



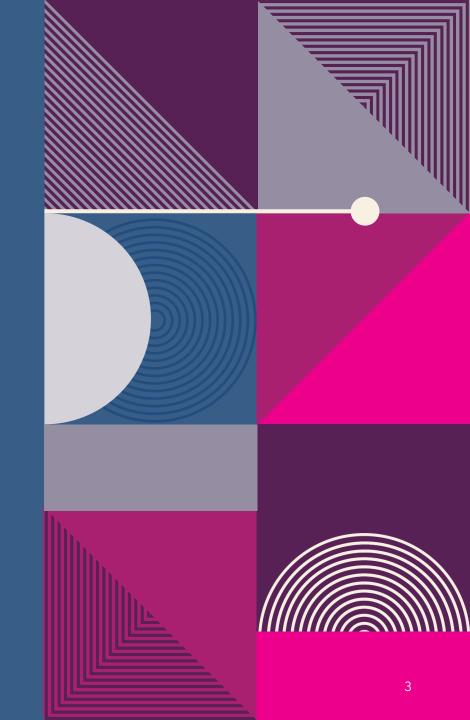
PRESENTATION OVERVIEW CASE LAW UPDATE: RECENT AND PENDING CASES

- TWO SETTLED/RESOLVED PHCB CASES
 - UNDERWOOD VS ECOLOGY (CEASE AND DESIST ORDER)
 - TACKMAN VS ECOLOGY (PERMIT CANCELLATION)
- TWO DECISIONS FROM THE PCHB
 - RAN GENERAL PARTNERSHIP VS ECOLOGY (PENALTY)
 - WAGNER VS ECOLOGY (PERMIT DENIAL)
- TWO PENDING APPELLATE CASES
 - BURKHOLDER VS ECOLOGY (PERMIT DENIAL)
 - DON FODE VS ECOLOGY (DENIALTY)

SETTLED CASES

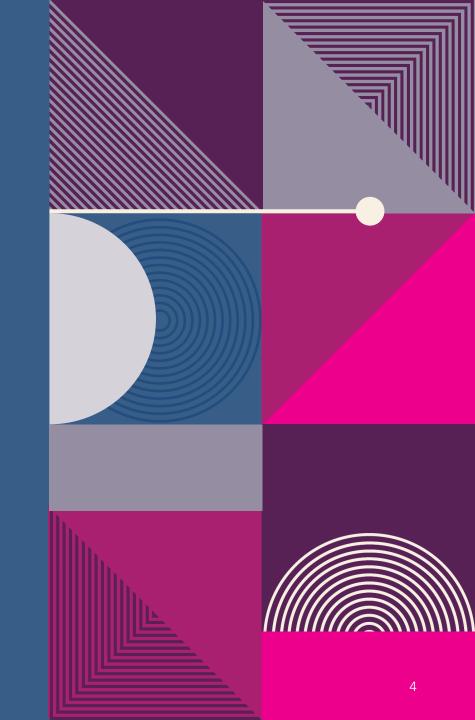
<u>Underwood vs. Ecology, PCHB No. 24-065:</u> Appeal of September 2024 administrative cease and desist order issued to Underwood Estates

- Plan was to develop and serve 21 homes in a subdivision that was part of a broader community with 21 exempt wells. Assertion was that this would not exceed 5000 gpd
 - Settled: Underwoods agree to do only 14 homes on the exempt wells and bring a water line for remaining lots and domestic irrigation



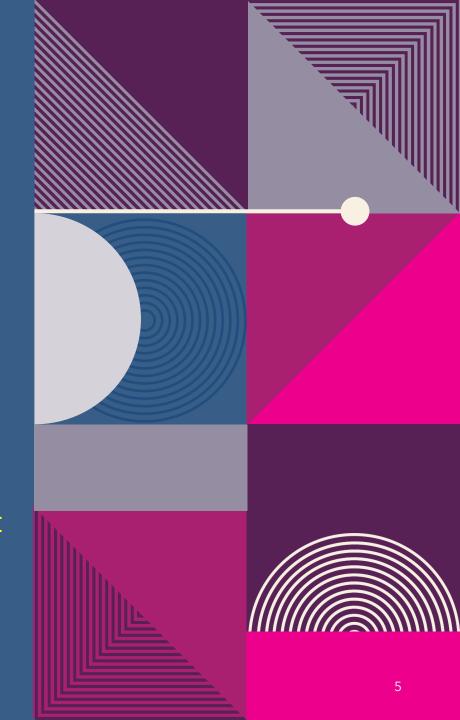
SETTLED CASES

- TACKMAN VS ECOLOGY, PCHB No. 24-073:
 Appeal of Ecology/OCR Order of Cancellation,
 Dated October 21, 2024
- Cancellation alleged failure to timely develop new permit (April 2016) that would be mitigated with water provided by MVID
- 13th of December, Ecology issues order Rescinding Cancellation
- Original Cancellation Order did not provide 60 days to show cause why the permit should not be cancelled per RCW 90.03.320



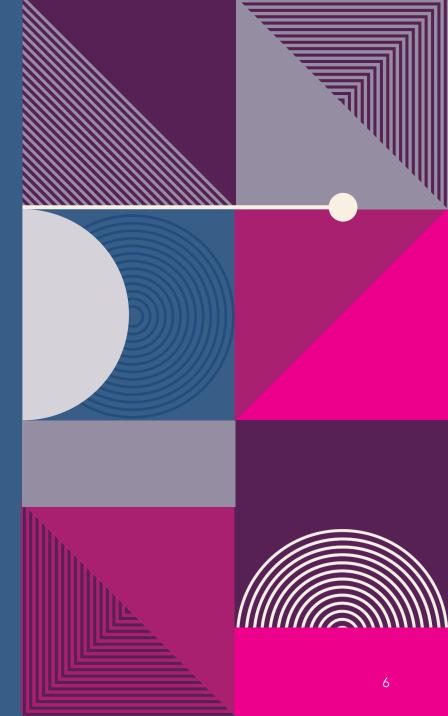
DECISIONS: <u>RAN GENERAL</u> <u>PARTNERSHIP VS ECOLOGY</u>, PCHB 23-040

- *\$12,000 penalty for illegal irrigation of 40 acres blueberries during the summer of 2023
- Ecology staff observed land cleared and plants planted.Technical assistance provided
- •Cease and desist order issued prior-summer of 2022
- Penalty calculated based on violation of the cease and desist order and 6 instances of alleged illegal irrigation at \$2000/day, June and July 2023
- Hearing December 2024, Order March 7 2025



DECISIONS: RAN PARTNERSHIP VS

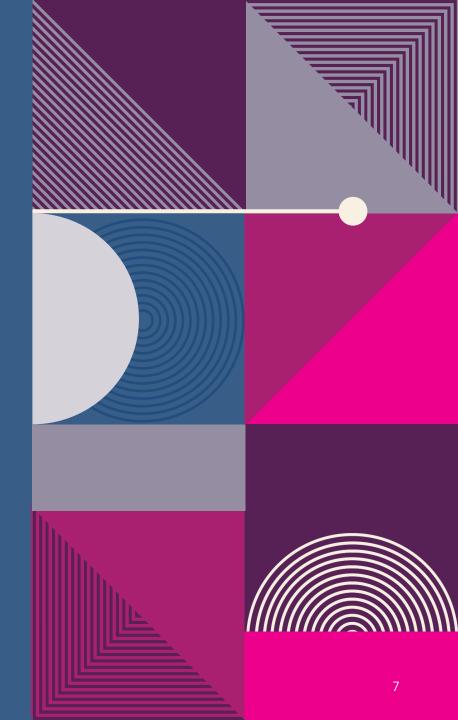
- One well or property no metering
- Owner testified he irrigated using no more than what is permitted under the exemption, RCW 90.44.050, and that he irrigated the property at a deficit in "zones"
- Board found this testimony lacked credibility:
 - "[Owner's] testimony that he did not water in excess of 5000 gallons a day using groundwater lacks credibility in light of his demeanor, evasiveness, lack of willingness to be forthcoming, lack of documentation, and the circumstantial evidence and expert testimony"



DECISIONS: RAN PARTNERSHIP VS

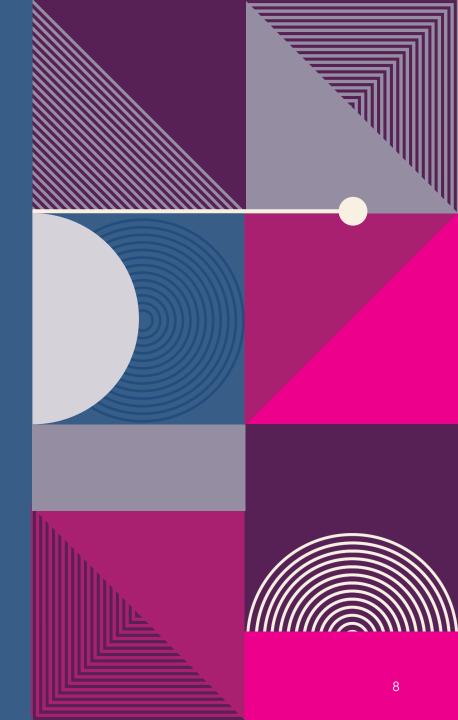
• "The case presented by Ecology is primarily circumstantial coupled with expert testimony."

- RAN owned the property, was made aware of the legal requirements for water usage
- The property was planted with blueberries
- The scientifically established typical water needs of blueberries in the region with the weather during the time
- The blueberry plants actual appearance, and the amount of groundwater allowed under the groundwater exempton
- RAN was using water from the groundwater exemption



DECISIONS: RAN PARTNERSHIP VS

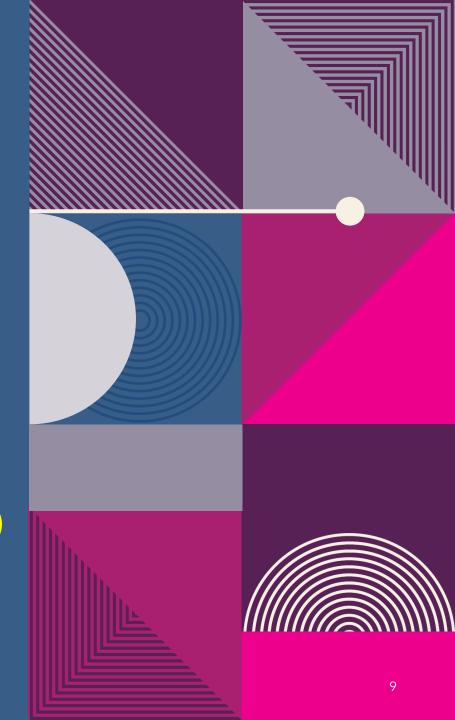
- Board utimately affirmed the penalty as reasonable
 - nature of the violation
 - prior history of the violator
 - remedial action taken by the penalized party
- Board accepted Ecology staff testimony as EXPERT TESTIMONY
- NO APPEAL—CASE IS CONCLUDED
- *FYI*
 - Ecology issued another 20K penalty against RAN for illegal irrigation last summer. This case is under appeal and set for hearing next year. PCHB NO. 24-072



DECISIONS: WAGNER VS ECOLOGY, PCHB 22-054

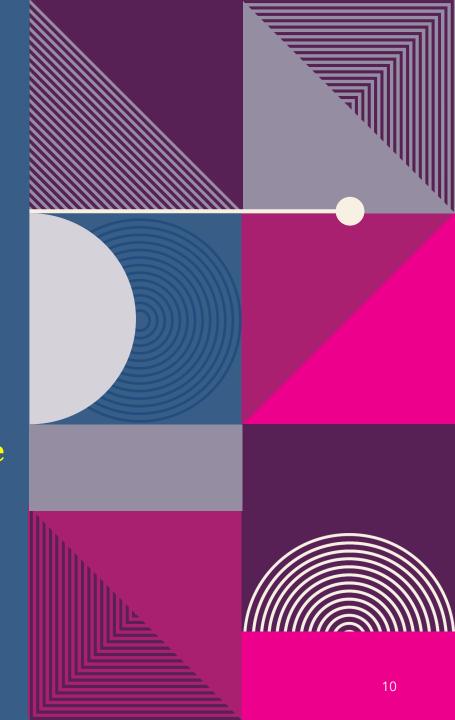
- Four-part test case
- Is water available for the Wagner's proposed appropriation (1.0 cfs for irrigation from Five Mile Creek headwaters)
- •Will the use impair existing users? What about the SWSL (surface water source limitation)?
- Is the use detrimental to the public welfare (are there any fish in the creek that could be harmed by the proposed diversion?)

Hearing October 7-10. PCHB issues Final Findings of Fact, Conclusions of Law and Order on Jan. 8, 2025



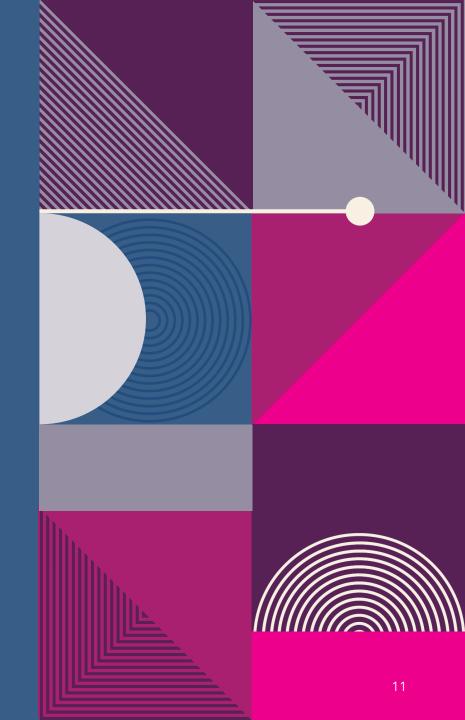
DECISIONS: WAGNER VS ECOLOGY, PCHB 22-054

- Appellants demonstrated there is water available to be diverted from Fivemile Creek without decreasing its water level
- Appellants' application requires Ecology to determine what amount of water is available for appropriation in Fivemile Creek without the weight initially attributed to the surface water source limitation.
- The Board remands Appellants' application to Ecology for further evaluation consistent with the findings and conclusions of this Order.



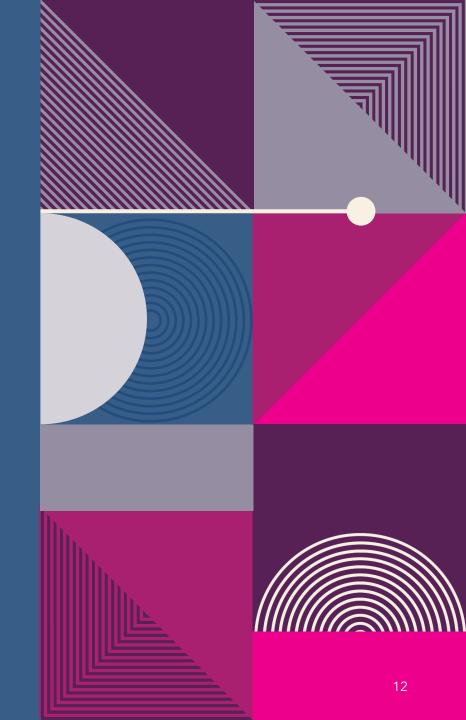
DECISIONS: WAGNER VS ECOLOGY, PCHB 22-054

- •1967 Water Right Associated with the property was conditioned with a 1.0 CFS SWSL to protect downstream users. SWSL was expressly associated with this water right. No ISF rule
- At hearing, Appellants showed that there is water available in Fivemile Creek, but not 1.0 CFS as proposed in the Application. (why wasn't this game over? Application was for 1 cfs???)
- Ecology did not consider whether an amount less than 1.0
 CFS was available, would impair the rights of downstream users, or would be detrimental to the public welfare. See RCW 90.03.290
- ""the SWSL is not a strict closure of Fivemile Creek like a minimum instream flow or administrative closure. In addition, the SWSL applicable to Fivemile Creek is not sufficiently persuasive evidence to justify Ecology's decision"



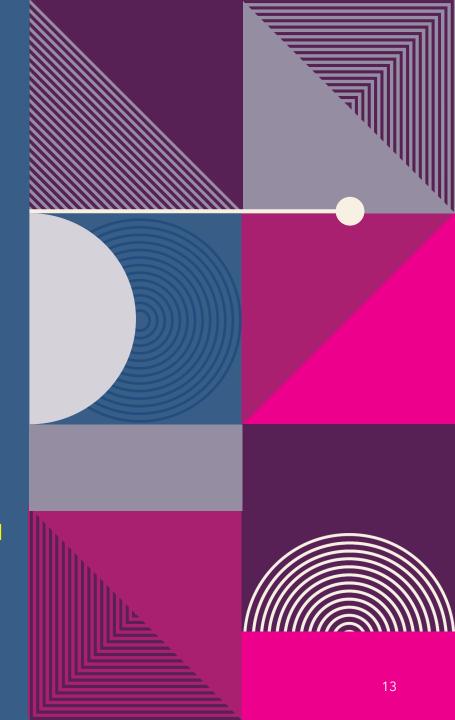
DECISIONS: WAGNER VS ECOLOGY, PCHB 22-054

- ■Consultant's measurements of Fivemile Creek demonstrated, at times, that there is at least 1.0 CFS in Fivemile Creek and that there is 100 GPM continuously available without a decrease to the instream flow.
- "The Board concludes that Appellants' demonstration must be included when considering 'what amount, if any, is available for appropriation' in Fivemile Creek"
- "the Board concludes that the SWSL holds less weight as a factor due to multiple aspects of its infrangibility with a relinquished water right and the changed conditions of Fivemile Creek as the surface water source"
- Other SWSLs may be important, but "the most important distinction" of this SWSL is the relinquishment of the right with which it was issued

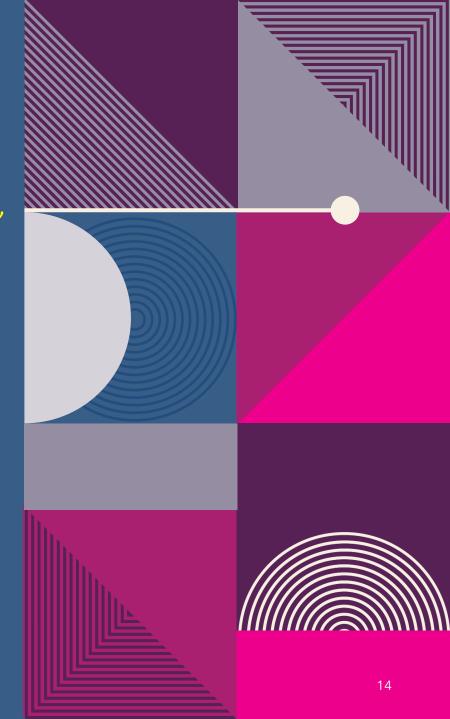


DECISIONS: WAGNER VS ECOLOGY, PCHB 22-054

- Board does not reach impairment and public interest in light of remand
 - The Board remands the Application to Ecology <u>for a renewed evaluation</u> without the weight previously associated with the SWSL and with the evidence presented by the Appellants
 - "The Board remands this matter to Ecology to reevaluate the Application consistent with this Order, including whether the appropriation will impair existing water rights and whether the appropriation will be a detriment to the public welfare."
- Petition for Judicial Review on 2/7 and Complaint for Declaratory Judgment
 - Order Ecology to approve the application for a minimum of 100 gpm without any finding of harm to the public welfare or impairment, or order the Board to direct Ecology to issue a permit for the same amount
 - Order Ecology to withdraw Five Mile Creek SWSL as an illegal rule of general applicability, and further declare SWSL is void as an ISF unless adopted through rulemaking

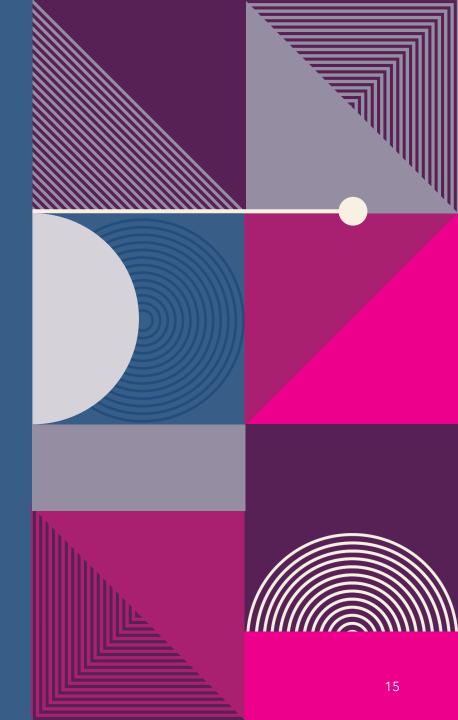


- Ecology denied Burkholder's requests to drill 14 wells in the Methow basin, near Thompson Creek, which is closed to new appropriations.
- ■Burkholder claims his wells should be allowed under <u>WAC 173-548-050(4)</u>:
 - If Ecology determines groundwater is not hydraulically connected to closed surface water; or
 - If Ecology has insufficient information to make such a determination, then prospective appropriator may provide additional information sufficient for Ecology to determine hydraulic continuity does not exist and that water is available
- ■Ecology prevailed on SJ. Superior Court Affirms. On Appeal to Div I
- **ALL BRIEFING COMPLETED!**



Appeals of 3 penalty orders for a total of \$618,000 issued by Ecology to Fode for illegal use of groundwater in the Odessa Subarea, an area of severe aquifer decline. This was the largest water rights penalty that Ecology has ever issued.

Fode contends that Ecology failed to comply with the requirement to provide technical assistance under RCW 90.03.605 before it issued the penalties.

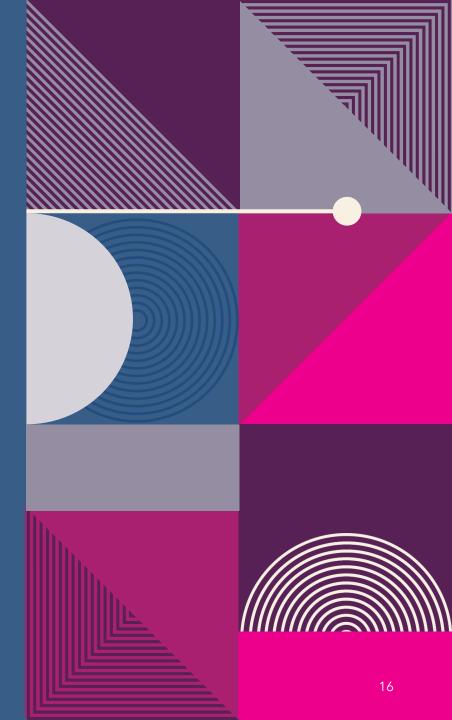


Fode contends that Ecology erred in calculating the number of days of illegal irrigation based on the length of the irrigation season rather than on the number of days when Ecology staff actually witnessed irrigation of the land.

The PCHB upheld the penalty orders but cut the total of the penalties to \$260,000.

The PCHB recognized that "The violation here is extremely serious."

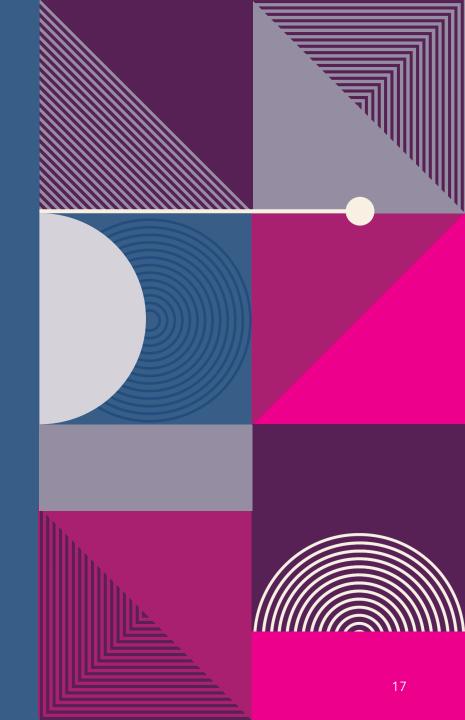
BUT (and it's a big but).....



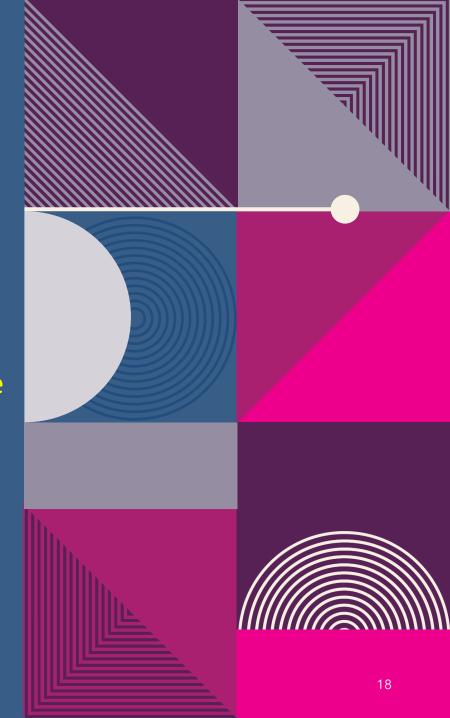
The PCHB did not follow Ecology's calculation of the penalty based on finding violations during each day of the irrigation season after cease and desist orders were issued.

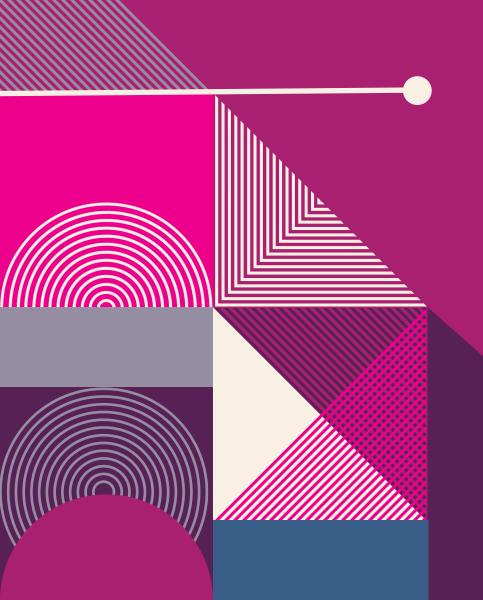
"Mr. Fode illegally irrigated on all the days that Ecology noted the pivots 'on' or 'wet.'"

Fode and Ecology filed petitions for review of the PCHB's decision, and the two cases were consolidated in Grant County Superior Court, along with Fode's petition for review of an earlier PCHB order that dismissed his appeal of cease and desist orders that were issued prior to the penalties because it was not timely filed.



- Fode vs. Ecology: The core issues on the parties' cross appeals:
- Should penalties be voided because Ecology did not provide proper technical assistance to Mr. Fode?
- Did the PCHB err when it concluded Ecology may only penalize for illegal irrigation for directly observed violations?
- ■Did Ecology engage in unauthorized "violation spreading?" (3 separate penalties on 3 separate properties)
- •ALL BRIEFING COMPLETED! Awaiting Div III to set argument





END