

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF WATER )  
TO VARIOUS WATER RIGHTS HELD BY OR FOR ) Docket No. CM-DC-2010-001  
THE BENEFIT OF A&B IRRIGATION DISTRICT, )  
AMERICAN FALLS RESERVOIR DISTRICT #2, ) **FINAL ORDER REGARDING**  
BURLEY IRRIGATION DISTRICT, MILNER ) **APRIL 2013 FORECAST**  
IRRIGATION DISTRICT, MINIDOKA IRRIGATION ) **SUPPLY**  
DISTRICT, NORTH SIDE CANAL COMPANY, ) **(METHODOLOGY STEPS 1 – 4)**  
AND TWIN FALLS CANAL COMPANY )  
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**FINDINGS OF FACT**

1. On June 23, 2010, the Director of the Idaho Department of Water Resources (“Director” or “Department”) issued his *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order established 10 steps for determining material injury to members of the Surface Water Coalition (“SWC”).

2. In 2010, the Director issued multiple final orders that applied steps from the Methodology Order to the 2010 irrigation season. The Methodology Order and subsequent “as-applied” orders are on judicial review before the Fifth Judicial District Court, in and for the County of Gooding, in case numbers CV-2010-382 *et al.*

3. On December 10, 2010, the Department filed a *Motion for Stay* (“Motion”) with the district court, which was joined by the City of Pocatello, Ground Water Users, and SWC. The Motion asked the district court to “stay all proceedings in the above-captioned matters until a decision has been entered by the Idaho Supreme Court in the SWC Supreme Court Appeal.”<sup>1</sup> The parties agreed that, “in the interim, administration of hydraulically connected ground water and surface water rights shall continue as set forth in the Methodology Order.” *Motion* at 3.

4. Consistent with the Motion, the district court entered an order staying proceedings on judicial review until the Idaho Supreme Court issues “its decision in the SWC Supreme Court Appeal.” *Order Granting Motion for Stay*, CV-2010-382 (Fifth Jud. Dist., Dec. 13, 2010).

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<sup>1</sup> Related issues to the SWC delivery call are before the Idaho Supreme Court, consolidated under case number 38191-2010. Argument before the Idaho Supreme Court occurred on June 13, 2012.

5. The Director has applied the Methodology Order in 2010, 2011, and 2012.
6. This order will apply Methodology steps 1, 2, 3, and 4, and address step 5.

**A. Step 1**

7. Step 1 requires members of the SWC to provide electronic shape files delineating the total irrigated acres to the Department by April 1, “or confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5% . . .” *Methodology Order* at 34. If the SWC does not timely provide the information, the Department will conservatively determine the total number of irrigated acres. *Id.*

8. On February 21, 2013, the Department sent a letter to SWC managers requesting the above information. Each SWC entity timely complied with the Director’s request.

**B. Step 2**

9. Step 2 states that, “Starting at the beginning of April, the Department will calculate the cumulative CWN volume for all land irrigated with surface water within the boundaries of each member of the SWC.” *Methodology Order* at 34. CWN stands for “Crop Water Need.”

10. The Department has initiated its ongoing calculation of cumulative CWN volume for the 2013 water year, and will continue this calculation throughout the irrigation season.

**C. Step 3**

11. Step 3 states that, within fourteen days of the issuance of the joint forecast (“Joint Forecast”) prepared by the United States Bureau of Reclamation and the United States Army Corp of Engineers, the Director “will predict and issue an April Forecast Supply for the water year and will compare the April Forecast Supply to the baseline demand (“BD”) to determine if a demand shortfall (“DS”) is anticipated for the upcoming irrigation season. A separate April Forecast Supply and DS will be determined for each member of the SWC.” *Methodology Order* at 35.

12. On April 3, 2013, the Joint Forecast was announced, predicting an unregulated inflow of 2,650,000 acre-feet at the Snake River near Heise gage for the period of April through July. The Joint Forecast “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” *Methodology Order* at 9. The forecasted flow volume equates to 82% percent of average<sup>2</sup> and is most similar to the flow volume experienced in 2010. The Heise forecast was used in regression equations for each SWC entity to predict the natural flow supply.<sup>3</sup> Given the predicted supply, it is anticipated that an additional 563,300 acre-feet will accrue to the storage rights after April 1.

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<sup>2</sup> The average is based on years 1981-2010.

<sup>3</sup> Attached hereto are the regression analyses for each SWC entity used to predict natural flow supply.

13. The storage allocation is based on the average of the 2002 and 2004 reservoir rights' fill after April 1; 718,500 acre-feet and 408,000 acre-feet, respectively. While this year's predicted runoff volume is similar to that experienced in 2010, it was not considered for a representative year because the current snowpack conditions and the near-term forecast climatic conditions are not similar. In 2010, the Joint Forecast was 1,940,000 acre-feet. However, spring rain that year resulted in a runoff volume of 2,604,000 acre-feet. The current snowpack above Palisades is similar to 2002 and 2004. In 2002, the snowpack above Palisades continued to accumulate until the latter half of April. In 2004, the snowpack peaked in the middle of March and had already begun to runoff by mid-April. The current snowpack above Palisades has not begun to melt and has increased from the beginning of the month. In 2002 the reservoirs filled an additional 718,500 acre-feet after April 1. By contrast, in 2004, only an additional 408,000 acre-feet of fill resulted because of warmer weather and increased diversion demand. Given that the snow above Palisades has not begun to melt as it did in 2004, and that is unknown if the snow will remain as long as it did in 2002, the average of the 2002 and 2004 reservoir accrual was chosen for 2013 fill.

14. The Department predicts that Jackson, American Falls, Palisades winter water savings, and Lake Walcott will have 100% storage allocations. The 1939 Palisades Reservoir right is expected to fill 535,300 acre-feet, resulting in a 59% storage allocation. Reservoir evaporation is assumed to be 3%, which is similar to the total evaporation charges in both 2002 and 2004.

15. On February 11, 2013, the Director issued a *Final Order Regarding Instructions to Water District 01 Watermaster, In the Matter of Water Right No. 1-6* ("Final Order re: 1-6"). In The Final Order re: 1-6, the Director instructed the Watermaster for Water District 01 to change his accounting practices for AFRD2's natural flow water right, 1-6. Because of the change in accounting, Department staff has updated the regression equation that has historically been used to predict natural flow available to AFRD2. The Final Order re: 1-6 does not change reservoir spaceholder allocations in 2002 or 2004.

16. Based on the above, and using the updated regression for AFRD2, the Director predicts as follows:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 2006/2008	Shortfall
A&B	5,035	116,770		121,805	58,492	-
AFRD2	58,759	381,744	1,000	441,503	415,730	-
BID	89,254	214,392	5,130	308,776	250,977	-
Milner	7,772	80,310		88,082	46,332	-
Minidoka	131,984	333,683	8,370	474,037	362,884	-
NSCC	361,822	834,101	(7,750)	1,188,173	965,536	-
TFCC	799,407	238,552	(6,750)	1,031,209	1,045,382	14,200
					Total	14,200

17. Based on the above, and using the AFRD2 regression from prior years, the Director still predicts the same demand shortfall:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 2006/2008	Shortfall
A&B	5,035	116,770		121,805	58,492	-
AFRD2	55,872	381,744	1,000	438,616	415,730	-
BID	89,254	214,392	5,130	308,776	250,977	-
Milner	7,772	80,310		88,082	46,332	-
Minidoka	131,984	333,683	8,370	474,037	362,884	-
NSCC	361,822	834,101	(7,750)	1,188,173	965,536	-
TFCC	799,407	238,552	(6,750)	1,031,209	1,045,382	14,200
					Total	14,200

**D. Step 4**

18. Step 4 states as follows:

If the April DS is greater than the reasonable carryover shortfall from the previous year, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure and provide a volume of storage water equal to the difference of the April projected demand shortfall and reasonable carryover shortfall, for all injured members of the SWC. If junior ground water users fail or refuse to provide this information, by May 1, or within fourteen (14) days from issuance of the values set forth in Step 3, whichever is later in time, the Director will issue an order curtailing junior ground water users.

*Methodology Order* at 35-36.

19. As is shown above, it is predicted, at this time, that the SWC will experience a maximum demand shortfall of 14,200 acre-feet. As established in Step 8 of the *Methodology Order*, no water shall be owed until the Time of Need. *Methodology Order* at 37. At the Time of Need, the volume of water necessary to mitigate for material injury to the SWC may be less but not greater than 14,200 acre-feet. *Methodology Order* at 35.

20. Junior ground water users shall have fourteen (14) days from the issuance of this Order to establish, to the satisfaction of the Director, their ability to secure and provide a volume of storage water or to conduct other approved mitigation activities that will provide water to the SWC.

**E. Step 5**

21. Step 5 states as follows:

If the storage allocations held by members of the SWC fill, there is no reasonable carryover shortfall. If the storage allocations held by members of the SWC do not fill, within fourteen (14) days following the publication of Water District 01's initial storage report, which typically occurs soon after the Day of Allocation, the volume of water secured by junior ground water users to fulfill the reasonable carryover shortfall shall be made available to injured members of the SWC. The amount of reasonable carryover to be provided shall not exceed the empty storage space on the Day of Allocation for that entity. If water is owed in addition to the reasonable carryover shortfall volume, this water shall be provided to members of the SWC at the Time of Need, described below. The Time of Need will be no earlier than the Day of Allocation.

*Methodology Order* at 35-36.

22. On November 26, 2012, the Director predicted 17,318 acre-feet of material injury to AFRD2's reasonable carryover. *Final Order Establishing 2012 Reasonable Carryover (Methodology Step 9)* ("2012 Step 9 Order"). On December 21, 2012, and pursuant to stipulation between AFRD2 and the Idaho Ground Water Appropriators, Inc. ("IGWA"), the Director entered an order establishing that IGWA had secured 17,389 acre-feet of storage water to mitigate for predicted material injury to AFRD2. *Order Adopting Stipulated Notice of Secured Water in Compliance with Final Order Establishing 2012 Reasonable Carryover (Methodology Step 9)*.

23. According to the Methodology Order, "If at any time prior to the Director's final determination of the April Forecast Supply, the Director can determine with certainty that any member of the SWC has diverted more natural flow than predicted, or has accrued more storage than predicted, the Director will revise his initial, projected demand shortfall determination." *Methodology Order* at 36. When the Director issued the 2012 Step 9 Order, the reasonable carryover shortfall determination, 17,318 acre-feet, was based on Water District 01 preliminary storage accounting. *2012 Step 9 Order* at 3. Based on preliminary Water District 01 storage accounting, it was predicted that AFRD2 would have an actual carryover shortfall of 38,682 acre-feet. *Id.* AFRD2's reasonable carryover is 56,000 acre-feet. *Id.* The difference between AFRD2's reasonable carryover and actual carryover was 17,318 acre-feet. *Id.*

24. Water District 01 has since finalized its 2012 storage accounting. Based on Water District 01's final accounting, the Director knows with certainty that the actual carryover was 41,395 acre-feet, not 38,682 acre-feet. The difference between AFRD2's reasonable carryover (56,000 acre-feet) and actual carryover (41,395 acre-feet), is 14,605 acre-feet. The Director knows with certainty that the AFRD2 reasonable carryover shortfall is 14,605 acre-feet, not 17,318 acre-feet.

25. While the Director predicts with reasonable certainty that American Falls Reservoir will fill, as of the issuance of this Order, that event has not occurred. Because American Falls Reservoir has not yet filled, AFRD2 still has a predicted reasonable carryover shortfall that must be protected. *Methodology* at 35-36. When American Falls Reservoir fills,

the Director will issue an order, consistent with Step 5, releasing IGWA from its 14,605 acre-feet reasonable carryover shortfall obligation to AFRD2.

## CONCLUSIONS OF LAW

1. Recently, the Fifth Judicial District Court, in and for the County of Minidoka, held that the evidentiary standard of proof to apply in conjunctive administration of hydraulically connected water rights is clear and convincing. *Memorandum Decision and Order on Petitions for Judicial Review*, CV-2009-000647 (Fifth Jud. Dist., May 4, 2010); *Memorandum Decision and Order on Petitions for Rehearing*, CV-2009-000647 (Fifth Jud. Dist., Nov. 2, 2010).

2. “Clear and convincing evidence refers to a degree of proof greater than a mere preponderance.” *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) (internal quotations removed). “Clear and convincing evidence is generally understood to be ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) citing *In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006); see also *Idaho Dept. of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

3. According to the Methodology Order:

[The] Joint Forecast is the best predictive tool at the Director’s disposal for predicting material injury to RISD. . . . By using one standard error of estimate, the Director purposefully underestimates the water supply that is predicted in the Joint Forecast. The Director further guards against RISD shortage by using the 2006/2008 BLY, which has above average ET, below average in-season precipitation, and above average growing degree days. The 2006/2008 average represents years in which water supply did not limit diversions. The Director’s prediction of material injury to RISD is purposefully conservative. While it may ultimately be determined after final accounting that less water was owed than was provided, this is an appropriate burden for junior appropriators to carry. Idaho Const. Art. XV, § 3; Idaho Code § 42-106.

Just as members of the SWC should have certainty at the start of the irrigation season that junior ground water users will be curtailed, in whole or in part, unless they provide the required volume of mitigation water, in whole or in part, junior ground water users should also have certainty entering the irrigation season that the predicted injury determination will not be greater than it is ultimately determined at the Time of Need (defined in footnote 8, *supra*). If it is determined at the time of need that the Director under-predicted the demand shortfall, the Director will not require that junior ground water users make up the difference, either through mitigation or curtailment. This determination is based on the principles of optimum utilization and full economic development of the State’s water resources. Idaho Const. Art. XV, § 3; Idaho Const. Art. XV, § 7; Idaho Code § 42-106; Idaho Code § 42-226. Because the methodology is based upon

conservative assumptions and is subject to refinement, the possibility of under-predicting material injury is minimized and should lessen as time progresses.

*Methodology Order* at 31.

4. In 2013, each SWC entity timely supplied the Department with information concerning irrigated area, as required by Step 1.

5. As required by Step 2, the Department has initiated its ongoing calculation of cumulative CWN volume for the 2013 water year, and will continue this calculation throughout the irrigation season.

6. The Joint Forecast, which is the best tool available for predicting material injury, predicts an unregulated inflow of 2,650,000 acre-feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 82% percent of average and is most similar to the flow volume experienced in 2010. The storage allocation is based on the average of 2002 and 2004. Reservoir evaporation is assumed to be 3%. Given the above, the Director concludes with reasonable certainty that the SWC will experience a maximum demand shortfall of 14,200 acre-feet.

7. Using either regression equation for AFRD2, the Director predicts that the maximum demand shortfall will still be 14,200 acre-feet.

8. As identified in the 2012 Step 9 Order, IGWA has established access to 17,389 acre-feet of storage water. Based on Water District 01 preliminary accounting, the Director originally predicted a 17,318 acre-feet reasonable carryover shortfall to AFRD2. *2012 Step 9 Order* at 3. Based on final accounting from Water District 01, the Director knows with certainty that the reasonable carryover shortfall is 14,605 acre-feet. When AFRD2's storage allocation in American Falls Reservoir fills, the Director will issue an order, consistent with Methodology Step 5, releasing IGWA from its reasonable carryover obligation to AFRD2.

9. As of the issuance of this order, IGWA shall have fourteen (14) days to establish, to the satisfaction of the Director, that it has secured 14,200 acre-feet of storage water or to conduct other approved mitigation activities that will provide water to the SWC for the predicted, in-season demand shortfall. If IGWA does not demonstrate to the satisfaction of the Director that it has complied with this requirement, the Director will issue an order curtailing junior-priority ground water rights.

10. If IGWA elects to meet its predicted, 14,200 acre-feet in-season demand shortfall with storage water, and until the Director issues an order consistent with Methodology Step 5, IGWA must demonstrate that the volume of storage water secured for in-season purposes is different than the volume of water required to meet its 14,605 acre-feet reasonable carryover shortfall.

11. As established in Step 8 of the Methodology Order, the predicted in-season demand shortfall shall not be owed until the Time of Need. *Methodology Order* at 37. At the

Time of Need, the volume of water necessary to mitigate for in-season material injury to the SWC may be less, but not greater than 14,200 acre-feet. *Methodology Order* at 35.

## ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED as follows:

The Director predicts, at this time, an in-season demand shortfall of 14,200 acre-feet. Fourteen (14) days from the issuance of this Order, IGWA shall be required to establish, to the satisfaction of the Director, that it has secured 14,200 acre-feet of storage water to mitigate for the predicted, in-season demand shortfall. If IGWA cannot establish, to the satisfaction of the Director, that it has secured the required volume of water, in whole or in part, the Director shall issue an order curtailing junior-priority ground water users. IGWA is not required to provide the secured volume of storage water until after the Director determines the SWC's Time of Need, as established in Step 8 of the Methodology Order. The volume of water required for mitigation at the Time of Need shall not exceed 14,200 acre-feet.

IT IS FURTHER ORDERED that if IGWA elects to satisfy the predicted, in-season demand shortfall with storage water, it must establish that the volume of storage water is different than the volume of storage water required to mitigate the 14,605 acre-feet reasonable carryover obligation to AFRD2.

IT IS FURTHER ORDERED that pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order may appeal the final order to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Dated this 17<sup>th</sup> day of April, 2013.

  
GARY SPACKMAN  
Director

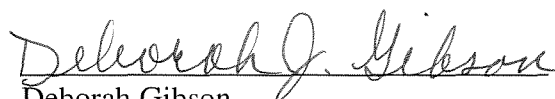


## CERTIFICATE OF SERVICE

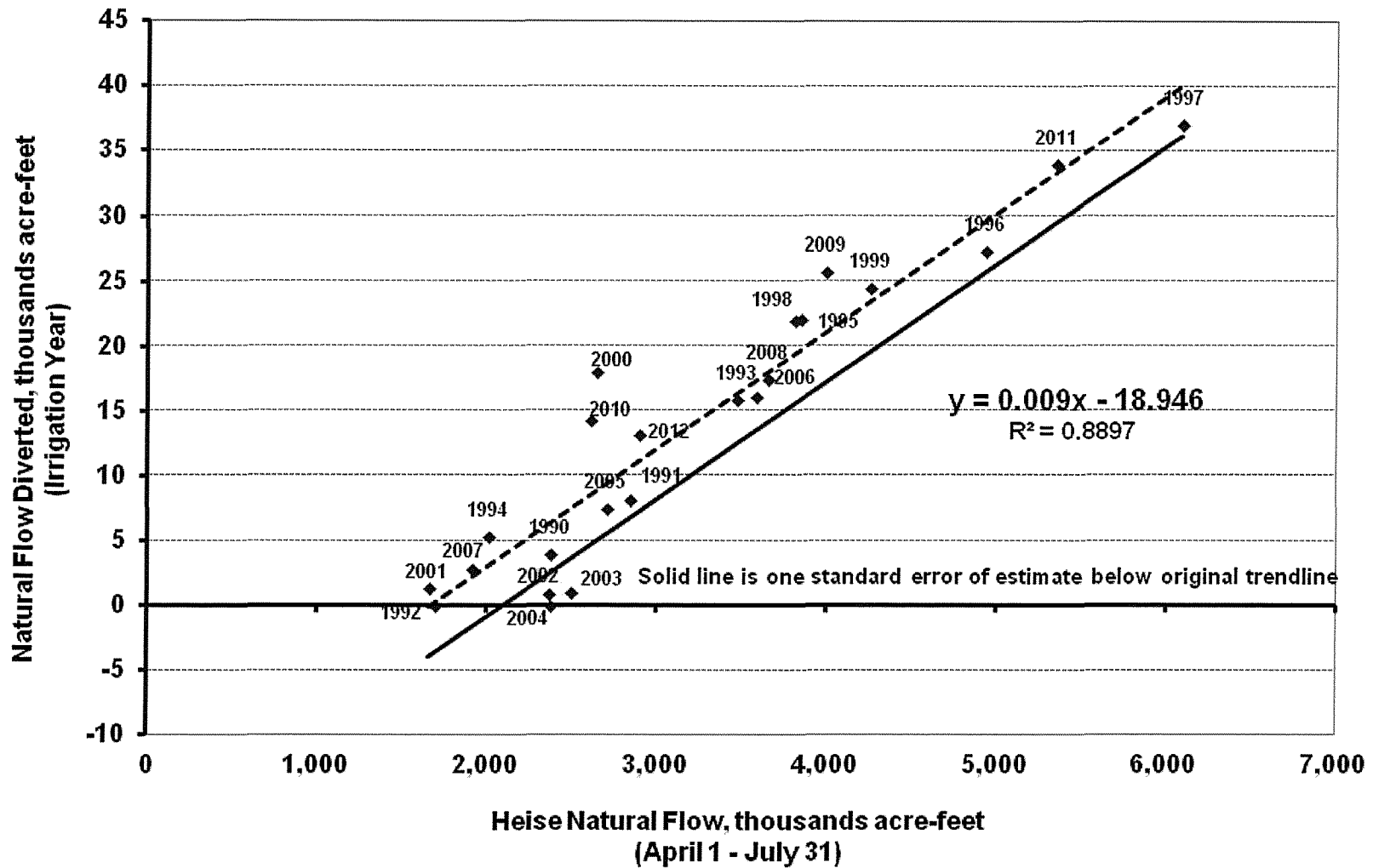
I HEREBY CERTIFY that on this 17<sup>th</sup> day of April, 2013, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson          Travis L. Thompson          Paul L. Arrington          BARKER ROSHOLT &amp; SIMPSON, LLP          195 River Vista Place, Ste. 204          Twin Falls, ID 83301-3029  <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>  <a href="mailto:flt@idahowaters.com">flt@idahowaters.com</a>  <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>
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<p>David W. Gehlert          Natural Resources Section          Environment and Natural Resources Division          U.S. Department of Justice          999 18<sup>th</sup> Street          South Terrace, Suite 370          Denver, CO 80202  <a href="mailto:david.gehlert@usdoj.gov">david.gehlert@usdoj.gov</a></p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid  <input type="checkbox"/> Hand Delivery  <input type="checkbox"/> Overnight Mail  <input type="checkbox"/> Facsimile  <input checked="" type="checkbox"/> Email</p>

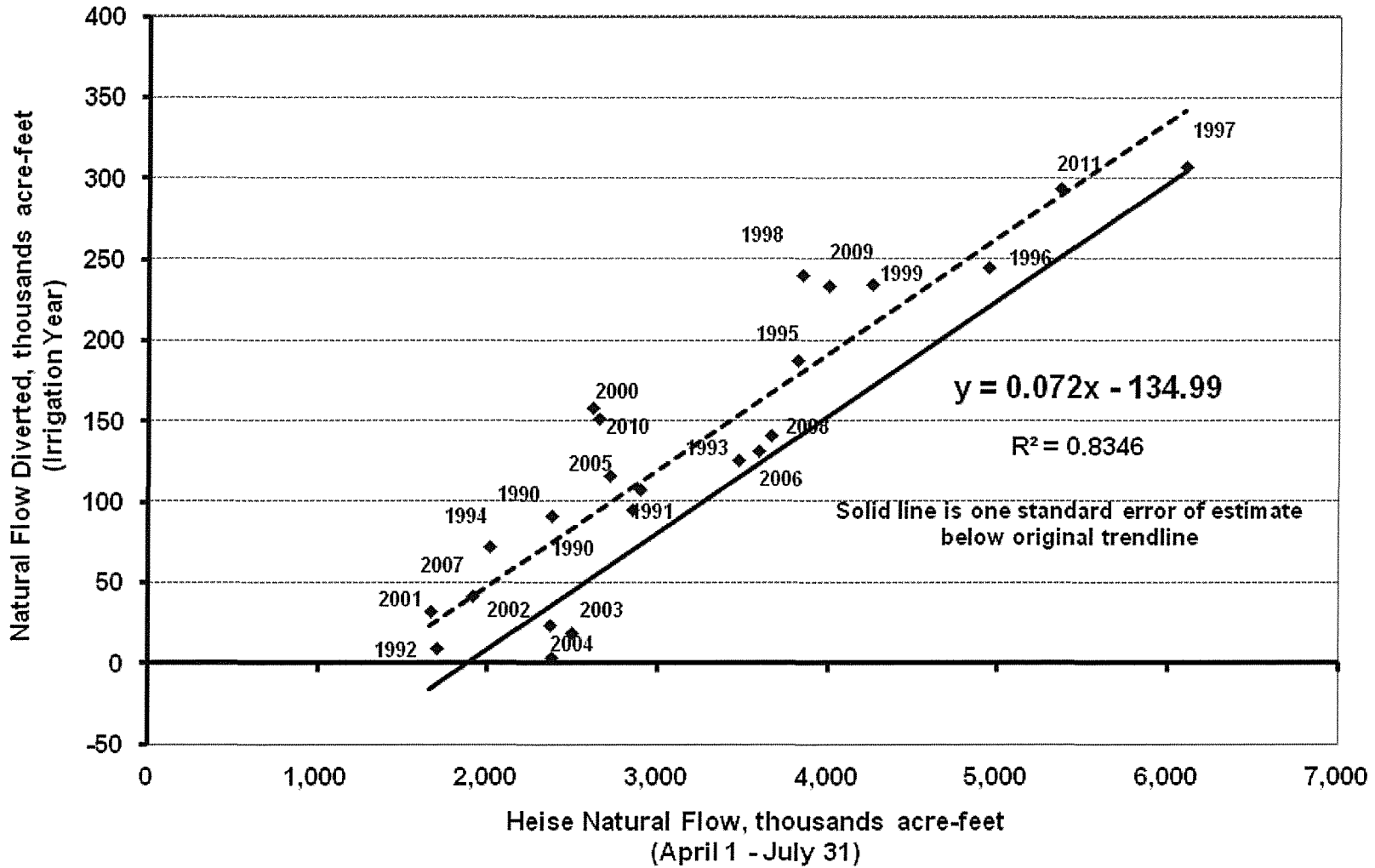
<p>Matt Howard  US Bureau of Reclamation  1150 N Curtis Road  Boise, ID 83706-1234  <a href="mailto:mhoward@usbr.gov">mhoward@usbr.gov</a></p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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<p>Lyle Swank  IDWR—Eastern Region  900 N. Skyline Drive, Ste. A  Idaho Falls, ID 83402  <a href="mailto:lyle.swank@idwr.idaho.gov">lyle.swank@idwr.idaho.gov</a></p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Allen Merritt  Cindy Yenter  IDWR—Southern Region  1341 Fillmore St., Ste. 200  Twin Falls, ID 83301-3033  <a href="mailto:allen.merritt@idwr.idaho.gov">allen.merritt@idwr.idaho.gov</a>  <a href="mailto:cindy.yenter@idwr.idaho.gov">cindy.yenter@idwr.idaho.gov</a></p>	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email

  
Deborah Gibson  
Administrative Assistant

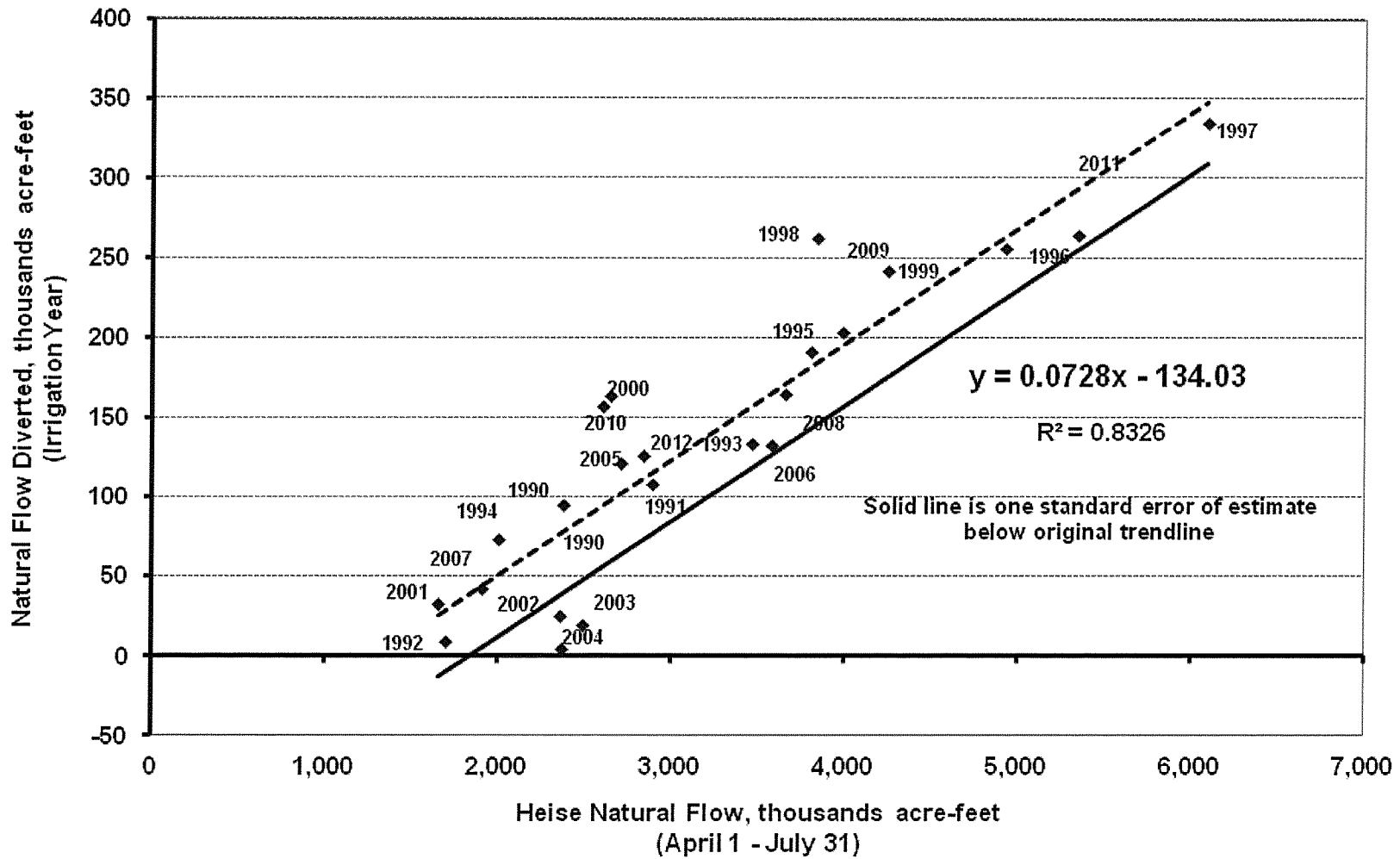
### A & B IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



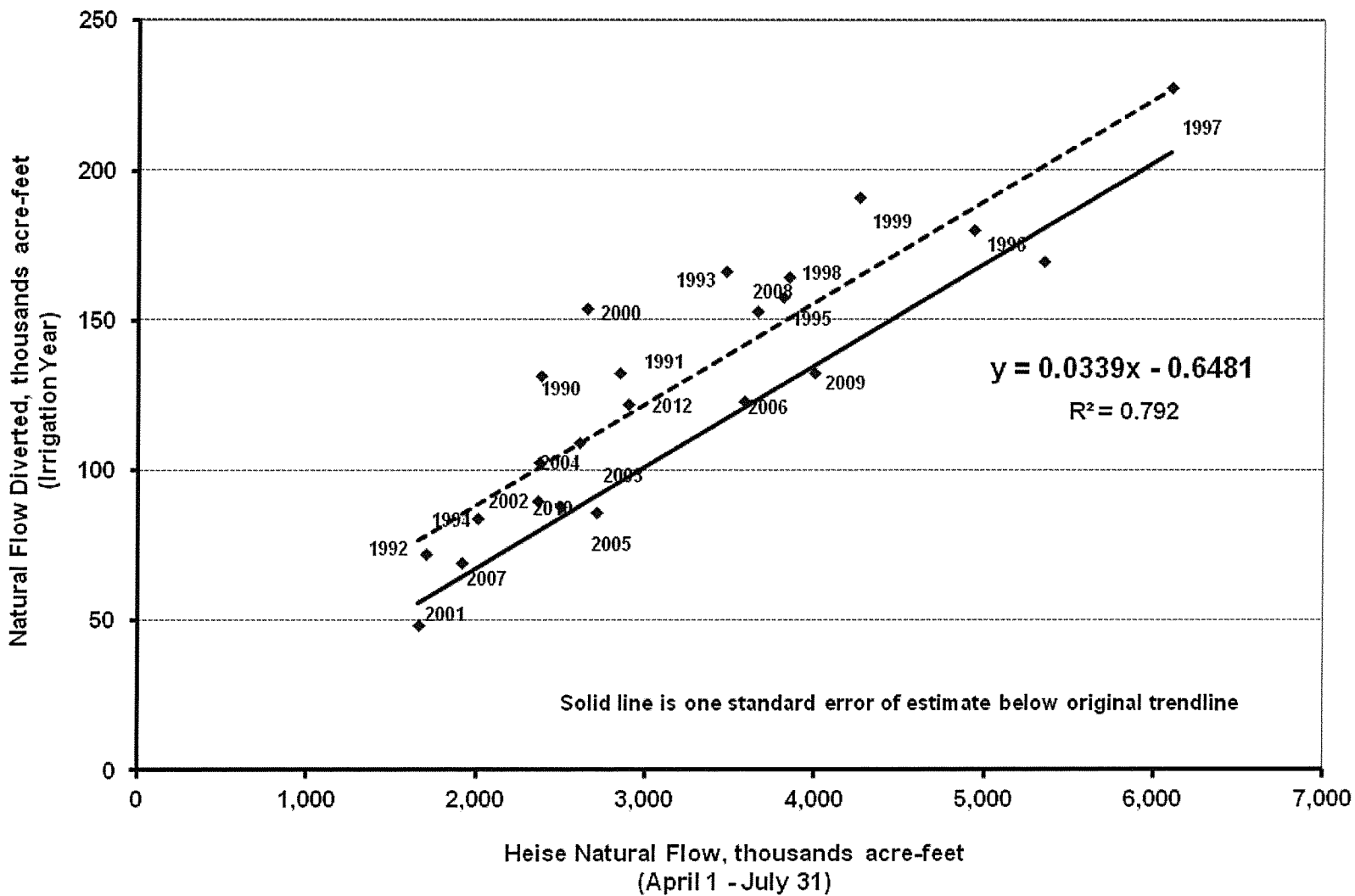
**AMERICAN FALLS RESERVOIR DISTRICT #2  
Natural Flow Diversions with Heise Inflow  
Original Regression**



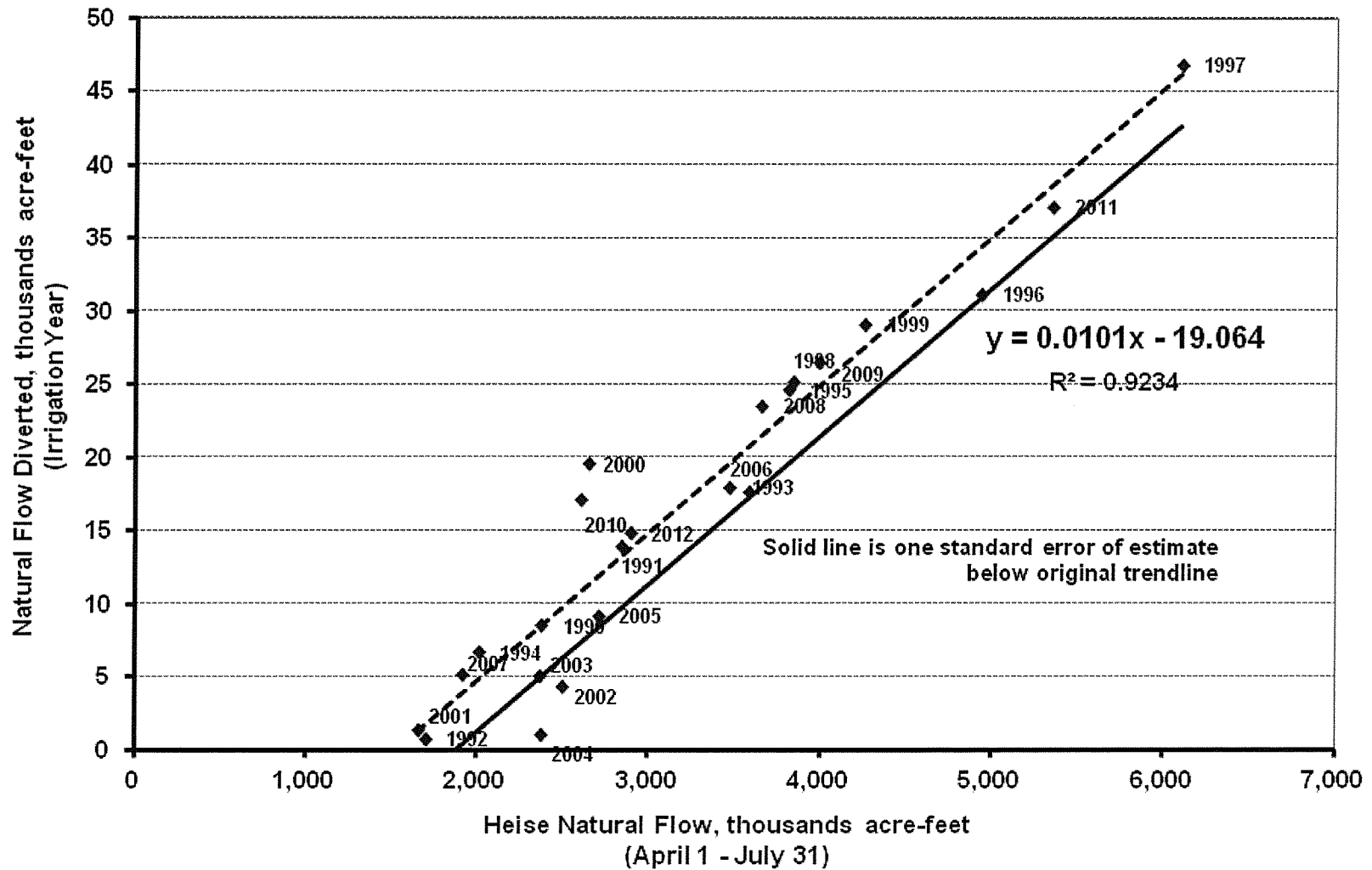
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Updated Regression**



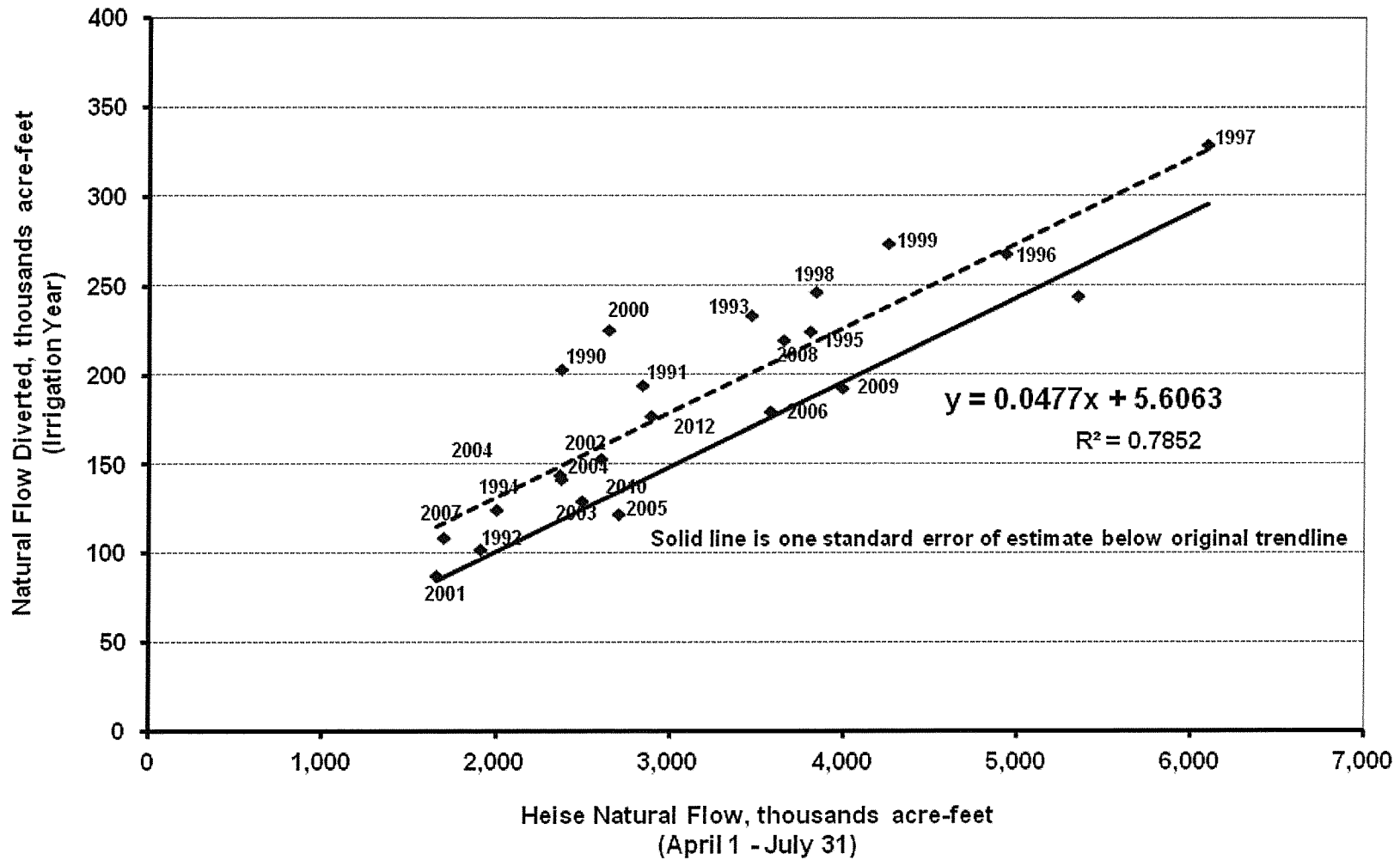
### BURLEY IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



### MILNER IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow

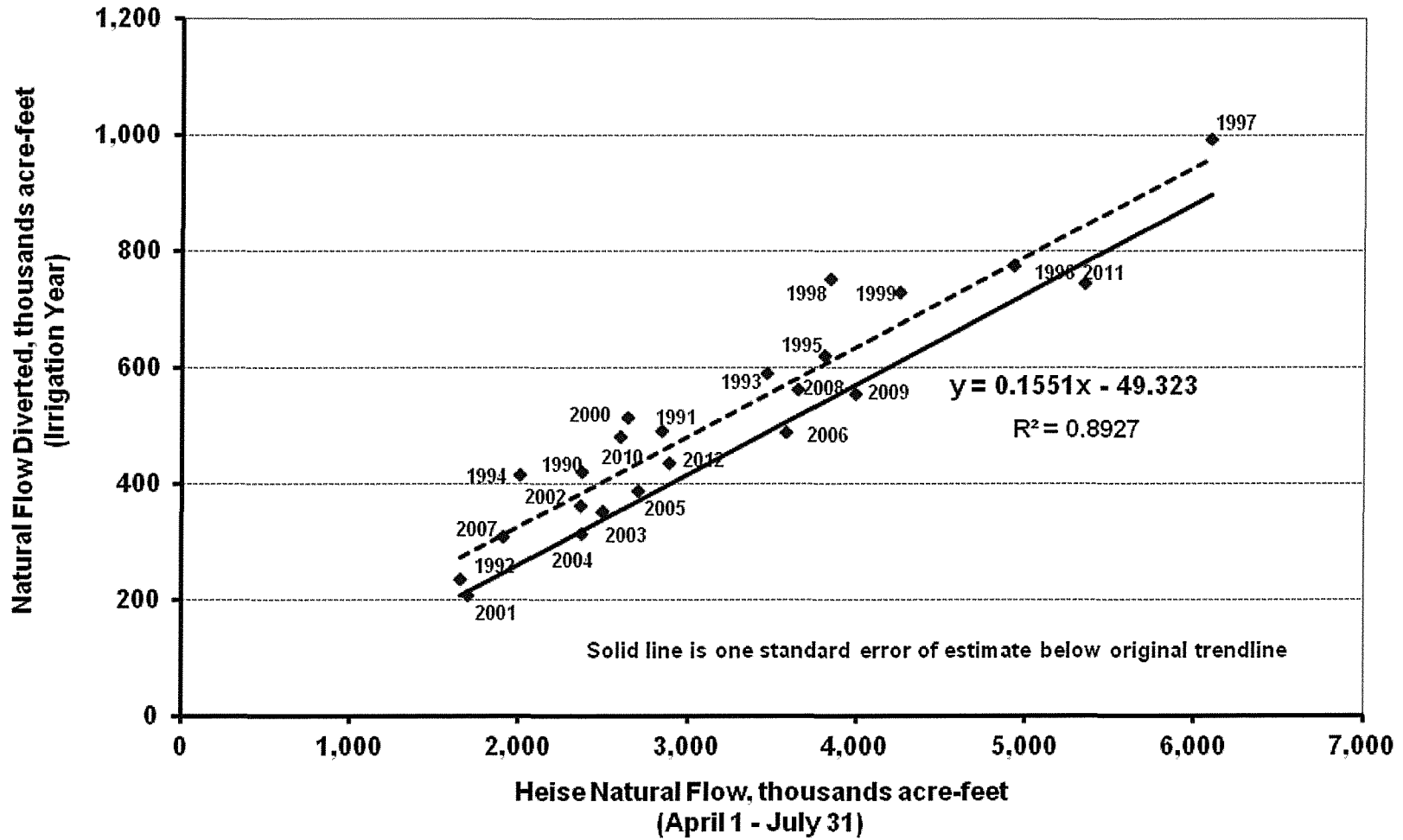


### MINIDOKA IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow





**NORTH SIDE CANAL COMPANY  
Natural Flow Diversions with Heise Inflow**



### TWIN FALLS CANAL COMPANY Natural Flow Diversions with Heise Inflow

