Hershberger II* court adopted as its analysis under the Minnesota Constitution the same religious-liberty-versus-compelling-state-interest balancing test it had employed in its federal constitutional analysis in *Hershberger I*. The court ruled that it must:

> [B]alance competing values in a manner that the compelling state interest test we relied on in *Hershberger I* ably articulates: once a claimant has demonstrated a sincere religious belief intended to be protected by section 16, the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means. *Hershberger I,* 444 N.W.2d at 288-89.
>
> This analysis is similar to that applied to the claim for religious freedom based jointly on federal and state constitutional protection in *State v. Sports & Health Club,* 370 N.W.2d 844 (Minn.1985). While we did not expressly base our decision in *Sports & Health Club* on section 16 grounds, we held an exemption from the state Human Rights Act was not required, notwithstanding that sincere religious beliefs were burdened by the Act, because the state had a compelling interest in prohibiting discrimination and no less restrictive alternative existed.
>
> ***

[4] Article I, section 16, of the Minnesota Constitutions provides that:

> The right of every man to worship God according to the dictates of his own conscience shall never be infringed; . . . nor shall any control of or interference with the rights of conscience be permitted . . .; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state. . . .

> Thus, while the terms "compelling state interest" and "least restrictive alternative" are creatures of federal doctrine, concepts embodied therein can provide guidance as we seek to strike a balance under the Minnesota Constitution between freedom of conscience and the state's public safety interest.

Id. at 398.

The *Hershberger II* court applied the *state* constitutional analysis to the Amish SMV objections as follows:

> Competing values of such significance require this court to look for an alternative that achieves both values articulated in section 16. Specifically, if freedom of conscience and public safety can be achieved through use of an alternative to a statutory requirement that burdens freedom of conscience, in this case the SMV symbol, section 16 requires an allowance for such an alternative. As we found in *Hershberger I,* the state has failed to demonstrate that use of reflective tape and a lighted red lantern proposed by the Amish is an insufficient warning to other drivers of a slow-moving buggy. 444 N.W.2d at 289. The reflective tape and lighted lantern provides an alternative that achieves both of the important values embodied in section 16: freedom of conscience and public safety.
>
> The record in this case demonstrates an important attribute of the balancing test we adopt today for purposes of analyzing article I, section 16 of the Minnesota Constitution. The state's interest in public safety cannot be disputed. Merely because public safety is articulated as a competing interest in section 16, however, does not establish that interest as paramount. To infringe upon religious freedoms which this state has traditionally revered, the state must demonstrate that public safety cannot be achieved through reasonable alternative means. It may be that a claim for a religious exemption from public safety laws will seldom prevail over the state's strong interest in protecting the lives of its citizens. Today we hold only that the state has failed to provide a record which demonstrates that both values embodied in section 16, freedom of conscience and public safety, cannot be achieved through use of white reflective tape and a lighted red lantern.

Id. at 399.[5]

[5] The Religious Freedom Restoration Act of 1993 (42 U.S.C. § 2000bb *et seq*) and its sister statute, the Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc *et seq*), were enacted to statutorily restore to federal law the broader protection of religious liberty that had been narrowed under the *Smith II* court's constitutional analysis. The RLUIPA analysis is substantially identical to the Minnesota constitutional analysis under *Hershberger II*, and thus the Court's decision herein under the Minnesota Constitution also determines Plaintiffs' RLUIPA claims.

The two *Hershberger* cases have obvious and close factual and legal similarities to the present case. But they are not the only Minnesota appellate decisions that are informative regarding this constitutional analysis. *Hill-Murray Federation of Teachers v. Hill-Murray High School*, 487 N.W.2d 857 (Minn. 1992) dealt with the constitutionality of applying the Minnesota Labor Relations Act ("MLRA") to a Roman Catholic-affiliated high school's labor-related dealings with its teachers. After determining that there was no federal constitutional obstacle to application of the MLRA to the school, the Supreme Court turned to analysis of the "greater protection for religious liberties against governmental action" afforded by the Minnesota Constitution. *Id*. at 865. The *Hill-Murray* court described the Minnesota constitutional analysis as follows:

> Because the Minnesota freedom of conscience clause provides more protection than the Federal Constitution, we will not follow the United States Supreme Court's limited analysis and will retain the compelling state interest balancing test. This test has four prongs: whether the objector's belief is sincerely held; whether the state regulation burdens the exercise of religious beliefs; whether the state interest in the regulation is overriding or compelling; and whether the state regulation uses the least restrictive means.

Hill-Murray at 865.

Regarding the first factor -- the "sincerely held religious belief" issue -- the *Hill-Murray* court noted that "it is not the province of the court to examine the reason of religious beliefs or to resolve purely religious disputes." *Id*. The court also noted that "judicial intervention into the determination and interpretation of religious beliefs warrants caution." *Id*. The court "recognize[d] the presence of a sincerely held religious belief." *Id*.

On the second factor -- the question of "the burden on the exercise of religious beliefs" -- the *Hill-Murray* analysis arguably adds something to Minnesota case law. Hill-Murray High School had argued that application of the MLRA to the school "would result in significant

interference with the school's religious autonomy that would compel the school to negotiate and compromise its doctrinal positions." *Id*. at 866. The court was not persuaded. "Hill-Murray asserts that negotiations about conditions of employment will lead to negotiations about religion. This assertion is *remote* and an *insufficient basis* to exempt Hill-Murray from the regulatory laws of the state." *Id*. at 866 (emphasis added).

> Negotiations under the limits of the MLRA do not possess the tendency to undermine Hill-Murray's religious authority. Hill-Murray retains the power to hire employees who meet their religious expectations, to require compliance with religious doctrine, and to remove any person who fails to follow the religious standards set forth.
>
> While Hill-Murray may have demonstrated that the application of the MLRA interferes with their authority as an employer, *they have not established that this minimal interference excessively burdens their religious beliefs*.

Id. (emphasis added).

The *Hill-Murray* court found that the State's "overriding and compelling" interest "in promoting the peace and safety of industrial relations, the recognition of the statutory guarantees of collective association and bargaining, and the First Amendment protection of the right of association outweighs the *minimal infringement* of Hill-Murray's exercise of religious beliefs." *Id*. at 867 (emphasis added). Thus, the Supreme Court found no state constitutional problem with application of the MLRA to the religious school.

The *Hill-Murray* court addressed the burden issue differently than the court had done two years before in the *Hershberger* case. The *Hershberger* court had considered burden established by the simple fact that the Amish defendants in that case faced "criminal sanctions including fines or jail time" for following their religious beliefs instead of state law.

Unlike *Hershberger*, the *Hill-Murray* case did not arise in a criminal context. It is not clear that anyone would ever go to jail if Hill-Murray High School refused to cooperate with the

collective bargaining rights of its teachers under the MLRA. So in *Hill-Murray*, the burden issue was not settled by the specter of criminal penalties being imposed on the religious objector.

The *Hill-Murray* court addressed other supposed burdens described by the school, and found those arguments unpersuasive. It is not clear whether the *Hill-Murray* court was finding *no* burden whatsoever on religious beliefs (the only burden the court describes is on the school's "authority as an employer"); or rather, a burden on religion that was simply too small to create a constitutional problem. But the court used language which implies that *some* burden on religious rights might exist, but be insufficiently significant to require relief from the court. The *Hill-Murray* court termed the school's burden arguments "remote" and "insufficient." "[T]hey have not established that this *minimal* interference *excessively* burdens their religious beliefs." *Hill-Murray* at 866 (emphasis added.)

In *Edina Community Lutheran Church v. State*, 745 N.W.2d 194 (Minn. App. 2008), two churches objected on religious freedom grounds to application to them of certain provisions of state law dealing with the lawful carrying of firearms. The trial judge had enjoined enforcement against the objecting churches, finding that the law "excessively burdens the rights of [the churches] protected by" the federal and state constitutions. *Id*. at 198. The Court of Appeals affirmed on state constitutional grounds. Noting that the Minnesota Constitution affords greater protection against governmental action affecting religious liberties than does the federal constitution, the *Edina Community* court stated the test as follows:

> Minnesota courts employ a heightened "compelling state interest balancing test" when determining whether a challenged law infringes on or interferes with religious practices. *Hill-Murray,* 487 N.W.2d at 865. The test has four prongs: (1) whether the objector's beliefs are sincerely held; (2) whether the state regulation burdens the exercise of religious beliefs; (3) whether the state interest in the regulation is overriding or compelling; and (4) whether the state regulation uses the least restrictive means.

Edina Community at 203.

It is again on the burden issue that the court's analysis in *Edina Community* is instructive here. The State in *Edina Community* argued "that the challenged provisions of the [law] present only a de minimis burden on the church's exercise of their religious beliefs." *Id*. at 204. The *Edina Community* court described the burden analysis as follows:

> Under the second *Hill-Murray* factor, those challenging the application of a law have the burden of establishing that challenged provisions infringe on their religious autonomy or require conduct inconsistent with their religious beliefs. *Shagalow v. Minn. Dep't of Human Servs.,* 725 N.W.2d 380, 390-91 (Minn.App.2006), *review denied* (Minn. Feb. 28, 2007). To constitute such a burden, the challengers must establish that the risk of interference with religious beliefs or practice is *real and not "remote*." *Hill-Murray,* 487 N.W.2d at 866. Religious institutions can be required to comply with statutes of general application, and the focus is on whether compliance requires a change in "religious conduct or philosophy." *Rooney v. Rooney,* 669 N.W.2d 362, 369 (Minn.App.2003), *review denied* (Minn. Nov. 25, 2003).

Id. at 204 (emphasis added).

The *Edina Community* court undertook a detailed discussion of exactly how the statutory scheme collided with "the sincerely held religious beliefs of the respondent churches," refuting point-by-point the State's arguments that the statutory requirements pose "only a *de minimis* burden and do[] not force the churches to change their religious conduct or philosophy;" "do[] not substantially burden the exercise of religious beliefs;" and create only "a minimal burden on sincerely held religious beliefs." *Id*. at 204-05. In the course of that discussion, the *Edina Community* court took guidance from *Hershberger* as follows:

> The Minnesota Supreme Court has recognized that the compelled use of a specific warning, whose color and meaning are mandated by the state, may sometimes be "antithetical to" sincerely held principles of religious faith. *Hershberger,* 462 N.W.2d at 396. The fact that religious adherents are willing to convey a warning or message on the same subject, using different methods or means of communication, did not preclude the supreme court in *Hershberger* from finding that the state-mandated slow moving vehicle symbol at issue *substantially burdened religious freedom*.

Edina Community at 205 (emphasis added).

The *Edina Community* court rejected each of the State's "*de minimis* burden" arguments, holding that application of the law to the churches "*significantly* burden[ed] the sincerely held religious beliefs of the respondent churches." *Id*. at 206, 208 (emphasis added). The *Edina Community* decision, like *Hill-Murray*, uses language at least implying that a religious objector may *not* be entitled to constitutional relief from application of a statute if the burden the statute imposes on his/her sincerely held religious beliefs is not "substantial" or "significant," but rather is "minimal," "remote," or "de minimis." Thus for purposes of analyzing the present case, I assume the Amish Plaintiffs are required to show that the statutory requirement places a "substantial," "significant," "real" and non-"remote" burden on or interference with the exercise of their religious beliefs or rights of conscience.

Minnesota courts have determined on at least one occasion that an individual's supposedly religious-based activity was, in fact, *not* connected with a sincerely held religious belief, but rather with a "personal, secular belief." *State v. Pederson*, 679 N.W.2d 368, 376 (Minn. App. 2004). Ariel Pederson was prosecuted criminally for marijuana possession. Ms. Pederson presented evidence that she used marijuana medicinally; that her use was "consistent with her religious beliefs as a Messianic Jew;" and that, therefore, her prosecution violated Article I, Section 16 of the Minnesota Constitution. *Id*. at 372.

The *Pederson* court rejected the constitutional defense. Quoting *Wisconsin v. Yoder*, the *Pederson* court noted that while determining "what is a 'religious belief' or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Id*. at 374. The *Pederson* court noted that a

number of jurisdictions had rejected similar religious liberty arguments in what might be termed "The Church of Marijuana" cases. *Id*. at 374-75. The court noted that in Ms. Pederson's case, as in prior similar matters in other jurisdictions, "no evidence" was presented that the defendant's "religious belief in smoking marijuana" "was espoused by any organization or was a principle, tenet, or dogma of any organization to which [she] was a member." *Id*. at 375. The *Pederson* court affirmed the district court's finding that "appellant's beliefs in connection with the use of marijuana are personal beliefs, based on a personal, rather than communal, interpretation of religious significance." *Id*. at 373-74. "Appellant's isolated and anecdotal citations to scriptures generally extolling the virtues of plant life are insufficient to prove that her medicinal use of marijuana is a communal religious belief." *Id*. at 376.

In re the Matter of Jill Marie Newstrand, 869 N.W.2d 681 (Minn. App. 2015) provides an example of just how cautious Minnesota courts are in questioning a religious objector's sincerity of belief, and in evaluating the degree to which state law burdens that belief. *Newstrand* involved a child custody dispute. There was reason to evaluate the father's mental health, as part of the court's analysis of the child's best interests, under Minn. Stat. Sec. 518.131, subdivision 1. The father refused to undergo a psychological evaluation on religious freedom grounds.

> Father is Rastafarian and claims that the tenets of that religion prohibit him from obtaining a psychological evaluation. The district court did not question the sincerity of father's belief, and mother does not dispute the sincerity of father's belief on appeal. The record supports a determination that father's belief is sincerely held.

Newstrand at 687.

The father also contended that the statutory best interests analysis "unconstitutionally burdened the exercise of his beliefs by forcing him to violate a tenet of his religion by undergoing a psychological evaluation or suffer a restriction of his parenting time with J.J.I.A."

Id. With little discussion, the Court of Appeals in *Newstrand* held: "Based on the facts in this case, we conclude that the burden placed on father was real and not remote, potentially interfering with his father-child relationship." *Id*. at 687-88.

Ultimately, however, the *Newstrand* court declined to exempt the father from application of the statute. The court found that the State had a compelling interest in safeguarding the physical and psychological well-being of children; and that the required psychological evaluation was "the least-restrictive means available to verify [father's] mental capacity to parent J.J.I.A." *Id*.

Interestingly, while prior cases have made clear that it is the *State's* burden to prove that no less restrictive means was available, the *Newstrand* court faulted the *father* for "not provid[ing] the district court with any specific less-restrictive alternatives to a psychological evaluation." *Id*. at 690.

> Based on the record before us, we conclude that none of father's vague alternatives for verification of his mental health and fitness to parent was a viable less-restrictive means to accomplish the state's compelling interest in protecting the children.

Id. The *Newstrand* court concluded "that Minnesota Statutes section 518.131, subdivision 1, as applied, does not impermissibly violate father's constitutional freedom of conscience." *Id*.

United States Supreme Court

One cannot address a constitutional religious liberty-based argument made by Amish parties without recognizing the United States Supreme Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).[6] *Yoder* involved Wisconsin's criminal prosecution of Jonas Yoder and

[6] Of course the *Yoder* court applied the *federal* constitutional test as it was still articulated in 1972. But the federal analysis used at that time was substantially the same as the s*tate* constitutional analysis Minnesota has applied since *Hershberger II*. *Yoder* was relied upon by the *Hershberger I* court for the "compelling interest -- least restrictive alternative test," *Hershberger I* at 287-88; and that analysis became, in *Hershberger II*, Minnesota's *state* constitutional analysis.

Wallace Miller for refusing to send their fourteen and fifteen-year-old children to school after they completed the eighth grade. Wisconsin law required parents to have their children attend school until they were sixteen. The Amish defendants declined to comply on religious grounds.

> The trial testimony showed that [the Amish] respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

Yoder at 209.

The *Yoder* court's description of the evidence about the Amish is informative and consistent with the evidence in the present case:

> The history of the Amish sect was given in some detail, beginning with the Swiss Anabaptists of the 16th century who rejected institutionalized churches and sought to return to the early, simple, Christian life de-emphasizing material success, rejecting the competitive spirit, and seeking to insulate themselves from the modern world. As a result of their common heritage, Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith.
>
> A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil, as exemplified by the simple life of the early Christian era that continued in America during much of our early national life. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated in great detail by the *Ordnung,* or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community.
>
> * * * * *
>
> [T]he record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the

> Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world . . . ." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.
>
> The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education. The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call "life style" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.
>
> As the society around the Amish has become more populous, urban, industrialized, and complex, particularly in this century, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards.

Yoder at 209-10, 216-17.

The *Yoder* court found that requiring Amish children to attend high school to age sixteen posed an existential threat to a society that seeks "separation from, rather than integration with, contemporary worldly society." *Id*. at 211. The court noted that "in the Amish belief higher learning tends to develop values they reject as influences that alienate them from God." *Id*. at 212. The *Yoder* court described the "impact" of the state statute on Amish beliefs -- what Minnesota courts call the "burden" on religious belief -- as follows:

> The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.
>
> The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law

> affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. See *Braunfeld* v. *Brown,* 366 U. S. 599, 605 (1961). Nor is the impact of the compulsory-attendance law confined to grave interference with important Amish religious tenets from a subjective point of view. It carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

Id. at 218.

The *Yoder* court described the burden imposed by the law on Amish belief as a "severe interference with religious freedom." *Id*. at 227. In response, the State of Wisconsin argued that its "interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of [the Amish] respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice." *Id*. at 219.

The determinative question before the *Yoder* court was whether the State's "interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way." *Id*. at 221. Because "fundamental claims of religious freedom [were] at stake," the *Yoder* court determined that it "must searchingly examine the interests that the state seeks to promote by its" statutory scheme. *Id*. at 221. After first acknowledging the Jeffersonian principle of the importance of education to the American political system and society, the *Yoder* court concluded that requiring an additional two years of compulsory education of Amish children "would do little to serve those interests." *Id*. at 222. The court also rejected Wisconsin's argument that the Amish position "foster[s] 'ignorance' from which the child must be protected by the State." *Id*. The court recognized the State's "duty to protect children from ignorance" (*Id*.), but rejected the "ignorance" argument as contrary to the facts. The

Amish, the court noted, were a "productive," "very law-abiding," and "highly successful social unit within our society, even if apart from the conventional mainstream." *Id*. The Amish, the court noted, did not oppose education in general, but only "conventional formal education of the type provided by a certified high school." *Id*. Their own "system of learning-by-doing" "ideal[ly]" "prepar[ed] Amish children for life as adults in the Amish community."[7] *Id*.

The State's argument that children who choose to leave the Amish community would be inadequately prepared for life in the outside world without the two additional years of compulsory education mandated by the statute, was found "highly speculative."

> There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society.

Id. at 224.

To the degree the school-until-sixteen state policy was in part a means of preventing exploitative child labor practices, the *Yoder* court found little to be concerned about in the "employment of children under parental guidance and on the family farm from age 14 to age 16 [which] is an ancient tradition that lies at the periphery of such [child labor] laws." *Id*. at 229.

The *Yoder* court concluded that "accommodating the religious objections of the Amish by foregoing one, or at most two, additional years of compulsory education will not…in any…way materially detract from the welfare of society." *Id*. at 234. The court summed up its decision as follows:

> Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs,

[7] The *Yoder* court was unpersuaded by Wisconsin's suggestion that the state law promoted "the substantive right of the Amish child to a secondary education" and should be upheld as a proper exercise of "the power of the state as parens patriae to extend the benefit of secondary education to children regardless of the wishes of their parents." *Id*. at 229. The court observed that this was not a case "in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or maybe properly inferred." *Id*. at 230.

> the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education. In light of this convincing showing, one that probably few other religious groups or sects could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

Id. at 235-36.

Before leaving *Yoder*, I would note a passage in that decision that has particular relevance to the present case:

> [I]n the Middle Ages, important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong." A way of life that is odd or even erratic ***but interferes with no rights or interests of others*** is not to be condemned because it is different.

Yoder at 223-24 (bold and italics added).

Yoder was not the Supreme Court's last word on Amish religious liberty. In *United States v. Lee*, 455 U.S. 252 (1982) an Amish employer[8] asserted that requiring him to participate in the social security system interfered with his rights of free exercise of religion under the federal constitution. The Supreme Court analyzed the sincerity of belief and burden prongs of the constitutional analysis as follows:

[8] "[T]he Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system." *Lee* at 255. As the *Yoder* court had noted, there is a provision in the social security law specifically created to accommodate Amish beliefs, by "exempti[ng]…such groups as the Amish from the obligation to pay social security taxes." *Yoder* at 222 and fn. 11. The *Lee* court found, however, that the statutory social security exemption "is available only to self-employed individuals and does not apply to employers or employees." *Lee* at 256. The exemption did not, therefore, apply to Mr. Lee in his capacity as an employer of other Amish at his farm and in his carpentry shop.

> Although the Government does not challenge the sincerity of this belief, the Government does contend that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance. It is not within "the judicial function and judicial competence," however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; "[c]ourts are not arbiters of scriptural interpretation." *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707, 716 (1981). We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.

Id. at 257. The *Lee* court noted, however, that this was:

> [O]nly the beginning…and not the end of the inquiry. Not all burdens on religion are unconstitutional. [authority cited] The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.

Id.

The *Lee* court stated that "the government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high." In other words, the Government had a compelling interest. The court then analyzed "whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest." *Id*. The court observed that "to make accommodation between the religious action and an exercise of state authority is a particularly delicate task…because resolution in favor of the state results in the choice to the individual of either abandoning his religious principal or facing…prosecution." *Id*. However, "to maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated…but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'" *Id*. The *Lee* court observed that congress had accommodated religious beliefs by "grant[ing] an exemption, on religious grounds, to self-employed Amish and others." *Id*. at 260. But noting that "the broad public

interest in maintaining a sound tax system is of such a high order," the court held that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *Id*. at 260-61. The court rejected the argument for a "constitutionally required exemption," ruling that "the tax imposed on employers to support the social security system must be uniformly applicable to all, except as congress provides explicitly others." *Id*. at 256, 261.

Analysis

Plaintiffs' Objection Based Upon a Sincerely Held Religious Belief

Fillmore County contends that the Plaintiffs' objection to compliance with the Governmental mandate at issue here does not arise out of sincerely held religious beliefs, but rather from secular or cultural considerations. This was the threshold question addressed by the United States Supreme Court in *Yoder*:

> [W]e must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Yoder at 215-16.

People may be resistant to the use of new technologies for a number of reasons that are purely secular, philosophical, or personal. The cost of new technology may be high. It may be

challenging to learn to use it. Some New Age folks want to live off the grid. And some of us greet change with a reflexive and stubborn aversion that may stem from advancing age or simply a sentimental attachment to the ways we have always done things. These motivations have nothing to do with religion.

But the Amish objection to adoption of many aspects of modern technology is certainly religiously based. In *Hershberger I* the Minnesota Supreme Court stated as follows:

> A principle tenet of [the Old Order Amish] religion is that its adherents remain separate and apart from the modern world. This concept of separation emanates from Christian biblical directions to "be not conformed to this world," *see Romans* 12:2; and "Be ye not unequally yoked together with unbelievers," *see II Corinthians* 6:14.

Hershberger I at 284. The evidence was the same in the present case. The Amish religion is part of the Anabaptist movement that arose in Europe in the Sixteenth Century. That movement was the source of a number of distinct religious groups, including Hutterites, Mennonites, as well as various Amish sects. Professor Johnson-Weiner, a retired professor from the Southern University of New York who has studied the Amish, described the Anabaptist movement as:

> [B]ased on a belief that church membership was voluntary, that you signaled your membership in the church through baptism. You remained committed to a scriptural way of life following Christ's example. It was characterized by pacifism and nonresistance, a leadership with leaders chosen by lot, and it has evolved to this day. Today's Amish are characterized by a determination to remain separate from the world.

The way of life characteristic of the Amish results from their interpretation of scriptural passages that tell them that in order to live a Godly life, they must separate themselves from the world and adhere to the ways and practices of their forefathers and foremothers. *See Ephesians* 6:2: "'Honor your father and mother' (this is the first commandment with a promise), 'that it may go

well with you and that you may live long in the land.'" They follow and adhere to tradition in the practices of their daily lives as an important part of their religious beliefs.[9]

The Amish are the most conservative of the Anabaptist groups, meaning that they are the least willing to adopt new, worldly technologies, and are "most separate" from the outside world. But the Amish are not homogenous. The evidence indicated that there are some forty different Amish affiliations. All Amish share certain aspects of their way of life. At baptism -- around age 18 -- they commit to live a "scriptural life." They live in close fellowship and community because they think individuals by themselves are too weak to lead a scriptural life. They do not have insurance, because they all support others in need in their community in place of insurance. Amish all still drive horses and buggies for local transportation; speak "Deitsch" (their dialect of German) at home; use a German language bible and the Ausbund Hymnal; limit their interactions with outsiders; practice adult baptism; and men wear no mustaches (because mustaches were associated with the military in the 17th century). But they vary somewhat in the degree to which they have accepted technological innovation. There are Amish in Pennsylvania who have and use computers and indoor flush toilets; and some Amish bishops in Indiana own cell phones. [10]

The Plaintiffs are all members of the "Swartzentruber" Amish. Swartzentruber Amish make up seven percent of all Amish, and are among the most conservative of Amish people.

[9] Dr. Johnson-Weiner testified that the Amish are "always in church" in the sense that their religious rules, arrived at through decision-making across time, dictate their clothing, haircuts, shoes, curtains, whether they burn oil or propane, and so forth. The result is that it is impossible to separate Amish religion from Amish culture.

[10] Prior cases, including *Yoder*, *Hershberger I,* and *Hershberger II* have described the Amish parties involved in those cases as being "Old Order Amish." The Amish Plaintiffs here are also "Old Order Amish." The evidence in the present case indicates that the distinction between "Old Order Amish" and "New Order" does not describe any difference in their adherence to “old” ways, or acceptance of “new” ways, as one might possibly infer. Rather, the distinction between "New" and "Old Order" lies in a more esoteric theological disagreement. Professor Johnson-Weiner testified that New Order Amish, an outgrowth of Old Order, believe that one can have a personal knowledge of one's salvation. "One can know one is saved." Old Order Amish do not share this belief. "The Old Order will say that they have a hope of salvation. Whether or not one is saved is something only God can know."

Swartzentruber Amish were the defendants in *Hershberger I* and *Hershberger II* objecting to the display of slow moving vehicle signs. Professor Johnson-Weiner testified that the Swartzentrubers "have remained the most separate from modern technology. They have considered very, very carefully what new innovations they will permit in their communities and have drawn the line at most."

The group of Fillmore County Swartzentruber Amish to which three of the four Plaintiffs belong is a particularly conservative Swartzentruber church called variously the "Original Canton"[11] or "Middle Canton" district or church (the terms district and church are used synonymously here and mean a group of some 15 to 30 families who worship together and have their own bishop and ministers). In all there are six Swartzentruber Amish districts or churches in Fillmore County.[12] The evidence indicates that until about 30 years ago, all six were "in communion" with each other -- meaning that they all would take communion at one another's worship gatherings and their sons and daughters married across district lines. But the Original Canton district separated from the other five in approximately 1986 or 1987. The evidence indicates that among the Fillmore County Swartzentruber Amish, the Original Canton church is the most conservative.[13]

The Amish, including the Swartzentrubers involved here, have not flatly rejected all technological innovations. The Amish have, as religious communities, made judgments about

[11] "Canton" refers here to Canton, Minnesota, the Fillmore County town near which many Swartzentruber Amish live.

[12] In addition to the Original Canton church, they are the Northwest Canton, Northeast Canton, Southwest Canton, Southeast Canton, and Preston Churches.

[13] One example the witnesses were able to give of something permitted by the five more "liberal" Fillmore County Swartzentruber districts but prohibited by the Original Canton district, has to do with flashlight use. All six permit use of battery powered flashlights, but the Original Canton group requires that flashlights be handheld. The other five districts allow flashlights to be affixed to hats -- a "headlamp" -- that allows use of a flashlight while both hands remain free. Dan Swartzentruber also testified that Original Canton Amish do not "work in the towns" while Amish from the other five Fillmore County Swartzentruber churches do.

new technologies, machinery, devices, and practices, and decided whether or to what degree they will permit themselves to own or use these items. For example, while Swartzentruber Amish do no own or drive automobiles, they have determined it acceptable to *ride* in automobiles, trains, and buses. Swartzentruber Amish do not own telephones, but have decided it acceptable to *use* telephones, and to pay for telephone use. Swartzentruber Amish think it acceptable to use power tools, such as table saws, if the tool is powered by a gasoline engine rather than an electric motor.

The principle guiding these choices is keeping the Amish community separate from the world; and therefore decisions are made based on judgments as to how particular innovations would impact the community. For example, automobile ownership -- and the resultant ability to travel long distances fast and easily -- would unacceptedly expand the geographical boundaries of Amish communities that the Amish intend to remain small and tightly knit.[14]

It might seem to an outside observer that these Amish choices and distinctions -- between technologies, and between ownership and use -- are inconsistent with a professed repudiation of worldly ways. Some "English" might gather that, for all their supposed disdain of the things of the world, the Amish are in fact willing, on the sly, to circumvent their own supposed religious principles via technicalities or crafty work-arounds. Thus, the non-Amish observer might interpret practices such as use of an "Amish phone booth" as proof that Amish religious beliefs are not so sincerely held after all; and that the claimed Amish rejection of worldly ways is to some degree a phony pretense.

[14] I am reminded of a lyric in the opening song of Meredith Willson's *The Music Man*, in which the traveling salesmen on the train to River City, Iowa identify the cause of the changing business realities in the modernizing rural American Midwest: "Why it's the Model T Ford made the trouble, made the people wanna go, wanna get, wanna get up and go seven, eight, nine, ten, twelve, fourteen, twenty-two, twenty-three miles to the county seat."

A week-long trial does not make one an expert; and I claim no profound understanding of the Amish religion. But I am convinced that such a conclusion -- that Amish peoples' limited use of telephones, for example, or their acceptance of rides in automobiles for certain purposes, betrays an insincerity in their religious beliefs -- is mistaken. It is inaccurate to say that the Amish claim to use *no* modern technology. The Plaintiffs make no such claim. I am persuaded by Professor Johnson-Weiner's testimony that the Amish have long made and continue to make carefully considered judgments about the limits of permitted technology use in their lives. These choices are informed by the scriptural mandate to remain separate from the world, and are based on the judgments of the particular Amish church regarding what practices and technology use goes too far in that direction, bringing worldly ways unacceptably into Amish life. The Swartzentruber Amish understand themselves to be on a slippery slope of acceptance and use of modern conveniences and technology.[15] Their caution in allowing use of new technology is motivated in part by concern that a new step toward worldliness may accelerate a descent on that slope toward broader acceptance of worldly ways inconsistent with scripture. The care with which these decisions are made reflects Amish concern with the long-term Godliness of the community. One of the Amish witnesses testified as follows about the example change sets for the next generation: "[T]hey can look at me and I made this change...something that we never had in our history and you made this change, you aren't going to tell me now I can't make the next change."

This is a slow-changing but dynamic, rather than absolutely static, way of religious life when it comes to technology use. The fact that the Amish have, over generations, made choices

[15] The testimony indicated that, in the last 40 years, the Swartzentruber Amish of Fillmore County have come to use telephones more than they did previously; accept (and make arrangements for) more automobile rides; and accept more off-the-farm work than they used to.

to allow some use of technology and prohibit other use, is not proof that their beliefs are a pretense. Those choices about worldly ways are an integral part of Amish religious practice.

This cautiously considered discrimination between the permitted and prohibited inevitably results in some fine distinctions being made (Shall battery flashlights be handheld only, or are hat-worn flashlights acceptable?) and one might be puzzled at where the particular Amish church draws the line. We might question its rationale or logic; it may not make sense to us. But questions about where the Amish have drawn those lines do not undermine the genuineness of the religious beliefs that necessitate the line-drawing. Nor am I persuaded that the Court may substitute its judgment for that of a particular Amish church as to what technology ought to be permitted consistent with Amish beliefs.[16] Religiously-based judgments are not matters in which a Minnesota court may indulge in second guessing. Courts do not demand "logical...consisten[cy]" of religiously-based beliefs entitled to constitutional protection.

While Swartzentruber Amish have found some limited use of modern technological conveniences to be acceptable, broad rejection of such conveniences plainly remains the principal reality and hallmark of their lives. To name a few: They do not drive automobiles, do not have electric lights in their homes and farm buildings, do not use tractors or combines in their fields, and -- this is the absolute deal breaker for many of us -- do not use modern flush toilets in their homes. Because they have made these choices, Swartzentruber Amish live a life that is

[16] Fillmore County, citing the Dordrecht Confession and the Book of Deuteronomy, points out that the Amish also believe in following the law, respecting secular authority, not causing harm to their neighbors, cleanliness, and caring for God's creation. "Those beliefs," the County argues, "conflict with [Plaintiffs'] refusal to install a [state-mandated] gray water system." (Fillmore County's Memorandum/Final Argument, pp. 6, 11.)

If the County suggests, with this argument, that Plaintiffs are being dishonest in describing to the Court what they think their faith requires of them, I am not persuaded. I find the Plaintiffs' testimony about their beliefs credible. If, on the other hand, the County is contending that the Plaintiffs' are theologically *wrong* -- that they are placing too much emphasis on Paul's Epistle to the Romans ("Be not conformed to this world.") and too little on other scriptural passages -- that is not a judgment for any court to make. "Courts are not arbiters of scriptural interpretation." *Hershberger I*, at 286.

much more labor-intensive and less comfortable than do most non-Amish Americans. One cannot reasonably doubt the genuineness and sincerity of the Amish religious beliefs that cause them to choose a life that is so much more physically demanding and wearisome -- in a word, harder -- than that lived by most other Americans.

The Government argues that it is unclear that the Swartzentruber "Ordnung" is actually violated by installation of a state-required septic system. The Ordnung -- the code or set of rules governing Amish conduct and way of life -- is entirely unwritten. It is apparently orally reviewed twice a year at a meeting of the church. But that does not mean that there is a comprehensive recitation of all the existing rules; for example, no one has to announce biannually that the Ordnung *still* prohibits driving automobiles and wiring houses with electricity in order for those prohibitions to continue.

The Original Canton church has not voted on an Ordnung specifically prohibiting gray water septic systems. That does not mean, however, that this new practice is not contrary to the Ordnung. The response of the Amish parties at trial to Fillmore County's question asking what Ordnung specifically prohibits installation of a gray water septic system, was essentially: *This is a septic system, and septic systems have never been permitted.* The status quo for the Amish of the Original Canton church is that this technology has *always* been, and *remains*, prohibited. These people have never allowed themselves any septic systems, just as they have never allowed themselves any automobiles. The Government is now requiring the Plaintiffs to install a device they have never had, an innovation inconsistent with the Original Canton church's Ordnung which has never permitted septic systems.

In addition to the testimony of the Plaintiffs, their wives, and other members of the Original Canton church that installation of the state-required septic system violates their church's

rules, the Court was provided the August 31, 2015 letter of Bishop Jacob Swartzentruber (co-signed by 53 others, including the Plaintiffs) stating to the Government the church's position:

> In regard to the septic system requirement. We feel this is the way of the world and we are not to go the way of the world as in Romans 12:2 it read and be not conformed to this world, but be ye transformed by the renewing of your mind: that ye may prove what is that good and acceptable and perfect will of God.
>
> ***
>
> If we take a step in the wrong direction and teach our children and grandchildren and lead them in that direction we will have to answer for it at the day of judgment[.] We are again asking in the name of our Lord to be exempt and for given this oppression that is being laid on us.

The Government points out that some other Swartzentruber Amish in Fillmore County do not share Plaintiffs' belief that installation of state-mandated septic systems is a worldly way forbidden by their faith. (See, for example, the testimony of Dan Gingerich.) Whether others share a religious belief has some relevance here. Part of the reason the court rejected marijuana use as a matter of religious belief in *Pederson* was that no "organization" of which the defendant was a member espoused that belief; the Court determined that it was a "personal" rather than "communal religious belief." *Pederson* at 376.

Here the evidence indicates that while not shared by some other Fillmore County Swartzentrubers, the belief that the state-required septic system is scripturally forbidden *is* the "communal religious belief" of the 30 families of the Original Canton church. This is not the "Church of Marijuana," the supposed "religious beliefs" of which were idiosyncratic to an individual. *Hershberger I* makes clear that a religious belief need not be "uniformly" held by all adherents of a faith in order to be constitutionally protected. Again: "Intrafaith differences...are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences.... [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Hershberger I* at 286.

The Government, citing *Beechy v. Central Michigan Dist. Health Department*, 475 F.Supp.2d 671 (E.D. Mich. 2007), argues that not all Amish objections to state-mandated modernity are religiously based. *Beechy* is interesting to anyone analyzing the present controversy, because it dealt with Amish parties objecting to Michigan's gray water septic system requirements. The Amish in *Beechy* did not object to putting in septic systems. Rather, they objected to the requirement that a 750-gallon tank be part of that system. They asserted this was larger than necessary to handle the amount of gray water produced by Amish households, and they proposed the alternative of a septic system with a 300-gallon tank. They contended that the state's 750-gallon requirement "impinges upon [their] religious freedom." *Id*. at 672.

The court in *Beechy* granted summary judgment against the Amish objectors on the religious liberty claim. Asked at deposition why they objected to the 750-gallon tank, the Amish parties in *Beechy* had cited the higher cost of the larger tank; and that the smaller tank "wouldn't take as much work." *Id*. at 676-77. Religion was raised in their objections in only two respects. First, on the necessary tank-capacity issue, they contended "that the Amish faith prevented them from generating the amount of waste water necessitating a 750-gallon tank." *Id*. at 673. Second, one of the Amish parties testified that "having a tank with such excess capacity would create a temptation...to adopt more worldly ways." *Id*. Based on this record, the *Beechy* court concluded there was no dispute of material fact on the threshold question of "whether the plaintiffs' objections are based on religious beliefs" versus secular considerations. *Id*. at 679. The court ruled that the uncontested facts "demonstrate that the objection to a 750-gallon septic tank and the preference for a 300-gallon tank are based on secular, not religious concerns." *Id*.

> [T]he [Amish parties] all cite to their religious beliefs and practices as support only for their claim that they would not generate enough wastewater so as to need a 750-gallon tank. Accepted in the light most favorable to the plaintiffs, the affidavits prove that the CMDHD-required tank size is not needed by Amish families (and

> therefore the variance should be granted for practical reasons), but they do not state or imply that installation of the 750-gallon tank violates their Ordnung, contravenes a tenet of their faith, or interferes with the practice of their religion. Their religious beliefs, which dictate their lifestyle, are offered as explanations for *why* they do not need a larger tank, and nothing more.
>
> *****
>
> *[T]he [Amish] plaintiffs never have plainly stated that the practice the defendants seek to compel* — installing a 750-gallon septic tank for the deposition of wastewater on residential property — *itself violates the tenets of the plaintiffs' faith*. Absent that declaration, the Court is left with the undisputed facts put forth in the depositions, namely, that the plaintiffs' primary and sole objection to the tank ordinance — and the reason they sought the variances — was based on cost, convenience, and the practical fact that they just did not need to comply with the capacity requirements ordained by the defendants. The Court must conclude, therefore, that the defendants have not interfered with the plaintiffs' religious practices, the ordinance does not substantially burden the plaintiffs' exercise of their religious rights.

Id. at 674 (italics added).

Beechy stands for the proposition that not every Amish objection to government-mandated technology is necessarily based on religious belief. But the evidence in the present case is different than in *Beechy*. Here the Amish Plaintiffs, their wives, others from the Original Canton church, and some other Swartzentruber Amish testified that installation and use of the state-required septic system violates the tenets of their faith.

> **DAN SWARTZENTRUBER:** "It's something that we feel would conform us with the world and our forefathers felt that we shouldn't have them. The church has never, in our congregation, has never had them. They haven't allowed them. It's -- we feel it's something that would lead to the world....
>
> That is our beliefs to keep as much as at all possible what our forefathers left us. If we start straying from that, where will we stop? Honoring our forefathers is part of our beliefs.
>
> [W]e were taught that it would put us closer with the world.... It would conform us with the world, we might say....
>
> [W]hen our forefathers made the rules for the church, they went through what they felt would be less conforming to the world, and they made their set of rules. When

we joined the church, we agreed to those rules. We were baptized in those rules. We take them very serious." [17]

EMERY MILLER:

Q. Why didn't you just install a gray water system or a septic system if you were being threatened with all those things?

A. Because I feel that that is the way of the world and Romans 12:2 says "be not conform to this world.... *** That's something that's never been allowed in our church."

MENNO MAST: "It would burden my religious beliefs if I would put one in.... That is against my religious beliefs to put a septic system in."

AMMON SWARTZENTRUBER: "Well it's against my religious beliefs.... We've never had it before so we're not allowed to have it."

SUZI MAST: "Well I guess we want to do like our forefathers did."

VERNA MILLER: "We're afraid it's in the step of the wrong direction... I'd rather not have those worldly things."

SARA SWARTZENTRUBER: "It's against the church rules."

ABE SWARTZENTRUBER:

Q. Mr. Swartzentruber, did you want to install a gray water system?
A. Not really, no.
Q. Why?
A. Because it was a tradition of before that we never had.
Q. Is tradition important to your religion?
A. Yes.
Q. How so? Or why?
A. Because we go by -- we have regulation of our traditions from handed down from elders before.

MATTIE MAST: "It was against our religion."

[17] Dan Swartzentruber has been one of the ministers of the Original Canton church since 2001. It was interesting to learn during the course of this trial that there are no formally trained clergy in the Amish faith. Amish ministers and even bishops are chosen by lot. No one goes to seminary. Few, if any, Amish are scriptural scholars in the way that clergy in other religions often are. The leaders and authorities in Amish religious communities are working farmers, farm wives, saw mill operators, carpenters, and so forth, all with less than a high school education. It is not surprising, given these facts, that their descriptions of their faith and the governance of their church might seem unsophisticated to outsiders.

As the evidence indicated in *Yoder* and here: "These people aren't purporting to be learned people." *Yoder* at 223. Professor Johnson-Weiner described this religion as a "lived faith, not an intellectual one." The Court would not expect an Amish farm wife to be able to explain her faith with the erudition of a Jesuit theologian. But of course her faith is nonetheless entitled to equal respect.

ELI HERSHBERGER:

Q. If you put in a gray water system, that's not going to change anything as far as how you're putting stuff down the drain, is it?

A. No, not putting it down the drain. Not if you're talking gray water, no. But it might. I could think of other things that wouldn't go down a drain. I mean, it -- it might put the good of the church down the drain.

The testimony of the Amish Plaintiffs and their witnesses might be disbelieved by the fact finder, just like anyone else's testimony. Courts are not authorized to "dissect religious beliefs," but courts *do* decide the credibility of testimony, by whomever offered. The trier of fact could conclude that purported Amish religious objections to septic systems are actually a disingenuous cover for the real, secular objection: The cost of putting in such a system.

But that is not my finding. To the contrary, I find credible the testimony of the Amish plaintiffs that their objection to the state-mandated septic system stems from their religious belief that these systems must be avoided as a way of the world, antithetical to a faith that tells them to be separate in order to live as God intends.

I find that the Plaintiffs sincerely hold religious beliefs that are the basis for their objections to the Government's mandate at issue herein.

The Government Regulation Substantially Burdens Plaintiffs' Religious Beliefs

The Government contends that its gray water septic system requirement does not actually burden -- or does not burden significantly -- the Plaintiffs' religious beliefs. In support of this argument, the Government points out that these Swartzentruber Amish use various items of "modern" technology: gasoline engines, some rubber tires, modern building materials (Tyvek, for example), power tools, washing machines, and so forth. More specifically, the Government points out that these Swartzentruber Amish move water *into* their houses using plastic piping and large (1,000 gallon) tanks. These components, the Government observes, are the basic items that

would make up the septic systems that would treat gray water coming *out* of the Plaintiffs' houses, if the Government prevails here. The *Hill-Murray* and *Edina Community* cases indicate that the burden element of the constitutional analysis involves a *quantification* of the burden: In order to infringe on religious rights, the burden must be "substantial[]," significant[]," and not "de minimis."[18] The Government asserts that since the Plaintiffs are already using some modern technology and, more specifically, already use most if not all of the components and materials that make up a gray water septic system, it cannot credibly be claimed that use of these same items to build a gray water septic system is anything more than a de minimis burden on their religious beliefs. So argues the Government.

The Amish Plaintiffs focus, however, on the sum of the parts -- the septic system -- rather than on the components used to build it. The materials are unobjected to. But the septic system built of those materials is a mechanism new to them and *is* religiously objected to. I find their testimony on this topic credible. I see no inconsistency or implausibility in the Plaintiffs drawing a distinction between plastic pipes and a tank and the septic system constructed of those materials.

I am convinced that requiring Plaintiffs to install gray water septic systems imposes a significant burden on their religious beliefs. First, the *Hershberger* test for burden is satisfied: The Plaintiffs can be criminally prosecuted for not installing gray water septic systems. The Government is requiring Plaintiffs, on pain of criminal penalties, to install on their properties a permanent apparatus that is antithetical to their religious beliefs. Second, refraining from ownership of worldly technology is central to Amish religious faith and practice. As Professor

[18] Although *Hill-Murray* and *Edina Community* both describe this quantification aspect of the analysis, neither (and no other Minnesota case brought to the court's attention) found that a religious faith was in fact burdened, but that the burden was insignificant.

Johnson-Weiner testified, this is a "lived, not intellectual, faith." Religion does not comprehensively dictate for most of us what we own, the color of our shirts, how we wear our hair, how we travel, and the tools we use -- not to mention broader rules of conduct such as pacifism. For the Swartzentruber Amish, religion *does* control these things. Requiring these religious people to build, own, and use on their properties an item of technology unused and unknown to prior Amish generations, to which they sincerely object as a way of the world prohibited in their lives by scripture, is a significant burden on their faith. So they testified; and I believe them.

The Government points out that installation of a gray water septic system does not affect the Plaintiffs' ability to believe, pray, gather as a congregation, worship, and in all other outward respects continue to practice their religion in exactly their current manner. But it misses the point to contend that all the Government is requiring is a single, isolated practice at odds with the beliefs of this group of Swartzentruber Amish. A single deviation from religiously required conduct -- one defilement -- may weigh heavily on the mind and conscience of the devoutly religious believer.

The example that comes to mind is requiring an observant Jew who keeps kosher to eat a single pork hotdog. No one would dream of minimizing the significance of such a violation of religiously-based principles, even though that violation does not impede or prevent any other religious activity -- prayer, attendance at worship, study of scripture, and so forth. We recognize at once, in this context, that a single transgression of a sincerely believed religious dictate substantially and significantly burdens belief.[19] And the violation of a religiously-based code of

[19] The significant burden placed on religious belief by the state requiring an individual to do a single act in conflict with that belief, is illustrated by the case of Sir Thomas More (the Roman Catholic patron saint of lawyers) who went to the block in 1535 rather than acknowledge Henry VIII as head of the church in England.

conduct in the present case is not transitory, as would be true of a one-time violation of a religious dietary restriction, but rather is permanent. I find that Government-required installation of gray water septic systems on Plaintiffs' farms will significantly burden their religious beliefs.

State's Compelling Interest Cannot be Accomplished by Less Religiously Burdensome Means

Having found that the Plaintiffs' objections are based on sincerely held religious beliefs, and that compliance with the Government's mandate significantly burdens those beliefs, the Court turns to the question of whether the Government's compelling interest in protecting public health and the environment can be accomplished by a means less burdensome to Plaintiffs' religious liberty. On this issue, the Government bears the burden of proof.

Let us begin with a description of the public health and environmental risks at issue here. Ms. Laura Allen, the Plaintiffs' expert witness on gray water treatment, testified that gray water poses a "very small risk" to public health and safety. Ms. Allen noted that "no cases of any disease have been documented to be caused by exposure to gray water" -- though she acknowledged that there has been little scientific research on that public health question.

The Government's witnesses disagreed with Ms. Allen's minimization of the gray water health risk. Dr. Sara Heger testified that while gray water is less dangerous from a human health standpoint than is toilet "black water" (black water waste can contain ten to a hundred times more coliform bacteria than gray water does), gray water carries contaminants and organic materials such as human fecal material, disease organisms (pathogens) in the form of harmful bacteria and viruses, and a variety of chemicals, commercial soaps and detergents (containing the environmentally-problematic nutrients nitrogen and phosphorous). Dr. Heger testified that 100 milliliters of gray water can contain 10,000,000 coliform bacteria (an indicator of potential for pathogenic bacteria and viruses). To put this number in perspective, it is considered unsafe to

swim in water with more than 200 coliform bacteria per 100 milliliters. Untreated gray water may carry a variety of pathogens that cause common illnesses like the flu and diarrhea, as well as less common threats such as e coli and cryptosporidium. Dr. Heger testified that "whatever might make you sick, that's also present in the gray water." MPCA soil scientist Brandon Montgomery testified similarly: "So gray water is still a subcomponent of sewage, so to speak, and there are still all of the pathogenic constituents found within that sewage; so there's bacteria and viruses, protozoa that I had mentioned earlier, all of those things are still found in gray water."

I find that untreated or inadequately treated gray water presents substantial and serious danger to public health and risk to the environment, and that the Government has a compelling interest in protecting against those dangers.

I also find that proper waste water treatment is of particular urgency in Fillmore County due to its karst topography. That topography -- characterized by fissures, fractures, and sinkholes in the slowly dissolving limestone bedrock -- permits much more rapid travel of waste water to both ground and surface waters than would be the case elsewhere. It is possible, in a karst area, for household waste water to reach a drinking water source in a time measured not in years or decades (as may be the case in non-karst areas) but in days. Dr. Heger testified that without "good treatment going on here with our septic systems, we could be contaminating that drinking water aquifer much quick[er]." She testified that our "water is all connected;" and in karst topography, that connection can be rapid.

Let us turn to the competing treatment technologies at issue here.

The Government requires a septic system for gray water treatment, though one that is smaller in size because it is not intended to handle black water. The gray water septic systems

permitted by ordinance in Fillmore County for Amish households are further reduced in size, based on an assumption that Amish homes have less water usage (100 gallons per day) than non-Amish homes. (Fillmore County zoning officials think that they made a significant compromise when they reduced the size of the required gray water system to accommodate the Amish.)

The alternative means of gray water disposal proposed by the Plaintiffs as less burdensome to their religious beliefs than septic systems, is the "mulch basin" system.[20] The Plaintiffs indicated that the mulch basin system is a gray water treatment technology they can use consistent with their religious beliefs. The line drawn by the Amish Plaintiffs based on their religious objection was: No septic tanks, and no pipe-utilizing drain fields. In other words, no septic systems.

To analyze whether mulch basin gray water treatment systems are up to the job of adequately protecting Minnesota's public health and environment, one must have some understanding of how household waste water gets treated in rural Minnesota. The evidence presented at trial provided the Court a primer on that subject matter.

In both systems -- the Government's septic system and the Plaintiffs' mulch basin system -- the gray water starts the treatment journey by coming out of the house in a buried PVC pipe, and it ends up going into the native soil where most of the treatment of farmhouse waste water really happens. What is different about the two systems is how they deal with the gray water between those beginning and ending points.

[20] There is no religious liberty issue regarding the "straight pipes" the Plaintiffs were all using to dispose of their gray water until recently. The Plaintiffs do not all share the Government's belief that gray water flowing untreated from a straight pipe onto the ground surface poses a serious public health risk. (See the testimony of Menno Mast, who does not agree that straight pipe gray water disposal is unsafe, and who declined to categorically rule out ever again using a straight pipe in the future.) But recently the Plaintiffs have all given up straight pipe disposal of gray water. They claim no religious freedom-based constitutional right to keep or return to straight pipes.

With the septic system, the waste water flows from the house into an underground septic tank. In the tank the flow is slowed -- this is called "attenuation" -- during a period of "hydraulic retention." During this two or three day period of slow movement through the tank, some components in the effluent are sorted out. Heavy solids, lint, food particles and like debris sink to the bottom of the tank; and lighter oils, greases, and soaps float to the top. The tank is a "settling chamber" that provides initial "primary treatment" via this separation process, removing these heaviest and lightest elements of the sewage and sending cleaner water out to the soil for treatment. This reduces the contaminant load the soil is required to clean and extends the life of the system. The sealed below-ground tank prevents the gray water and the pathogens it contains from coming into contact with people. The contents of the tank are periodically pumped out and hauled away.

From the septic tank, the cleaner gray water goes out a pipe to a drain field -- a distribution bed made up of perforated pipes set either in trenches covered by at least one foot of topsoil, or in an elevated mound where conditions make that necessary. From the pipes the water flows out into a non-organic, non-biodegradable "distribution medium" -- often gravel -- the purpose of which is to maintain the excavation, support the distribution piping, and create a "void space" to store water (absorbing surges from the tank) until the soil can accept it for treatment. In the drain field the waste water is broadly distributed through the medium into the soil. The natural aerobic purification process, by which bacteria remove contaminants from waste water, occurs in a layer of unsaturated, oxygenated soil beneath the pipes and distribution medium.

The drain field must have sufficient capacity, meaning enough area to meet standard loading rates (calculations of the square footage necessary for the particular soil type to

adequately treat the volume of effluent flowing from the residence). And it must be at least three feet above both of two "limiting conditions:" "Redoximorphic features" and bedrock. This "three feet of separation" is required for proper treatment.

Treatment requires oxygen in the soil; and complete treatment requires an oxygenated soil layer at least three feet deep beneath the drain field. The oxygen necessary for treatment is not present in saturated soil. "Redoximorphic features" in the soil are distinctive, rust-colored bands that mark the upper limit of the "perched" or "standing" water table -- the level at which the soil is wet for extended periods of time. The redoximorphic features indicate, to those who know what they are looking at, the dividing line below which the soil is saturated and anaerobic (without oxygen); and above which the soil is dry and oxygenated enough to treat waste water. The bottom of the drain field -- the "soil interface" where the waste water reaches the soil for treatment -- must be located at least three feet above this line of demarcation -- the redoximorphic features -- in order for there to be enough dry, oxygenated soil to treat the gray water.

Bedrock, like saturated soil, does not treat waste water. Therefore the system-soil interface must also be at least three feet above bedrock, defined as a layer with "more than 50% rock." [21]

Septic systems in Minnesota, including gray water systems, are professionally designed and their siting is approved only after soil analysis is done. Properly constructed and timely pumped, a septic system can be expected to reliably function for 25 years with little or no maintenance. The Government's evidence convinced me that septic systems provide effective

[21] There is also a depth limit of four feet from the ground surface to the interface, because the greater the depth from the surface, the less oxygen there is in the soil.

gray water treatment necessary to protect human health and the environment. The question is whether there is an alternative that is religiously acceptable to the Amish and that also accomplishes the compelling state interest of safeguarding public health and the environment.

Plaintiffs contend that mulch basin gray water systems are an equally effective and feasible alternative means of achieving the Government's public health and environmental objectives. In support of their position Plaintiffs presented the testimony of Ms. Laura Allen, an Oregon-based author, educator, and founder of an organization called "Gray Water Action." Twenty years ago Ms. Allen began to work in the gray water field because of her environmental concerns, her interest in ways people could use less water, and the idea that "we should at least reuse [the water] we already have." Ms. Allen has a bachelor's degree in environmental studies and a master's degree in environmental education. She does not hold a degree in soil sciences, hydrology, or engineering; but she has had extensive experience with mulch basin gray water systems in the Pacific coast states and Arizona. She has taught courses and written books and manuals on "water reuse" and the design and construction of "residential scale" gray water systems.[22] The typical users of these systems, in Ms. Allen's experience, are "environmentally aware" homeowners looking for "sustainable practices;" and homeowners in "water stressed regions" both urban and rural. Ms. Allen has worked with west coast states and cities (most of her work is in California and Oregon) developing codes for re-direction of gray water into the landscape for reuse, often to irrigate trees, bushes, and ornamental plants. She has worked with water utilities to educate customers about installing gray water systems.

[22] For example, Ms. Allen was the main author of the San Francisco Public Utilities Commission's *Gray Water Design Manual,* created to teach a "do-it-yourself type population how to build their own gray water systems."

Ms. Allen's professional focus is on "simple [gray water treatment system] designs that don't require engineering" -- "we really don't want engineers involved because it makes the systems too expensive." In Ms. Allen's opinion the "best [gray water] management practices" are exemplified by Arizona's approach, which she considers "the safest way because it's easy to comply with, it can be protective of environmental and public health. And so I personally think that is the safest way. It allows for mass education, it's very low cost and low barriers for people to comply with it."

In the mulch basin gray water systems proposed by Ms. Allen, the outlet pipe carries the gray water out of the house to a large hole dug in the ground. This earthen "basin" -- an example presented here was approximately four feet long by six feet wide by up to four feet deep -- is filled to ground level with coarse woodchips or bark chips (the "mulch" in the "mulch basin" system). Inside the hole, the gray water-carrying pipe enters a plastic "valve box" through an opening in the side of the box; and the pipe terminates inside the box. This valve box sits on the mulch bed, surrounded by and buried in mulch. The box (approximately 12 inches by 17 inches by 12 inches in size), has no bottom; holes are drilled in its sides; and its interior is an empty "air space." The top of the valve box -- a removable lid -- is flush with ground level. (To position the lid at ground level, it may be necessary to lengthen the vertical dimension of the box with an extender.) [23]

The valve box serves to create a chamber inside the mulch basin into which the pipe delivers the gray water. Gray water runs out of the end of the pipe into the valve box; it drops

[23] An alternative design for creating the air space inside the mulch-filled basin into which the gray water outlet pipe empties is depicted in Exhibit 42 (see diagrams 2 and 3 on the second page of that exhibit). This alternative design involves cutting a 55 gallon plastic barrel in half, lengthwise. Half of the barrel -- a trough-shaped structure -- is positioned on the mulch bed, open side down, with holes drilled in its sides. A hole is cut in the top of the half barrel, and over this hole a valve box is affixed. The outlet pipe enters the valve box in the same manner as in the "standard" design; and the effluent drops through the cavity created by both the valve box and the half barrel, to land on the mulch bed.

four to six inches through an "air gap" (which keeps the mulch from clogging up the end of the pipe); and falls onto the mulch bed on which the valve box sits. The woodchip mulch filters the water, with solids and greasy "gunk" sticking to the chips. The chips provide surge capacity, holding water like a sponge until it can percolate down to and into the underlying soil. The bacterial activity that treats the water begins in the air spaces in the mulch. The gray water trickles down to the dirt floor at the bottom of the basin -- the soil interface of this system -- and soaks into ("infiltrates") the soil where treatment happens in the same natural, aerobic manner that it does with a septic system.

Ms. Allen testified that in California, the mulch basin system must be "at least three feet above the ground water table." (She testified that in Arizona the requirement is five feet.) This sounds similar to the "three feet of separation" the Government's witnesses testified is necessary for effective treatment.

Diagrams of the configuration and elements a mulch basin system, explaining and illustrating Ms. Allen's testimony, were presented in Exhibit 7 (example C was described as the system most comparable to the Plaintiffs' systems and advocated by Ms. Allen for use here); and in Exhibit 42. The bottom of the basin -- the dirt floor of the hole -- should be no deeper than four feet from ground surface (this is consistent with the Government's evidence regarding the maximum depth of the soil interface in a septic system drain field); and no shallower than two feet, according to Exhibit 42.[24] The cross section diagrams on page 2 of Exhibit 42 indicate that

[24] Whether Ms. Allen really believes that a two-foot depth would be sufficient to withstand freezing during a Minnesota winter is unclear. She pointed out that household gray water is still relatively warm when it arrives at the end of the outlet pipe in the valve box, even in winter. Ms. Allen acknowledged that Minnesota cold, something she has never dealt with in her work, is a "key design consideration" that would require "slightly different precautions" to avoid freezing. She contended, nonetheless, that mulch basin "gray water systems have been proven across the country in many different climates," including places that freeze.

The Court did not find persuasive Ms. Allen's testimony that the climate in Yosemite National Park is sufficiently similar to that of Fillmore County, such that her gray water experience in Yosemite translates and would apply to the present case. The evidence indicated that the average *high* temperature in Preston, (CONTINUED)

the outlet pipe should be at least 12 inches below ground surface; and that between the floor of the valve box air space (the mulch surface onto which the gray water falls from the pipe) and the soil interface (the dirt bottom of the basin) the mulch bed should be at least 12 inches in depth.

Ms. Allen agreed with the Government that a gray water treatment system must be appropriately sized -- meaning that it must have sufficient area of soil interface to handle the amount of gray water coming from a house. In the mulch basin system, capacity means adequate square footage of the dirt floor of the basin(s). Ms. Allen testified that a conservatively designed system would provide one square foot of soil interface per gallon of gray water produced per day by the household. (One square foot per gallon is the ratio necessary for a system dug in a heavy clay soil, in which the infiltration of water is slow. Less square footage would be necessary if the system were installed in faster infiltrating loam.) Thus for 100 gallons per day (the Fillmore County figure for Amish household gray water), the basin floor(s) would need to total 100 square feet in area.

The mulch basin system has no septic tank. Ms. Allen agrees that gray water contains solids, soaps and greases that a septic tank removes by settling and floating. But she asserts that the woodchips in the mulch basin system perform essentially the same function of removing these solids and greases from the effluent. The mulch catches and filters out this "gunk," allowing cleaner gray water to run through to the soil for the natural aerobic treatment process.[25]

Minnesota in the months of December, January, and February is below freezing (with average monthly *low* temperatures of 11, 6, and 10 degrees Fahrenheit, respectively). In contrast, at Yosemite the average high temperature is not below freezing for any month (indeed, 47 degrees in December is as close as the average high comes to freezing). Yosemite undoubtedly has snow; but that does not mean its climate is like Minnesota's.

[25] It appears that in reaching and providing her initial opinions in this case, Ms. Allen may not have fully understood the content of Amish household gray water. She stated in her report: "The Amish gray water systems only contain water from their baths and washing machines." In fact, Amish gray water includes kitchen sink water, an element that is so contaminant-laden as not to be permitted in gray water systems in California. (California also prohibits putting laundry water from washing dirty diapers -- another not-uncommon element of Amish household gray water -- into a gray water system.) (CONTINUED)

Ms. Allen acknowledged that the mulch basin system requires more hands-on maintenance than does the Government's septic system. She testified that the mulch that has caught all the solids and grease dropping out of the pipe into the basin must be regularly removed, hauled away, and replaced with fresh woodchips. Usually the schedule for lifting the valve box lid to dig out and remove this dirty, decomposed mulch would be once per year. However, because Minnesota Amish household gray water includes the dirtier, greasier kitchen sink water, Ms. Allen testified that biannual basin maintenance would be necessary for the Fillmore County Amish systems. In contrast, a septic tank requires pumping only once every three to ten years.

Ms. Allen testified, however, that this twice-yearly maintenance would not require emptying the basin(s) of *all* their mulch contents. Rather, Ms. Allen testified that only "five or six shovel fulls" of decomposed mulch directly beneath the end of the outlet pipe would need to be removed and replaced that frequently. The rest of the mulch in the basin would not be so heavily loaded with contaminant material as to require such frequent change-out; it would decompose, she testified, more slowly and need replacement only once every ten years. Ms. Allen testified that mulch basin systems are "easy to maintain."

Ms. Allen was asked what assurance there is, in her experience, that this necessary, regular maintenance of mulch basin systems by the owners actually takes place? She testified that in the states in which she primarily practices, mulch basin gray water systems go essentially uninspected and unmonitored by state and municipal authorities once put in place; and Ms. Allen

That kitchen water would be in Plaintiffs' gray water did not, however, change Ms. Allen's opinions. She testified that kitchen sink water (and dirty diaper water) is still just "residential." She noted that, unlike California, "Oregon would allow kitchen water, Washington allows kitchen water, Arizona allows it as long as it's subsurface."

finds this laissez-faire regulatory approach appropriate.[26] The state or municipality gets involved only if a system is not performing properly -- for example, by backing up and overflowing -- and such a malfunction comes to light only when someone "notices and complains." Ms. Allen testified that in densely populated San Francisco, for example, "if there's a problem, if someone calls and is, like, my neighbor's dumping gray water in my yard, like, do something about it," the city can take action against the violator for not maintaining the required setback. Detection and enforcement require the "neighbors to notice something."

But what happens, Ms. Allen was asked, if the next-door neighbor lives a mile away, as might be the case in Fillmore County? In that scenario, how would a system malfunction be detected for correction? Ms. Allen responded: "It's probably not hurting anybody if they're not -- if it's not running into their neighbor's yard or somewhere else. It's most likely not causing a problem as long as they maintain the setbacks...."

While this litigation was pending, three of the Plaintiffs installed mulch basin gray water systems.[27] Prior to testifying, Ms. Allen visited Plaintiffs' farms to view those systems. She testified that Plaintiffs' systems included all the requisite components of serviceable mulch basin systems, and that the basic design of Plaintiffs' systems would be legal under the codes and practices of the western states with which she is most familiar. But she identified one principal problem with all of the Plaintiffs' systems as built: They were too small. Like the Government's witnesses, she observed saturated soil and pooling of waste water in Plaintiffs' systems. She

[26] Ms. Allen advocates codes that "make it easy for people to install an affordable [mulch basin gray water] system with not a lot of regulatory oversight," and she recommends "low barriers for people to comply with" in installing and maintaining such systems.

[27] The Government faults Plaintiffs for constructing their mulch basin systems without seeking prior governmental approval. The Plaintiffs characterized the systems they installed as experiments intended to see if they would work. The Court does not find these experiments to be improper; this litigation was pending, and these systems were built in good faith as a "better-than-nothing" improvement upon the unacceptable straight-pipe status quo.

attributed these problems to a mulch basin floor area not large enough for the volume of flow. The systems lacked necessary capacity, resulting in system saturation and the backing up of untreated gray water in the basins.[28]

The remedy for this defect, according to Ms. Allen, was to create more capacity by dividing the flow and sending the gray water to multiple basins. Page one of Exhibit 42 is a diagram illustrating gray water flow being divided, and then divided again, to send the effluent to four separate mulch basins, each of which has a 25 square foot soil interface area. In Ms. Allen's opinion, the design of Plaintiffs' mulch basin systems was basically sound, but undersized.

Before turning to an analysis of the evidence and a statement of my reasoning, I will note that the Government argues, with some justification, that the Plaintiffs' proposed alternative was a moving target for the Government during this litigation, and even during the trial. The greater-capacity design diagramed in Exhibit 42 appeared for the first time during Ms. Allen's rebuttal trial testimony. The Plaintiffs' alternative design has evolved, to a degree, during the pendency of this case, and as a result the Government has had to adapt its position on the fly to respond to the latest iteration of Plaintiffs' proposed alternative. The Government has objected to this.

I have overruled this objection. The Government knew long before the trial that Plaintiffs proposed a mulch basin system, and the essentials of that system have not changed. The Exhibit 47 design is simply an enlarged version of the Exhibit 7 design. There is no indication here that Plaintiffs have purposefully hidden the ball or sandbagged the Government, holding back important information and revealing it only when it was too late for the Government to effectively respond. The Government has not been dealt with unfairly, nor has it

[28] Ms. Allen also noted that in at least one of the Plaintiffs' systems, the woodchips were too fine (not sufficiently coarse). This had resulted in clogging and premature decomposition. Ms. Allen advocates use of a heavier, chunkier grade of chip that does not break down so quickly.

been prejudiced by the fact that Plaintiffs' design ideas have progressed as the case has developed. Further, the burden of proof is on the Government to establish that its compelling state interest cannot be served by "a less intrusive alternative." *Hershberger I* at 285. Plaintiffs have come forward with and advocated an alternative proposal -- just as the Amish defendants did in *Hershberger*. But the burden of proof *is not theirs*. If the evidence demonstrated that there is a workable, less religiously intrusive alternative that would serve the Government's compelling interests, I would find for the Plaintiffs and order the constitutional relief they seek; and I would do so even if that alternative only came to light for the first time at trial, and even if it was *not* one proposed or advocated by Plaintiffs.

So let us analyze the evidence. Part of the Government's case was a critique of what might be called procedural defects and potentially correctable operational shortcomings in Plaintiffs' mulch basin systems. For example, the systems Plaintiffs built were constructed without Plaintiffs having obtained permits from the Government -- permits that would certainly have been denied, if requested, because the systems are illegal under current law and regulations. Further, Plaintiffs' mulch basin systems were not designed by MPCA-certified designers, as required by Minnesota law. Plaintiffs' systems were built without the soil analysis necessary to determine that they had the requisite "three feet of separation" beneath the basins, and without the site inspections required to determine that they were properly set back from waterways and karst features. The systems used a distribution medium not approved by MPCA. And they were put into use without required post-installation inspections.

Let us put aside for purposes of this analysis the Plaintiffs' failure to ask the Government for permits. Plaintiffs could not have gotten permits to install mulch basins; and the constitutionality of the Government's insistence on septic systems is what this lawsuit is all

about. And let us assume that any future mulch basin systems would be installed only after Plaintiffs cooperate with procedural and technical steps to which they say they are agreeable: Use of a larger capacity design; pre-construction soil analysis to determine whether the bottom of the system has three feet of separation from redoximorphic features and bedrock; and Government inspections of the systems before, during, and after construction to ensure the systems have gone in according to plan. Setting aside for present purposes these more peripheral issues, let us address the central question: Is the mulch basin system an alternative that would accomplish the Government's compelling interest of ensuring public health and environmental safety?

The answer to that question is: **No**. Based on my consideration of the entire record, I find that the Government's compelling state interests cannot be achieved by less religiously burdensome means.

The finding with which I begin my analysis is that untreated household gray water presents a serious risk to public health via disease-causing viruses and bacteria, and endangers the environment with nitrogen and phosphorous. I conclude that the idea that gray water poses only a "very small risk" is erroneous. The gray water septic system required by the Government reliably and effectively treats household gray water over the long term with minimal maintenance, ensuring that contaminants and disease pathogens do not come into contact with people or enter the surface or ground waters untreated; and that problematic nutrients are not released untreated into the environment. The evidence convinces me that the mulch basin gray water system does *not* provide that same protection.

For more than 20 years Dr. Sara Heger has been a research engineer at the University of Minnesota Water Resources Center specializing in septic system research and education. Her

doctorate is in water resource science. She works in the university's Onsite Sewage Treatment Program. Dr. Heger persuasively testified to several problems with mulch basin systems and their feasibility in Fillmore County.

First, Dr. Heger testified to what is, in her opinion, the "biggest problem": It is questionable whether one could even find sites on the Plaintiffs' farms in Fillmore County that would provide three feet of separation from the perched water table and bedrock, beneath a two to four foot-deep mulch basin. The Court asked Dr. Heger a hypothetical question about the possibility of achieving the Government's public health and environmental goals using a mulch basin system, and the question required her to accept the premise that "we've got the three feet" of separation. Dr. Heger disputed the plausibility of that assumption, testifying as follows: "I actually think you're expecting a lot, because a lot of the soil conditions around here do not allow for a system in-ground with three foot of separation around them. So I think you're dreaming a dream that we -- that doesn't exist. And I can't say that a hundred percent, but that soil condition is very difficult to find." If one is convinced, as I am, that three feet of dry oxygenated soil is required beneath the system-soil interface, sites that would satisfy that requirement may simply not be available to the Plaintiffs, regardless of their willingness to otherwise comply with the Government's requirements.

Second, Dr. Heger testified that woodchip mulch would quickly saturate, break down, and plug up with solids: "It would seal up relatively quickly across the bottom." She testified that the mulch would "gum up" with solids, and "those solids are also going to travel to the interface where the sewage is going to the soil, and they will cause it to plug up."

Q. And when it seals up, it backs up.
A. Yep.
Q. And it stops performing its job.
A. Yes.

Q. And the answer to that is frequent changing the mulch.
A. Relocating.
Q. Oh. Okay.
A. It's not changing the mulch.
Q. All right.
A. If the soil plugs up, you'll have to move to another location unless you take that soil off, and then there's the risk of smearing and compacting that soil. When you do that, it may not take water as well again.

Dr. Heger does not believe that woodchips would adequately spread the waste water over the soil interface to get the unsaturated flow necessary for effective treatment. She also testified that because woodchips are organic, they break down and create their own oxygen demand, competing for the oxygen necessary for aerobic waste water treatment. Minnesota prohibits use of biodegradable substances such as woodchips as distribution media in waste water treatment systems because of the problems the decomposition of these materials creates. The evidence convinces me that that prohibition makes sense. I am persuaded by the Government's evidence that woodchip mulch is not suitable for this purpose.

But assuming sites satisfying the three feet of separation requirement *are* available on Plaintiffs' farms; and earthen basins dug at those locations are filled with biodegradable woodchips; could such a system provide ground water treatment that protects human health and the environment? Dr. Heger testified that this might be theoretically possible. But the maintenance required to keep such a system properly operating would be so burdensome as to render it unfeasible.

Ms. Allen had expressed the viewpoint that the twice-yearly maintenance required by mulch basins -- shoveling wet, dirty, decomposing mulch out of the basin, hauling it away, and replacing it with fresh mulch -- is not a big job. But in Dr. Heger's opinion, this maintenance requirement makes the mulch basin concept unworkably labor intensive. As Dr. Heger testified,

"Someone is going to need to do a very high level of maintenance."[29] I find Dr. Heger's opinion persuasive.

Dr. Heger testified that "we design systems here in Minnesota to have very little maintenance and to last with a design life of 25-plus years." The idea is not merely to afford Minnesota homeowners greater leisure time. This emphasis on maintenance-free system longevity is intended "to minimize the risk to public health and the environment in the...most long term way." Dr. Heger testified: "So it gets down to risk. That a system that needs this high a level of maintenance has a very high level -- has a much higher level of risk." In her opinion, to remain serviceable, the mulch basin system would require such "a very high level of maintenance and oversight" that the system is rendered unworkable. Such a system "would not last long term," according to Dr. Heger, and therefore would not provide reliable, long term protection of public health and the environment. Dr. Heger summed up her opinion on this point with: "I don't think it's practical."[30]

Ms. Allen, on the other hand, is confident that properly sized mulch basins would provide effective treatment of Amish household gray water in Fillmore County. I find Ms. Allen's opinions less persuasive and I give them less weight for several reasons.

[29] Amish people are accustomed to taking more time and expending more physical labor than are their non-Amish neighbors, to accomplish the same result. A non-Amish farmer can turn a tractor key and plow in an hour more acres than an Amishman can plow in a week with his team of horses. A task that is seen as prohibitively labor intensive in the "English" world might be viewed differently by the Amish.

But there is no evidence that Amish farmers have any more *time* on their hands than do non-Amish farmers. And as Dr. Heger testified, "I have yet to find a farmer who has time... They're the hardest working people I know." Her point is that farmers are unlikely to have available time to devote to the extraordinary monitoring and upkeep requirements that would come with biannually maintaining mulch basins totaling 100 square feet in area.

[30] Dr. Heger stated the opinion that *if* such a high-maintenance gray water treatment system were allowed, the greater risk it poses would require that it be "check[ed] on frequently" to assure that it was continuing to operate properly. "We have determined that when there is a higher level of risk, we are going to then require something called an operating permit, so that's a way for the regulatory body to assure that that system is protecting public health and the environment."

The Plaintiffs have expressed willingness to cooperate with regulatory steps connected with the *installation* of mulch basin systems. But they have *not* indicated a similar willingness to cooperate with "a very high level of [continuing] oversight" of the operation of their systems, once constructed.

First, the credibility of Ms. Allen's opinions was undermined by the haziness of her understanding of the important "three feet of separation" concept. To be sure, Ms. Allen knew that three to five feet of separation between the bottom of the system and the "ground water table" is necessary. But she did not know the significance of redoximorphic features (she was not able to define that term) as the marker of the depth of the "standing" or "perched" water table relevant here. She opined that the level of the "ground water table" can be easily determined by simply "digging a hole to show that there is no water in the hole." She testified that no water at the bottom of a three-foot hole (dug beneath the basin) means "you have more than three feet separation." But Dr. Heger convincingly testified that the perched water table "fluctuates throughout the year," meaning that Ms. Allen's method of determining its location by digging a hole would be unreliable.

As an alternative to that method of identifying the location of the ground water table, Ms. Allen testified that she had consulted the Minnesota Well Index for information regarding the depth at which drillers had first encountered water in drilling nearby wells. She testified that she found most of the "ground water table depths" in the "really close geographic area [were] over 100 feet, most were between 100 and 200, some were 300 feet." She testified: "From looking at that I would assume that the ground water in that area is going to be much deeper than five feet needed."

The problem with this testimony is that Ms. Allen was confusing the shallower "standing" or "perched" water table -- the one that is important here, that is identified by redoximorphic features, and that can often be just two or three feet below the surface in Fillmore County -- with the deep aquifers that are reported in the Minnesota Well Index. Dr. Heger and MPCA soil scientist Brandon Montgomery testified, and I am persuaded, that the Minnesota

Well Index provides no information useable in determining whether there is three feet of separation beneath a waste water treatment system.[31]

The three-feet-of-separation requirement is central to an accurate assessment of the feasibility of the treatment methods at issue here; and Ms. Allen's understanding of what she termed "ground water table stuff" was revealed to be rudimentary and flawed. I do not imply that Ms. Allen made any misleading claim that she was a "ground water expert." [32] To the contrary, she specifically disclaimed such qualifications. I simply conclude that the confidence one might otherwise place in Ms. Allen's opinions regarding the serviceability of mulch basin gray water systems in Fillmore County is undercut by her lack of expertise on a subject crucial to the analysis.

The weight I give Ms. Allen's opinions is also influenced by her view that the risk gray water poses to public health is really very minimal. This idea was clearly on display when she testified that gray water is "probably not hurting anybody if they're not -- if it's not running into their neighbor's yard or somewhere else. It's most likely not causing a problem as long as they maintained the setbacks..."

[31] Mr. Montgomery testified that the Minnesota Hydrogeology Atlas and Well Index "traditionally highlight or locate where ground water is found in what we call a water table, and when we say "water table" we'd be specifically talking about like a standing water table that you draw water -- well water from. That's different than the ground water that we're defining and characterizing in the SSTS program where we're highlighting those perched water tables, which tend to be a lot higher in the soil profile than the water tables that you would find in the Well Index or the Hydrogeology Atlas...So we would determine where the water table is located or ground water for an SSTS by doing the actual soil boring on site where you're looking to place the system, and then that is determined specifically by using the presence of redoximorphic features in the soil."

[32] Ms. Allen expressed an understanding that it is best to "keep the gray water as high up in the soil as possible because it is more biologically active," and that at a certain depth there are no longer "helpful bacteria." But asked about the significance of the "saturated soil" level to the efficacy of treatment, Ms. Allen acknowledged that she was "not equipped to answer questions, really detailed questions, about ground water table." Asked if she understood that the system needed to be three feet above the "level where you no longer have bacteria...for it to be an effective treatment system...and if you aren't, that then treatment is ineffective?" She answered: "I don't know. I don't know the answer to that." Cross examined about her understanding of Minnesota's definition of "ground water," and its relationship to the "water table," Ms. Allen indicated "that you might want to ask a different witness because I am not a ground water expert. I want to defer any ground water table questions...to the other expert that's coming up."

The notion that untreated gray water presents no real danger unless it is running onto someone else's property or into a river or stream was again evident when she described the reduced risk posed by gray water in rural settings:

> I think the concerns around gray water really diminish when you get on to -- in a rural situation as long as you're not too close to a waterway because you don't have the neighbors, you don't have the impact of other people. You have the space. You don't have problems with meeting these setbacks typically.

Indeed, it seems to be Ms. Allen's opinion that the public health risk is so small that how one disposes of untreated gray water ought to be, at least in some circumstances, a matter of informed personal choice. Asked about the practice of simply throwing household water directly onto the ground, something that has occurred in Amish households in the past, Ms. Allen first pointed out that this was "technically" not "gray water," because it had "not gone down a drain." Asked if it would be appropriate, from a public health standpoint, to "just take all your water and...throw it out in a pail on the yard," Ms. Allen responded: "Well, I would think about what are the risks, if it's, you know, my gray water that I just made, I'm not going to get myself sick from anything. So if it's my gray water and I choose to dump it on my own yard, that would be my choice. And if it's -- you know, if my own yard is not by a creek or a waterway, I'm not potentially risking health to the broader environment. So as long as I'm aware of what I could potentially be doing that's risky and I still want to do it, then there is, in my opinion, nothing unsafe about the practice."

As I have stated above, I am persuaded by the Government's evidence that untreated gray water poses a significant public health risk. I think Ms. Allen is wrong in describing that risk as negligible. But the fact that she sees the risk as minimal helps explain her view that a do-it-yourself system is are adequate to deal with it. The "very simple" system matches the "very small" risk.

I think there is also reason to question the overall objectivity -- and thus the accuracy and reliability, though certainly not the sincerity -- of the opinions Ms. Allen has provided. She is a proponent of mulch basin systems. All of us tend to underestimate the deficiencies and magnify the virtues of things we believe in. I detect some of that in Ms. Allen's opinions. She shrugs off objections to mulch basin systems as based on inexperience and a lack of knowledge. [33] Close governmental regulation and monitoring of mulch basin systems is unnecessary in her opinion; "honor system"-type self-regulation is sufficient. That Amish gray water contains kitchen and diaper water that California prohibits in its gray water systems will be no problem, in Ms. Allen's view, in Minnesota. But what about the fact that Plaintiffs' mulch basin systems all failed in their first year of operation? Just make them bigger and they will be fine, Ms. Allen assures us.[34]

Ms. Allen's opinions might be summed up as follows: She thinks that the risk posed by gray water to human health is overstated by inexperienced people like Dr. Heger; and that in the thirty states that do *not* permit mulch basin systems, gray water treatment is misguidedly over-regulated, over-engineered and overpriced. I am not convinced by these views and find the Government's evidence more persuasive on all of these points.

Ms. Allen testified that mulch basin gray water treatment systems are permitted in twenty states, but she acknowledged that most Upper Midwest states do not allow them. The climates of Arizona and California are so dissimilar in average temperature and precipitation to Minnesota's, that the Court can take little guidance from the experience of those states. The evidence

[33] Ms. Allen's critique of Minnesota's rejection of mulch basins as a gray water treatment mechanism was as follows: "Some states don't have a lot of experience and so their rules don't really match up with what is protective of health and safety and what's reasonable for people to comply with." These inexperienced states had "create[d] a modified septic rule" because they have not "br[ought] in gray water experts and people using gray water."

[34] Perhaps it might be argued that Dr. Heger is similarly an advocate of the septic system model. She certainly believes, and strongly so, that septic systems are the only safe, practical, long-term option for gray water treatment in Minnesota. But Dr. Heger is a researcher at a major university, whose opinions, I am satisfied, have a firmer grounding in science and academic rigor.

indicated that mulch gray water systems are also permitted in Montana and Wyoming; but little or no evidence was presented about the extent of use, regulation, and performance of mulch systems in those states. On this record, mulch systems in Montana and Wyoming provide the court no direction.[35] In a water-stressed part of the country, with a warmer climate than Minnesota's and less annual rainfall to saturate mulch basins, with a topography not characterized by fissured limestone, allowing homeowners to use bath and laundry water to irrigate their trees and bushes with minimally regulated mulch basins may make sense. But the evidence does not convince me that such systems would be as workable in Minnesota as Ms. Allen contends.

Had Plaintiffs' own experimental mulch basin systems proved successful, they might have been strong evidence of a practical, less religiously intrusive alternative. But they did not work, and instead illustrate the Government's objections to mulch basin systems. The Court is presented, as an alternative, with a purely hypothetical mulch basin system, an unproven quantity the workability of which is at best speculative, and at worst a thrice-demonstrated failure.

This record contains no evidence of a single, properly working mulch basin system in Minnesota; or in any other northern tier state with polar vortex temperatures. I find that the only practical and proven means of accomplishing household gray water treatment on the farms of Fillmore County, including the Amish farms, is a septic system of the type required by Fillmore County and MPCA. The Government's evidence convinces me that the proposed mulch systems, even with the capacity expansion and siting improvements to which the Plaintiffs are agreeable, would not accomplish the Government's compelling public health and environmental safety purposes.

[35] I note from a review of Exhibit 30 that some type of mulch basin system may be permitted in Wisconsin. However, no information about that neighboring state's experience with these systems was offered at trial.

Conclusion

In *Yoder* the United States Supreme Court said: "A way of life that is odd or even erratic but *interferes with no rights or interests of others* is not to be condemned because it is different." *Yoder* at 223-24 (italics added). I would never characterize Amish beliefs and the way of life guided by those beliefs as either odd or erratic. But to the degree their way of life would introduce untreated gray water into the soil and waters of Fillmore County, it interferes with the rights and interests of others. This is a situation in which the Amish cannot, despite their most sincere efforts, be separate from the world. All water is connected, and all of us, Amish and English alike, drink from the same aquifers. Because I find that the Government's public health and environmental safety interests cannot be accomplished by a less religiously intrusive alternative means, I deny Plaintiffs the relief they seek under the Minnesota Constitution and RLUIPA.

J.F.C.

Assistance with research and preparation provided by Ingrid Bergstrom, J.D.

STATE OF MINNESOTA

IN SUPREME COURT

A19-1375

Amos Mast, et al.,

Petitioners,

vs.

County of Fillmore,

Respondent,

Minnesota Pollution Control Agency,

Respondent.

ORDER

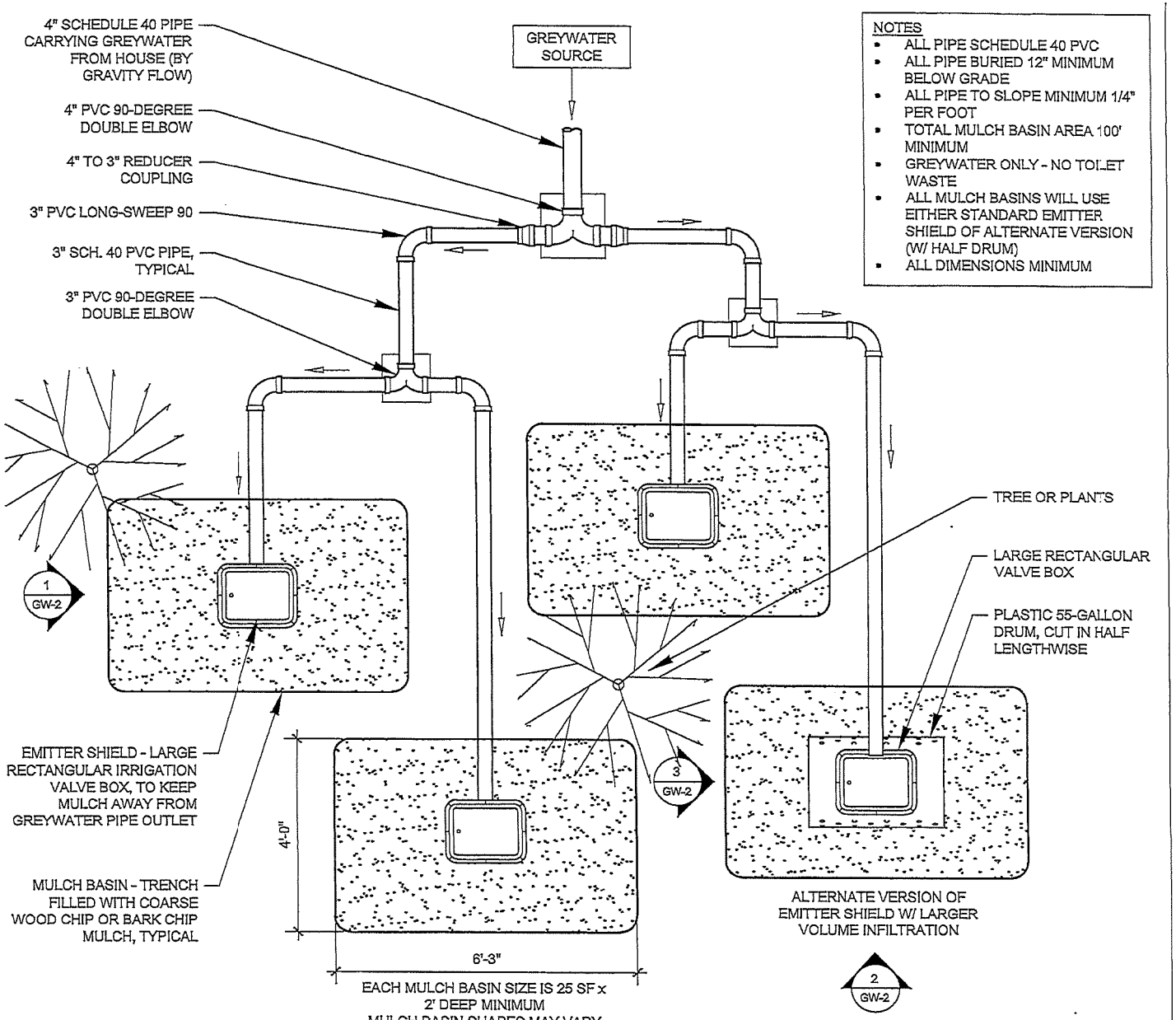
Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Amos Mast, et al., for further review be, and the same is, denied.

Dated: August 25, 2020

BY THE COURT:

Lorie S. Gildea
Chief Justice



NOTES

- ALL PIPE SCHEDULE 40 PVC
- ALL PIPE BURIED 12" MINIMUM BELOW GRADE
- ALL PIPE TO SLOPE MINIMUM 1/4" PER FOOT
- TOTAL MULCH BASIN AREA 100' MINIMUM
- GREYWATER ONLY - NO TOILET WASTE
- ALL MULCH BASINS WILL USE EITHER STANDARD EMITTER SHIELD OF ALTERNATE VERSION (W/ HALF DRUM)
- ALL DIMENSIONS MINIMUM

Greywater Corps
323-487-2687
greywatercorps.com
-
Leigh Jerrard,
Architect

Project:

Swartzentruber Amish
Greywater System
Preston, MN

LICENSED ARCHITECT
LEIGH JERRARD
NO. C 29818
EXP 1-31-2019
STATE OF CALIFORNIA

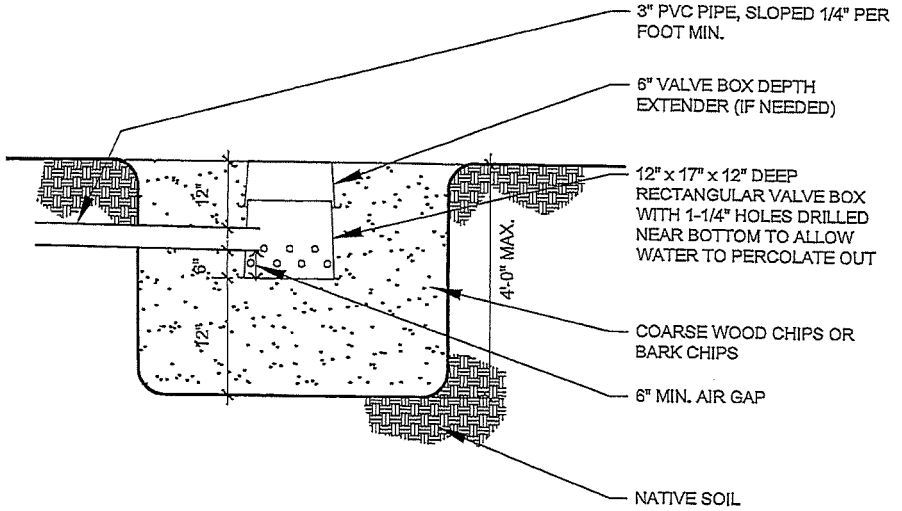
GREYWATER DISTRIBUTION SYSTEM - PLAN

SCALE:	3/8" = 1'
DATE:	DEC. 17, 2018
PROJ. #:	18-069

GW-1

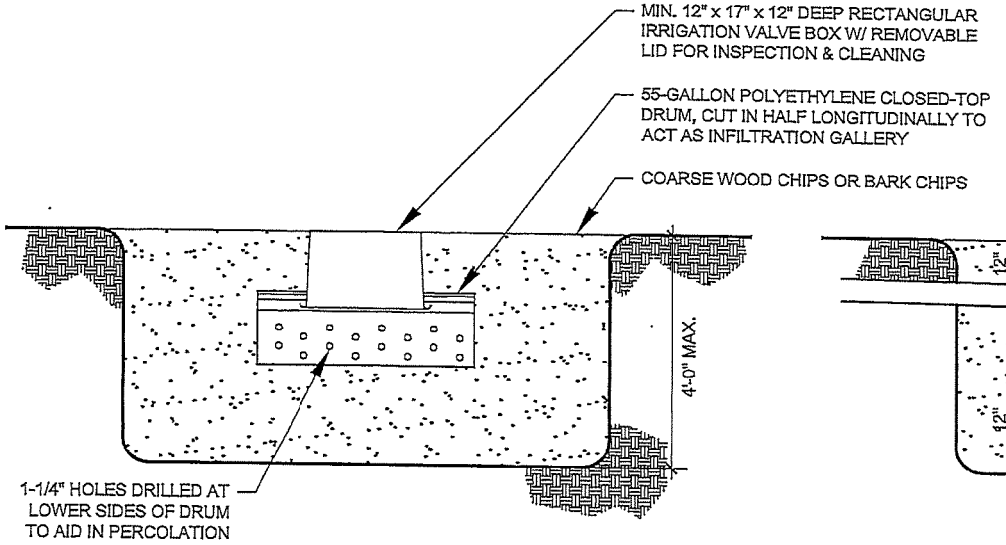
Pet. App. 77

Add-99

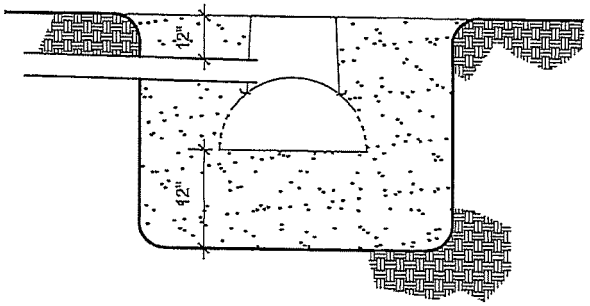


1 STANDARD EMITTER SHIELD - SECTIONAL VIEW
SCALE: 1/2" = 1'-0"

NOTES
- ALL DIMENSIONS MINIMUM EXCEPT WHERE OTHERWISE NOTED



2 ALTERNATE EMITTER SHIELD - LONG. SECTION
SCALE: 1/2" = 1'-0"



3 ALTERNATE EMITTER SHIELD - TRANSVERSE SECTION
SCALE: 1/2" = 1'-0"

Greywater Corps
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-
Leigh Jerrard,
Architect

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LICENSED ARCHITECT
LEIGH JERRARD
NO. C 29818
EXP 1-31-2019
STATE OF CALIFORNIA

GREYWATER DETAILS

SCALE:	1/2" = 1'
DATE:	DEC. 17, 2018
PROJ. #:	18-069

GW-2

Pet. App. 78

Add-100

5. **Warrantied Systems**
   Any SSTS system classified as a "Warrantied System" as found in MPCA Rules 7080 is prohibited in Fillmore County.

SECTION 5
SSTS Standards

501. Standards Adopted by Reference

The County hereby adopts by reference Minnesota Rules, Chapters 7080 and 7081 in their entirety as now constituted and from time to time amended. This adoption does not supersede the County's right or ability to adopt local standards that are in compliance with Minnesota Statute 115.55, as amended.

502. Alternative Local Standards

1. **Alternative Local Standards for New, Replacement, and Existing SSTS**
   Alternative local standards will apply to dwellings that do not have indoor toilet facilities, but still use water for their daily needs, in the following Townships within Fillmore County: Amherst, Bristol, Canton, Harmony, Holt, Newburg, Norway, Preble, Preston, and York. This type of system is intended to serve the Amish community and is intended to serve the needs of the Amish population within the above listed specific townships within Fillmore County.

   a. Local standards.
      1. Dwellings that do not have a toilet located in the home may be considered a Type IV Gray Water System and labeled, for the County's purpose, as Amish Gray Water Systems (this does not include seasonal dwellings);
      2. Such systems do not have bedroom classifications for determining gallons per day (gpd), instead, these types of systems should be calculated on a flat usage of 100 gpd;
      3. Use a minimum septic tank size of 1,000 gallons;
      4. Install a minimum of one-hundred (100') feet of drainfield;
      5. May use six (6") inches of rock instead of twelve (12") inches;
      6. Require three (3') feet of separation unless a variance is granted by the State; and
      7. Follow all other rules and regulations in reference to Minnesota Rules Chapter 7080.

   b. Existing systems that are not in compliance with this rule must be upgraded, replaced, or its use discontinued within eighteen (18) months of the owner's receipt of a Notice of Violation.

2. **Alternative Local Standards Requirements**
   This type of gray water system may be installed by the homeowner if all of the following regulations are met:

a. The owner has a design developed by an individual licensed by the State of Minnesota to design subsurface sewage treatment systems;
b. A septic system permit must be obtained from the County to install the gray water system;
c. The owner of the gray water system must attend an instructional class conducted by the Local Unit of Government for proper installation, operation and maintenance of a gray water system, if the system is installed by the homeowner;
d. The landowner or his/her family members may be the person(s) digging and installing the gray water system. If there are mechanical means used for the installation of the system such as a backhoe, skid steer or any other device used for digging, this person must be an immediate family member or be an individual licensed by the State of Minnesota to do installation of subsurface sewage treatment systems, as well as licensed to use such equipment in general;
e. Toilet waste must not be discharged to a gray water system. There must be proof of use of an outdoor privy that is detached from the house or wash room or the presence of a chemical toilet. New and existing homes must have at least a ten (10') foot section of Schedule 40 two (2") inch PVC pipe included in the line leading to the septic tank. This line must be immediately leaving the house of a gray water system. The largest line that may be attached or added to the four (4) inch line is a Schedule 40, two (2") inch PVC pipe may be used; and
f. The gray water system must be inspected by the LUG before, during, and prior to covering the system with soil in order for compliance inspections to be completed.

3. Locations where the Alternative Local Standards do not Apply
These alternative local standards shall not apply to systems in shore land or wellhead protection areas or to systems serving food, beverage, or lodging establishments.

503. Amendments to the Adopted Standards

1. List of Adopted Standards
a. Fillmore County may require any person seeking any exemption listed in 7083.700, as amended, to attend MPCA certified SSTS construction training and/or sign and have on record at the County Zoning Department an agreement indemnifying the County against claims due to failure of the landowner to comply with the provisions of this ordinance.
b. Fillmore County Permitted Sewage Treatment Systems installed prior to April 1, 1996, and not located in Shore land or Wellhead Protection Area or serving a food, beverage, or lodging establishment shall have not less than two (2) feet of vertical separation between the system bottom and saturated soil or bedrock.
c. All costs associated with the repair or replacement of a failing/non-compliant sewage treatment system shall be the responsibility of the property owner or as otherwise provided for in written agreement and on file at the County Zoning Department.
d. When official records of a sewage treatment system are not on file at the department for a property involved in the transfer or sale of that property; it shall be considered a violation of this ordinance, and a penalty may be imposed by the County as set and on file in the County Zoning Office.

e. An approved Fillmore County Holding Tank Service Agreement shall be signed and on record in the department prior to any holding tank installation.

2. Determination of Hydraulic Loading Rate and SSTS Sizing

Table IX entitled "Loading Rates for Determining Bottom Absorption Area for Trenches and Seepage Beds for Effluent Treatment Level C and Absorption Ratios for Determining Mound Absorption Areas Using Detail Soil Descriptions" and Table IXa entitled "Loading Rates for Determining Bottom Absorption Area for Trenches and Seepage Beds for Effluent Treatment Level C and Absorption Ratios for Determining Mound Absorption Areas Using Percolation Tests" from Minnesota Rules, Chapter 7080.2150, Subp.3(E) and herein adopted by reference, as amended, shall both be used to size SSTS infiltration areas using the larger sizing factor of the two (2) for SSTS design.

3. Compliance Criteria for Existing SSTS

Fillmore County permitted ISTS built before April 1st, 1996; located outside of areas designated as shore land areas, wellhead protection areas, or SSTS providing sewage treatment for food, beverage, or lodging establishments must have at least two (2) feet of vertical separation between the bottom of the dispersal system and seasonal saturation or bedrock.

SSTS built after March 31st, 1996 in Fillmore County; shall have a three-foot vertical separation between the bottom soil infiltrative surface and the periodically saturated soil and/or bedrock. Existing systems that have no more than a fifteen 15 percent reduction in this separation distance (a separation distance no less than 30.6 inches) to account for settling of sand or soil, normal variation of separation distance measurements and interpretation of limiting layer characteristics may be considered compliant under this Ordinance. The vertical separation measurement shall be made outside the area of system influence but in an area of similar soil, per 7080.1500, Subp.4, as amended.

4. Holding Tanks

Standards:

Installation of holding tanks, the specific conditions under which their use will be allowed are specified in 7082.0100, Subp.3G, as amended. All holding tanks shall comply with 7080.2290, items A through F, as amended. Further, all owners of holding tanks may be issued an operating permit 7082.0600, Subp.2A, as amended, which will include the provisions listed in 7082.0600, Subp.2B, (1) through (8), as amended. See Section 5. 502.02 of this Ordinance.

Fillmore County will severely limit the use of holding tanks. Yet, holding tanks are a practical method of handling wastewater for a variety of applications where water use is low such as in seasonal homes, buildings located on sensitive sites, parks, playgrounds service station drains, etc. However, reliable management, which ensures that the tanks are pumped and the contents are hauled to a permitted treatment facility, is a critical and necessary element of holding tank use. Proper management assured, holding tanks offer safe, effective and affordable options for low water use applications.

Restrictive Provision: Holding tanks may be allowed where it can be shown conclusively that a SSTS permitted under this Ordinance cannot be feasibly installed. Holding tanks shall not be allowed for all other wastewater applications.

Conditional Provision: Holding tanks may be used for limited water use under the following conditions:

a. The owner shall install a holding tank in accordance with Minnesota Rules Section 7080.2290, as amended.

b. The owner may be required to install a water meter to continuously record indoor water use.

c. The owner shall maintain a valid contract with a licensed liquid waste hauler to pump and haul the contents from the holding tank to a licensed treatment facility and provide a copy of the contract to the Fillmore County Zoning Office. The contract that must be used is the Pumpers Contract as provided for by the Department.

d. The holding tank shall be regularly pumped, no less frequently than monthly or other regular schedule agreed upon with the Department.

e. The pumper shall certify each date the tank is pumped, the volume of the liquid waste removed, the treatment facility to which the waste was discharged, and the water meter reading at the time of pumping and report to the Department that the holding tank is pumped less frequently than monthly or other schedule agreed upon with the Department.

Failure to meet these requirements will result in this matter being referred to the County Attorney for prosecution.

504. Variances

1. Variance Requests

A property owner may request a variance from the standards as specified in this ordinance pursuant to county policies and procedures.

2. Affected Agency

Variances that pertain to the standards and requirements of the State of Minnesota Department of Health must be approved by the affected State Agency pursuant to the requirements of the State Agency. Variances not related to the size or type of system may be authorized on-site by a Fillmore County Septic Inspector.

Variance requests to deviate from the design flow determination procedures in Minnesota Rules Chapter 7081-0110 if the deviation reduces the average daily estimated flow from greater than 10,000 gallons per day to less than 10,000 gallons per day, or to provisions in 7080.2150, Subp.2 and 7081.0080, Subp.2 through 5, as amended, regarding the vertical separation required beneath the treatment and dispersal soil system and saturated

soil or bedrock from the required three (3) feet of unsaturated soil material (except as provided in 7082.1700, Subp.4D) must be approved by MPCA.

Anyone requesting a variance from any technical requirements in this Ordinance shall:

a. Any property owner requesting relief from the strict application of the provisions in this Ordinance must complete and submit an Application for Variance to the Department on a form provided by the Department. The variance request must include, as applicable:
   1. A statement identifying the specific provision or provisions in the ordinance from which the variance is requested;
   2. A description of the hardship or difficulty that prevents compliance with the rule;
   3. The alternative measures that will be taken to achieve a comparable degree of compliance with the purposes and intent of the applicable provisions;
   4. The length of time for which the variance is requested, if applicable;
   5. Cost considerations only if a reasonable use of the property does not exist under the term of the Ordinance; and
   6. Other relevant information requested by the Department as necessary to properly evaluate the variance request.

b. The appropriate fee shall be paid at the time of submittal of the application to receive consideration.

c. Upon receipt of the variance application, the Department shall decide if a site investigation conducted by the Department will be necessary.

SECTION 6
SSTS Permitting

601. Permit Required

It is unlawful for any person to construct, install, modify, replace, or operate a SSTS without the appropriate permit from the Fillmore County Zoning Office. The issuing of any permit, variance, or conditional use under the provisions of this ordinance shall not absolve the applicant of responsibility to obtain any other required permit.

602. Sewer Permit

A permit shall be obtained by the property owner or an agent of the property owner from the County prior to the installation, construction, replacement, modification, alteration, repair, or capacity expansion of a SSTS. The purpose of this permit is to ensure that the proposed construction activity is sited, designed, and constructed in accordance with the provisions of this Ordinance by appropriately certified and/or licensed practitioner(s).

1. **Activities Requiring a Permit**
   A permit is required for installation, replacement, or for any repair of a SSTS or its components that could potentially alter the original function of the system, change the