

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 2015 FORECAST**
IRRIGATION DISTRICT, MINIDOKA IRRIGATION) **SUPPLY**
DISTRICT, NORTH SIDE CANAL COMPANY,)
AND TWIN FALLS CANAL COMPANY) **(METHODOLOGY STEPS 1 – 3)**
_____)

FINDINGS OF FACT

1. On April 16, 2015, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued his *Third Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“Methodology Order”). The Methodology Order established nine steps for determining material injury to members of the Surface Water Coalition (“SWC”). This order will apply Methodology steps 1, 2, and 3.

A. Step 1

2. 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 32. If the SWC does not timely provide the information, the Department will conservatively determine the total number of irrigated acres. *Id.*

3. On March 6, 2015, Minidoka Irrigation District (“Minidoka”) submitted its electronic shape files delineating its total irrigated acres to the Department.

4. On March 15, 2015, the Department received a letter from American Falls Reservoir District #2 (“AFRD2”), stating that its total number of irrigated acres have not varied by more than 5%.

5. On April 8, 2015, the Department received a letter from A&B Irrigation District (“A&B”), Burley Irrigation District (“BID”), Milner Irrigation District (“Milner”), North Side Canal Company (“NSCC”) and Twin Falls Canal Company (“TFCC”), stating that their total

number of irrigated acres for 2015 will not vary by more than 5% from the electronic shape files submitted in prior years.

6. Based on the information submitted by the SWC, the Department will use the following total irrigated acres:

	Total Irrigated Acres	Data Source
A&B	15,924	Director's Report
AFRD2	62,361	Director's Report
BID	46,035	2013 shapefile submitted, reduced for overlapping acres and acres outside of service area.
Milner	13,335	Director's Report
Minidoka	74,662	2015 shapefile submitted, reduced for overlapping acres and acres outside of service area.
NSCC	154,067	Director's Report
TFCC	194,732	2013 shapefile submitted, reduced for overlapping acres and acres outside of service area.

B. Step 2

7. Step 2 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 16.

8. On April 2, 2015, the Joint Forecast was announced, predicting an unregulated inflow of 2,515,000 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 16. The forecasted flow volume equates to 78% percent of average¹ and is most similar to the flow volume experienced in 2003. The Heise forecast was used in regression equations developed for A&B and Milner to predict the natural flow supply.²

¹ The average is based on years 1981-2010.

² Attached hereto are the regression analyses for each SWC entity used to predict natural flow supply.

9. The variables, Heise forecast and Box Canyon total discharge for the period November – March, were utilized in multiple linear regression equations to predict the natural flow supplies for AFRD2, BID, Minidoka, NSCC, and TFCC. *Methodology Order at 16*. The U.S. Geological Survey (“USGS”) measures and monitors the flow at the Box Canyon stream flow measurement gage. A unique circumstance developed this year at the Box Canyon gage. The Box Canyon gaging location has historically been a very stable gage and not subject to regular shifts. Based on stream discharge and stream gaging standards, the USGS began to apply a shift to the Box Canyon data starting in February 2015. The Director does not question the shift applied by the USGS to the Box Canyon data. The concern is that regression models adopted by the Methodology Order are based on unshifted data. A technical working group, comprised of technical experts of the parties, was briefed and did not express significant apprehension with the Director using unshifted Box Canyon data in the regression models for this order. The Box Canyon total discharge used in the regression models by the Director was based on unshifted data and totaled 95,310 acre-feet for the period November – March.

10. The storage allocations were predicted for each SWC member. As of the April 9, 2015 water right accounting, the water rights for Jackson, Lake Walcott, Palisade Winter Water Savings, and American Falls space have filled. The Director anticipates that the SWC will receive a full allocation in their Jackson, Lake Walcott, Palisades Winter Water Savings, and American Falls storage space. Given the runoff forecast, the Director anticipated that the Palisades storage rights will fill to 93%. The storage allocations are based on the anticipated allocation minus evaporation charges.

11. Based on the above, the Director predicts as follows:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 06/08/12	Shortfall
A&B	2,820	133,106		135,926	59,993	-
AFRD2	28,573	382,844	1,000	412,417	427,672	15,300
BID	72,579	220,262	5,130	297,971	251,531	-
Milner	6,136	86,940		93,075	47,135	-
Minidoka	107,013	350,228	8,370	465,611	369,492	-
NSCC	307,726	836,505	(7,750)	1,136,481	978,888	-
TFCC	753,817	239,240	(6,750)	986,307	1,060,011	73,700
Total Predicted Demand Shortfall (AF)						89,000

C. Step 3

12. Step 3 requires the following:

The April DS is the volume of mitigation water junior water right holders must actually physically secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations, unless adjusted as explained below. If junior ground water users previously secured mitigation water for a reasonable carryover shortfall to an individual SWC member in the previous year, the current-year mitigation obligation to the individual SWC member will be reduced by the quantity of water secured for the reasonable carryover shortfall.

By May 1, or within fourteen (14) days from issuance of the values set forth in Step 2, whichever is later in time, junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure a volume of storage water or to conduct other approved mitigation activities that will deliver water to the injured members of the SWC at the time of need.

13. The April predicted demand shortfall for AFRD2 is 15,300 acre-feet. The April predicted demand shortfall for TFCC is 73,700 acre-feet. The total predicted demand shortfall of 89,000 acre-feet is the volume of mitigation water junior water right holders must actually secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations. There was no carryover shortfall in the fall of 2014, junior ground water users did not secure any mitigation water for a carryover shortfall, and there is no adjustment to the mitigation obligation.

CONCLUSIONS OF LAW

1. 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. In 2015, the Director has sufficient information to quantify irrigated areas for each of the SWC members as required by Step 1.

4. The Joint Forecast predicts an unregulated inflow of 2,515,000 acre feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 78% of average and is most similar to the flow volume experienced in 2003.

5. The April predicted demand shortfall of 89,000 acre-feet is the volume of mitigation water junior water right holders must actually secure for delivery or deliver by other activities, as confirmed by ESPAM 2.1 model simulations. There was no carryover shortfall in the fall of 2014, junior ground water users did not secure any mitigation water for a carryover shortfall, and there is no adjustment to the mitigation obligation.

6. Junior ground water users will be required to establish, to the satisfaction of the Director, their ability to secure a volume of storage water or to conduct other approved mitigation activities that will deliver 89,000 acre-feet of water to the injured members of the SWC at the time of need. If junior ground water users fail or refuse to submit this information by April 30, 2015, the Director will issue an order curtailing junior ground water users.

7. 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.

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 89,000 acre-feet. On or before April 30, 2015, IGWA shall establish, to the satisfaction of the Director that it has secured 89,000 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 will issue an order curtailing junior-priority ground water users. IGWA is not required to deliver or assign the secured volume of storage water until after the Director determines the SWC's Time of Need, as established in Step 7 of the Third Amended Methodology Order.

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 16th day of April, 2015.


GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

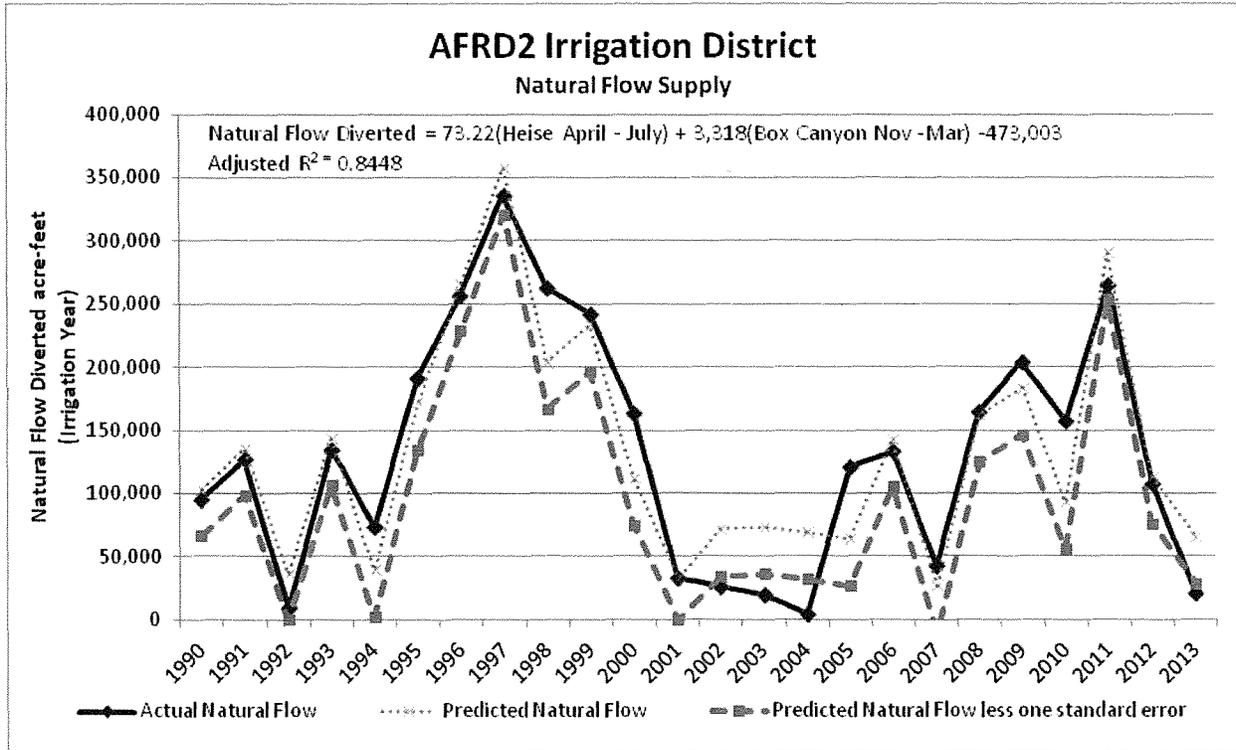
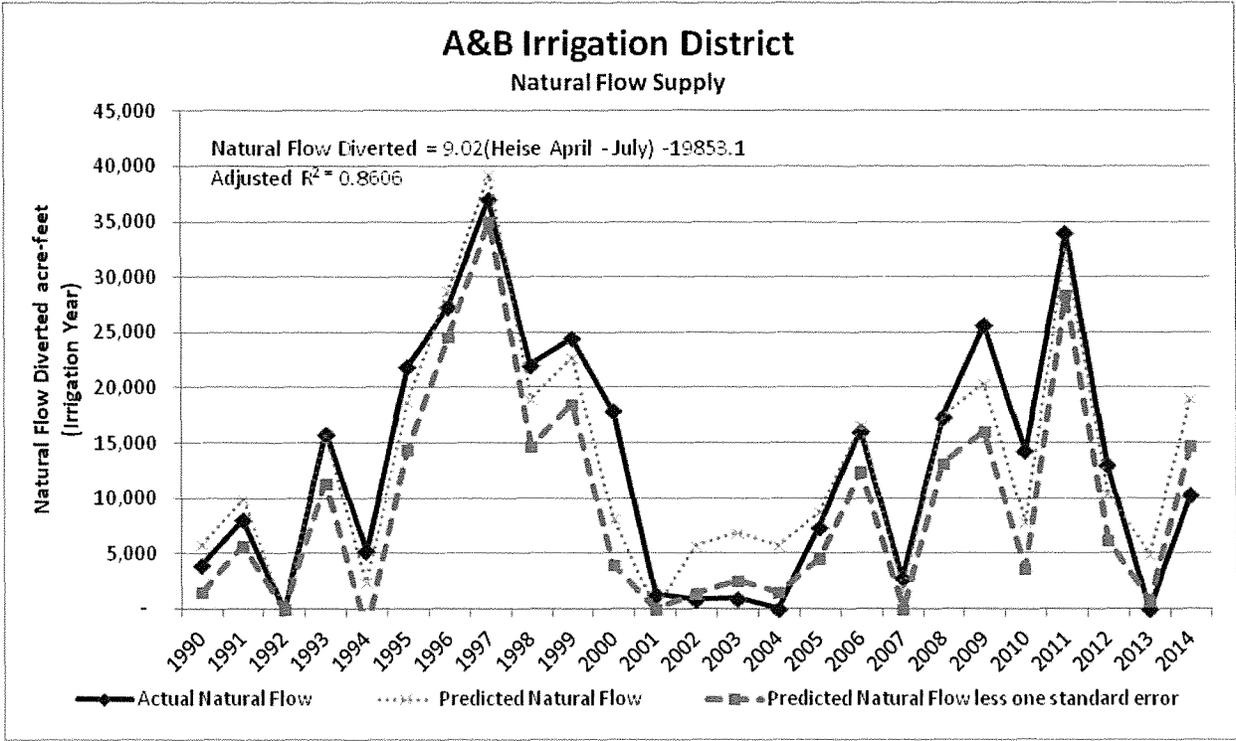
I HEREBY CERTIFY that on this 17TH day of April, 2014, the above and foregoing, was served by the method indicated below, and addressed to the following:

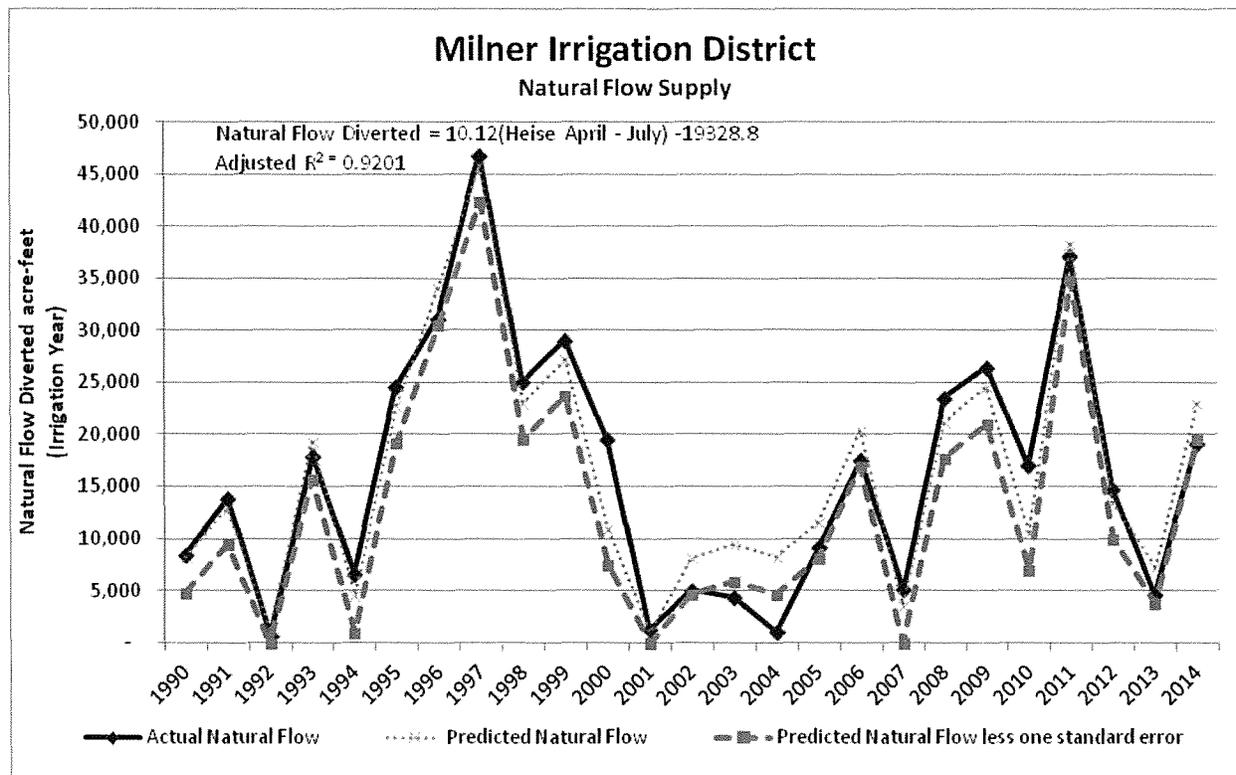
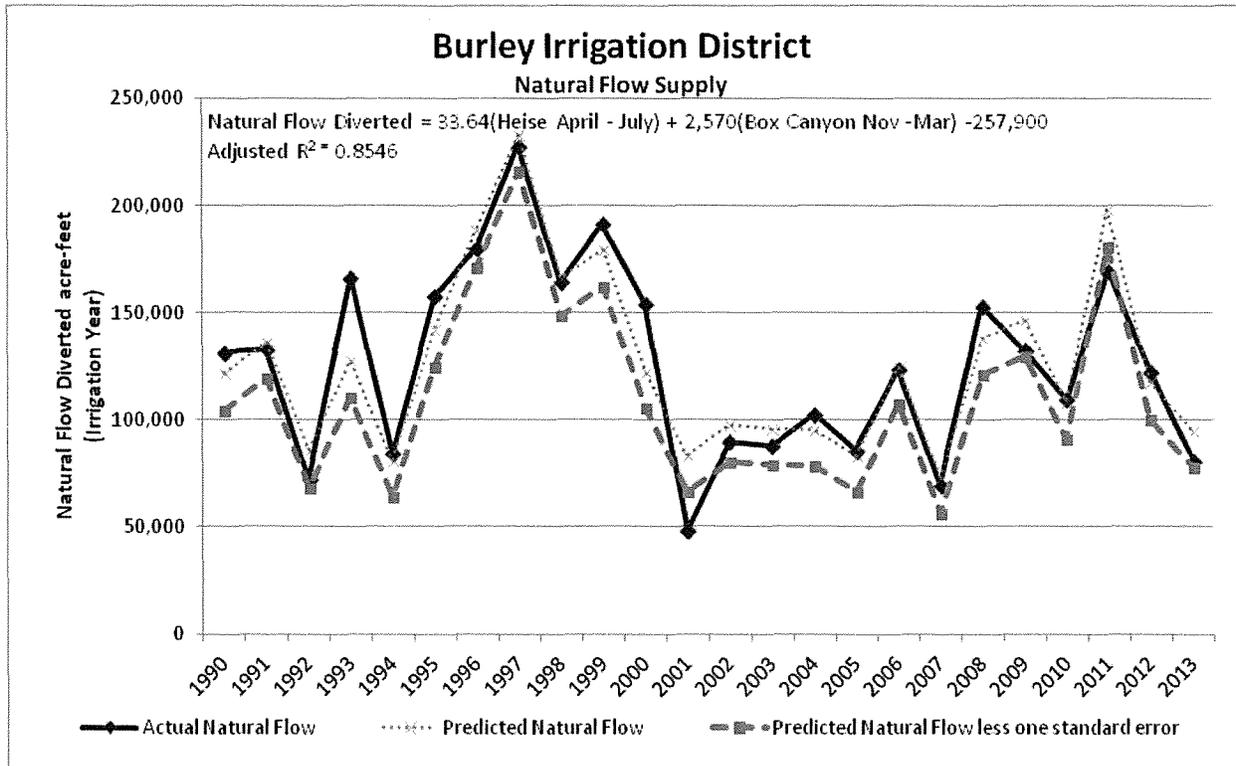
<p>John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP 195 River Vista Place, Ste. 204 Twin Falls, ID 83301-3029 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</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>Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov</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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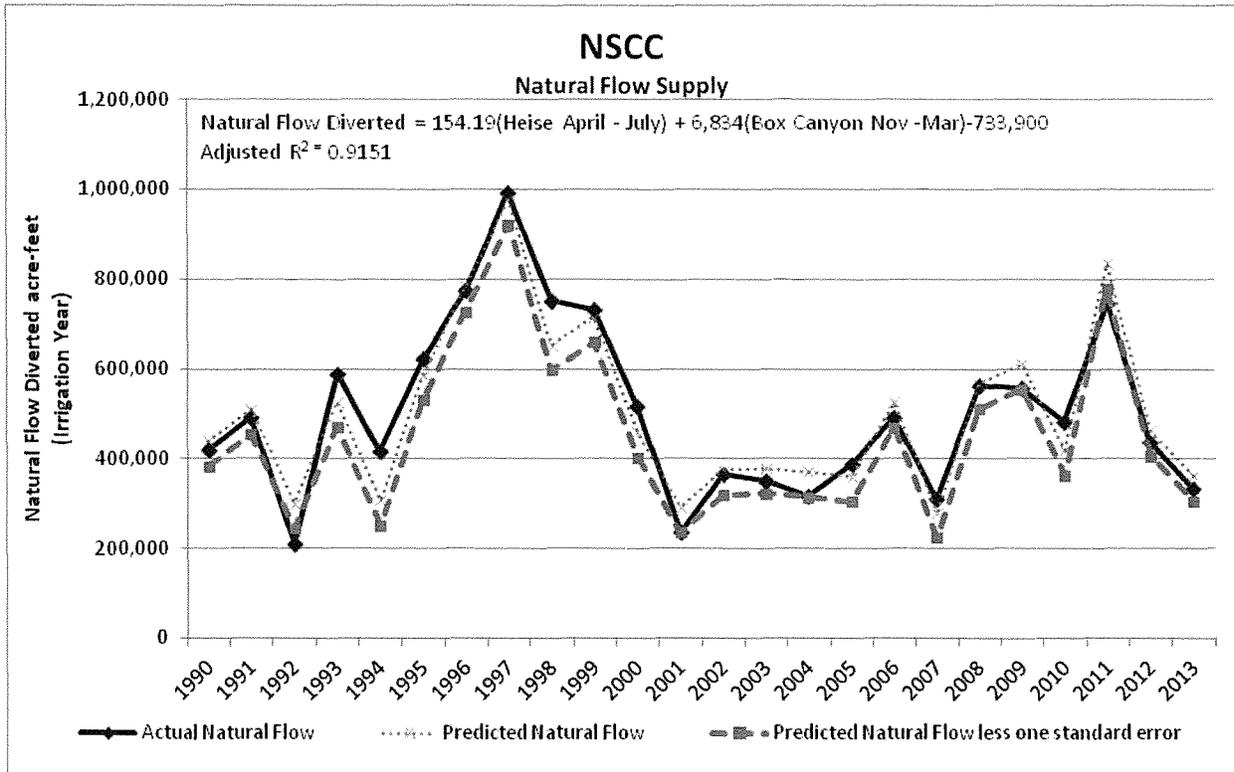
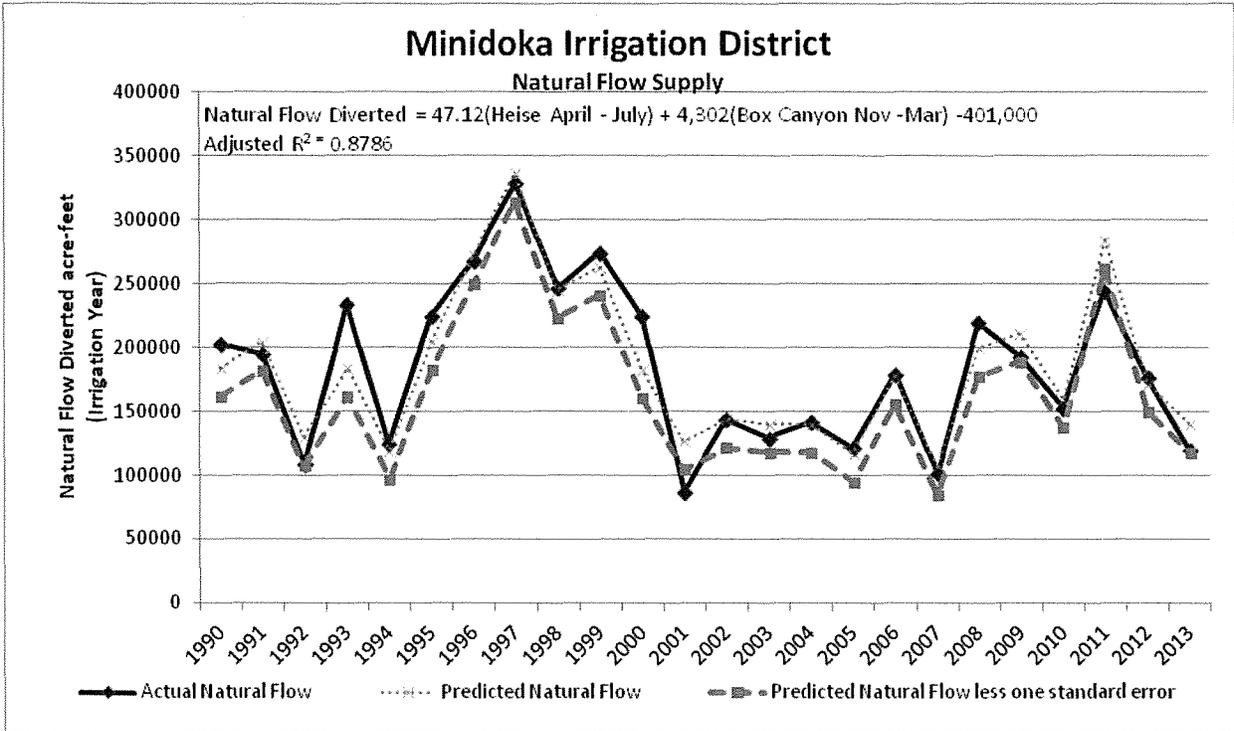
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<p>Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
<p>Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 lyle.swank@idwr.idaho.gov</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 allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov</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



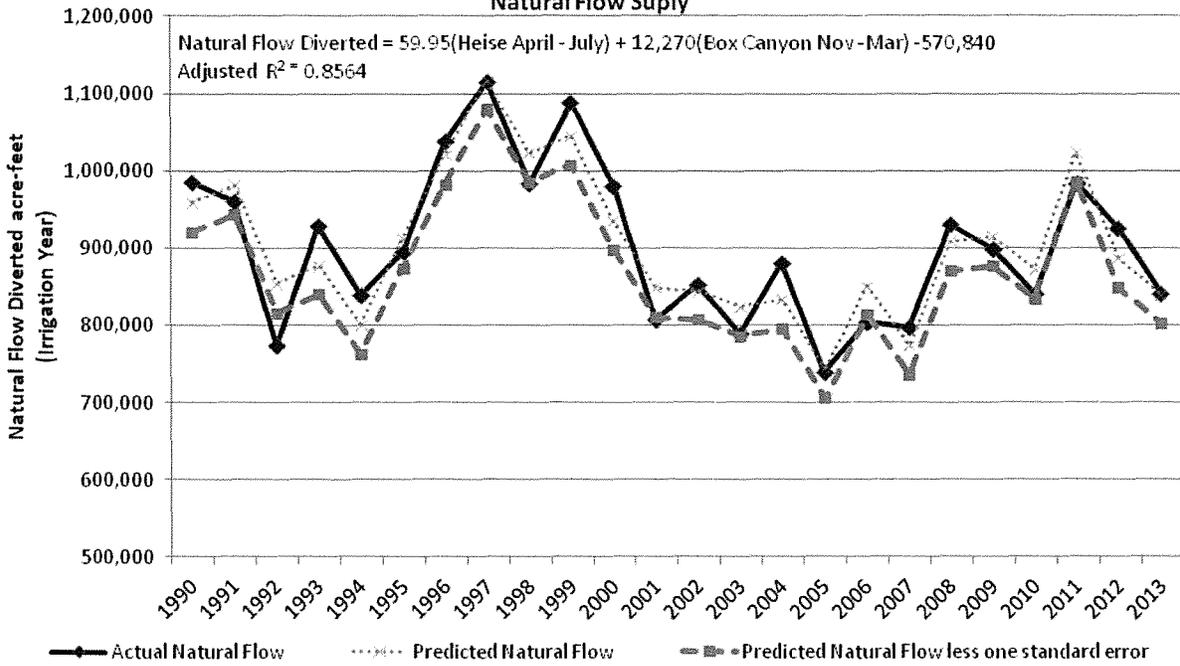




TFCC

Natural Flow Supply

Natural Flow Diverted = $59.95(\text{Heise April - July}) + 12,270(\text{Box Canyon Nov - Mar}) - 570,840$
Adjusted $R^2 = 0.8564$



EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: The petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. 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 of: a) the service date of the final order, b) the service date 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 section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.