

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 2016 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 15, 2016, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued his *Fourth 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 applies steps 1, 2, and 3 of the Methodology Order.

A. Step 1

2. Step 1 requires members of the SWC to submit electronic shape files delineating the total irrigated acres to the Department by April 1, “or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than five percent.” *Methodology Order* at 35.

3. On February 10, 2016, Minidoka Irrigation District (“Minidoka”) submitted its electronic shape files delineating its total irrigated acres to the Department.

4. On February 10, 2016, the Department received a letter from American Falls Reservoir District #2 (“AFRD2”), stating that its total number of irrigated acres has not varied by more than five percent.

5. On March 7, 2016, 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 2016 will not vary by more than five percent 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	SRBA Partial Decree
AFRD2	62,361	SRBA Partial Decree
BID	46,035	2013 shapefile submitted by BID, reduced by Department for overlapping acres and acres outside of service area.
Milner	13,335	SRBA Partial Decree
Minidoka	74,692	2016 shapefile submitted by Minidoka, reduced by Department for overlapping acres and acres outside of service area.
NSCC	154,067	SRBA Partial Decree
TFCC	194,732	2013 shapefile submitted by TFCC, reduced by Department 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 issue a final order predicting the April [Forecast Supply] for the water year for each SWC entity. The Director will compare the April [Forecast Supply] for each SWC entity to the [Baseline Demand] for each SWC entity to determine if a demand shortfall (“DS”) is anticipated for the upcoming irrigation season.” *Methodology Order* at 36.

8. On April 5, 2016, the Joint Forecast was announced, predicting an unregulated inflow of 3,200,000 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 17. The forecasted flow volume equates to 99% percent of average.¹

9. The Heise natural flow data from years 1990 – 2015 were data inputs for development of regression equations 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.

Data greater or less than two standard deviations from average were excluded from the regression development.

10. The April-July Heise natural flow data from the years 1990 – 2015 and Box Canyon November-March total discharge data for the period 1989 –2015, were data inputs for development of multiple linear regression equations to predict the natural flow supplies for AFRD2, BID, Minidoka, NSCC, and TFCC. *Methodology Order* at 17-18. The U.S. Geological Survey measures and monitors the flow at the Box Canyon stream flow measurement gage. The Box Canyon November-March total discharge used in the regression models by the Director for 2016 totaled 94,500 acre-feet.

11. The storage allocations were predicted for each SWC member. As of the April 1, 2016, preliminary water right accounting, the reservoir rights were 1,050,200 acre-feet from being satisfied. The water rights for Lake Walcott, Palisade Winter Water Savings, and American Falls Winter Water Savings space have been satisfied. Based on a comparison of the current Heise natural flow forecast to other analogous years (1991, 1993, 2006, 2012 and 2015), the Director anticipates the remaining reservoir water rights will be satisfied and the SWC will receive a full allocation. The storage allocations are based on the anticipated full allocation minus evaporation charges.

12. 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	9,948	134,185		144,133	59,993	-
AFRD2	81,396	383,711	1,000	466,108	427,672	-
BID	96,748	220,825	5,130	322,703	251,531	-
Milner	13,845	87,215		101,060	47,135	-
Minidoka	135,991	352,320	8,370	496,681	369,492	-
NSCC	411,223	838,401	(7,750)	1,241,874	978,888	-
TFCC	782,816	239,782	(6,750)	1,015,848	1,060,011	44,200
Total Predicted Demand Shortfall (AF)						44,200

C. Step 3

13. Step 3 requires the following:

Step 3: By May 1, or within fourteen (14) days from issuance of the final order predicting the April FS, whichever is later in time, junior ground water users with approved mitigation plans for delivery of water must secure, to the satisfaction of the Director, a volume of water equal to their proportionate share of the April DS unless the April DS is revised as explained below in paragraph 6. If junior ground water users secured 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. The secured water will not be required to be delivered to the injured members of the SWC until the Time of Need.

Methodology Order at 36.

14. The April predicted DS for TFCC is 44,200 acre-feet and the total predicted DS is 44,200 acre-feet.

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 2016, 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 3,200,000 acre feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 99% of average.

5. The April predicted DS is 44,200 acre-feet. Junior ground water users holding consumptive water rights bearing priority dates junior to February 8, 1989, within the Eastern Snake Plain Aquifer area of common ground water supply³ must mitigate for their proportionate share of the predicted DS in accordance with an approved mitigation plan.⁴ Junior ground water users mitigating with a secured volume of water pursuant to an approved mitigation plan must, to the satisfaction of the Director, secure their proportionate share for delivery to the injured members of the SWC on or before May 3, 2016. There was no carryover shortfall in the fall of 2015, junior ground water users did not secure any mitigation water for a carryover shortfall, and there is no adjustment to the mitigation obligation.

6. If, on or before May 3, 2016, ground water users holding consumptive water rights bearing priority dates junior to February 8, 1989, within the Eastern Snake Plain Aquifer area of common ground water supply fail to establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 44,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user. Junior ground water users who are mitigating with a secured volume of water are not required to assign the secured volume of water until after the Director issues a subsequent order requiring assignment of the water.

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, predicted DS determination.

³ The Director must utilize the best available technology for determining the impact of junior ground water diversions. See *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 816, 252 P.3d 71, 97 (2011). ESPAM 1.1 was the model version utilized in SWC delivery call proceedings. ESPAM 2.1 is the latest version of the ESPAM model and superseded ESPAM 1.1. The Director has determined that ESPAM 2.1 is the best available scientific tool for predicting the effects of ground water pumping. See *In re Water to Water Right Nos. 36-02551 & 36-07694 (Rangen, Inc.) IDWR Docket CM-DC-2011-004*, No. 42775, 2016 WL 1130276, at *4 (Idaho Mar. 23, 2016). Because no trim line has been determined utilizing ESPAM 2.1 in the SWC delivery call matter, in an exercise of discretion, the Director did not apply a trim line in determining the February 8, 1989, priority date.

⁴ There are three approved mitigation plans in place responding to the SWC delivery call filed by: 1) A&B Irrigation District, 2) Southwest Irrigation District and Goose Creek Irrigation District (collectively, "SWID"), and 3) the Idaho Ground Water Appropriators, Inc. ("IGWA"). A&B Irrigation District's proportionate share of the predicted DS of 44,200 acre-feet is 3,463 acre-feet. SWID's proportionate share of the predicted DS of 44,200 acre-feet is 956 acre-feet. Due to the nature of SWID's mitigation plan, SWID does not need to establish that it can mitigate for its proportionate share of the predicted DS. The remaining share of the predicted DS is 39,783 acre-feet. The Department does not have sufficient information to determine IGWA's proportionate share of the remainder because the Department does not have an accurate list of all ground water rights covered under IGWA's mitigation plan.

ORDER

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

The Director predicts an in-season DS of 44,200 acre-feet. On or before May 3, 2016, ground water users holding consumptive water rights bearing priority dates junior to February 8, 1989, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 44,200 acre-feet in accordance with an approved mitigation plan. If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted DS of 44,200 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.

Dated this 19th day of April 2016.


GARY SPACKMAN
Director

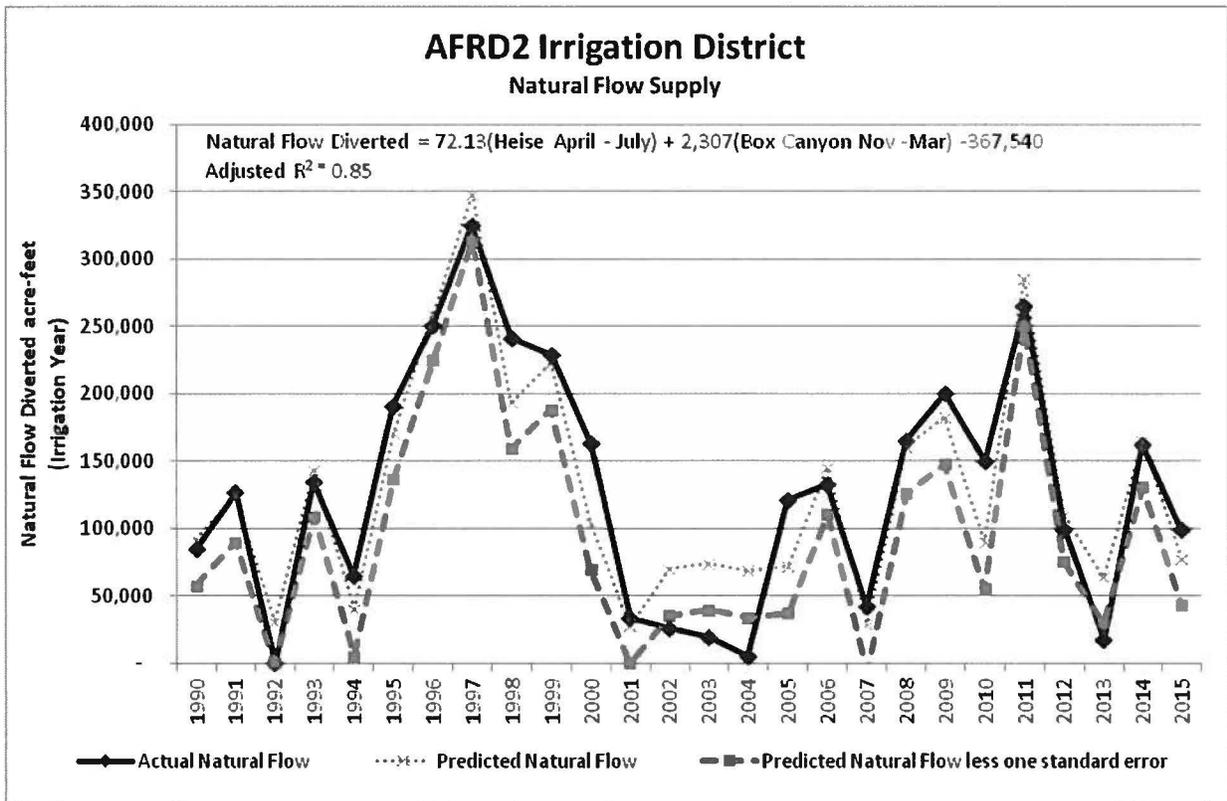
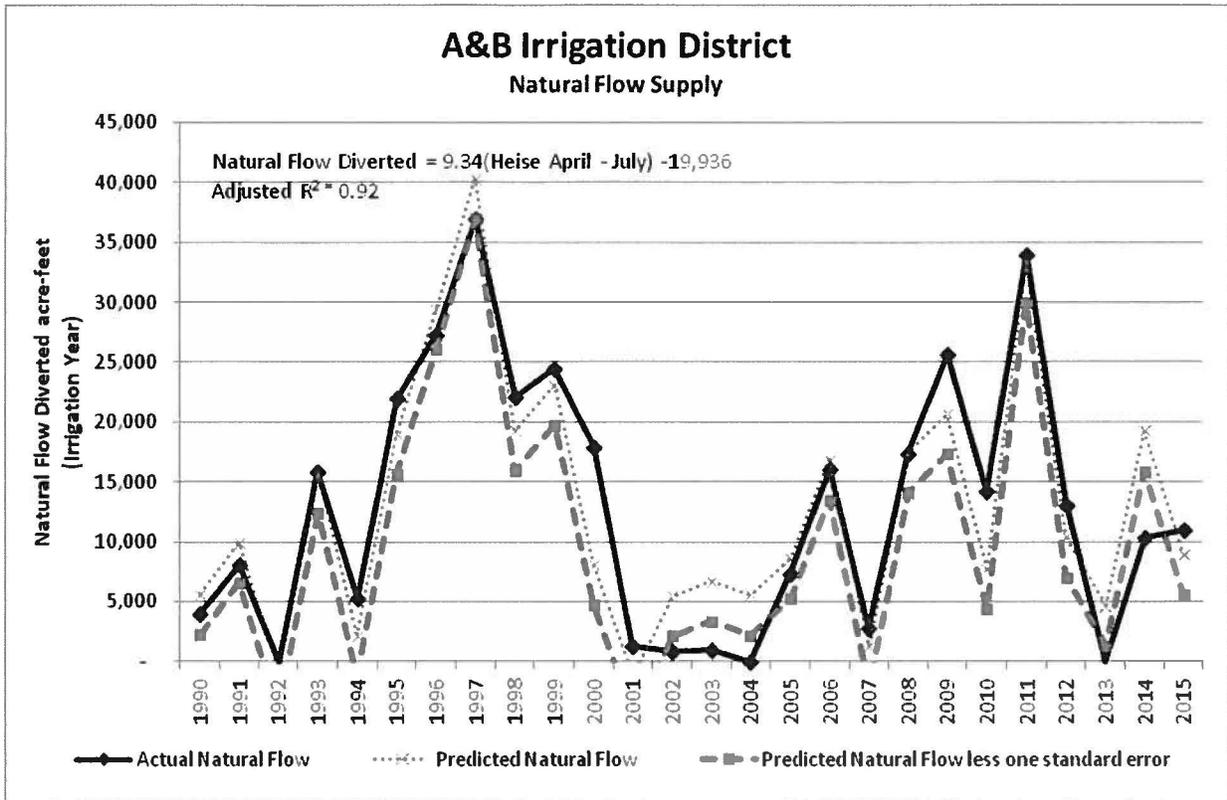
CERTIFICATE OF SERVICE

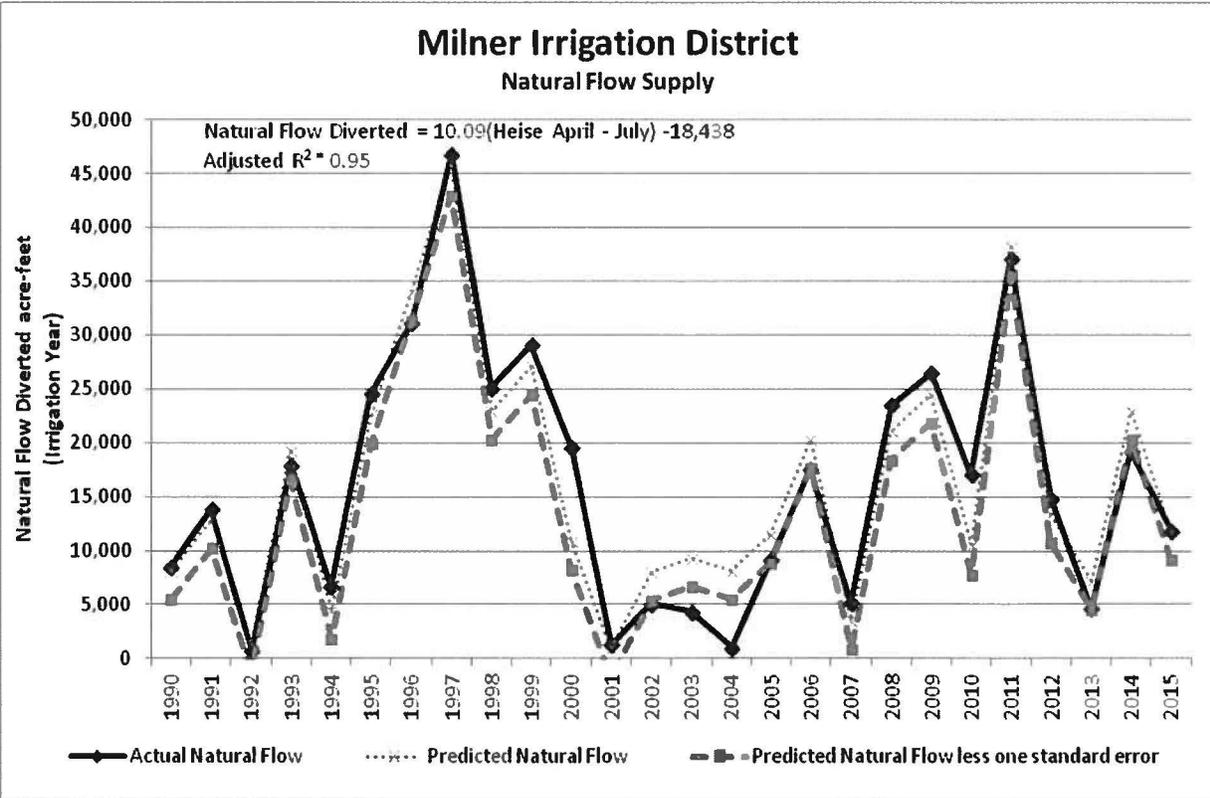
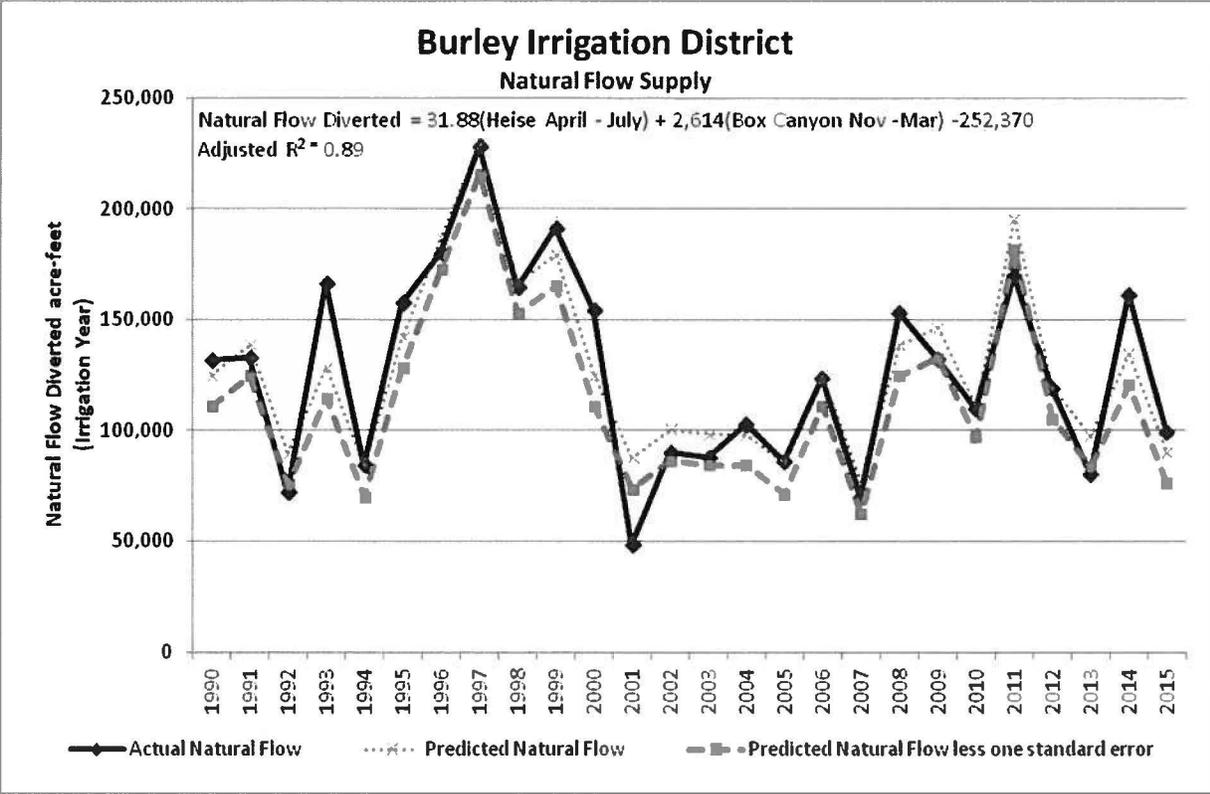
I HEREBY CERTIFY that on this 19th day of April 2016, the above and foregoing, was served by the method indicated below, and addressed to the following:

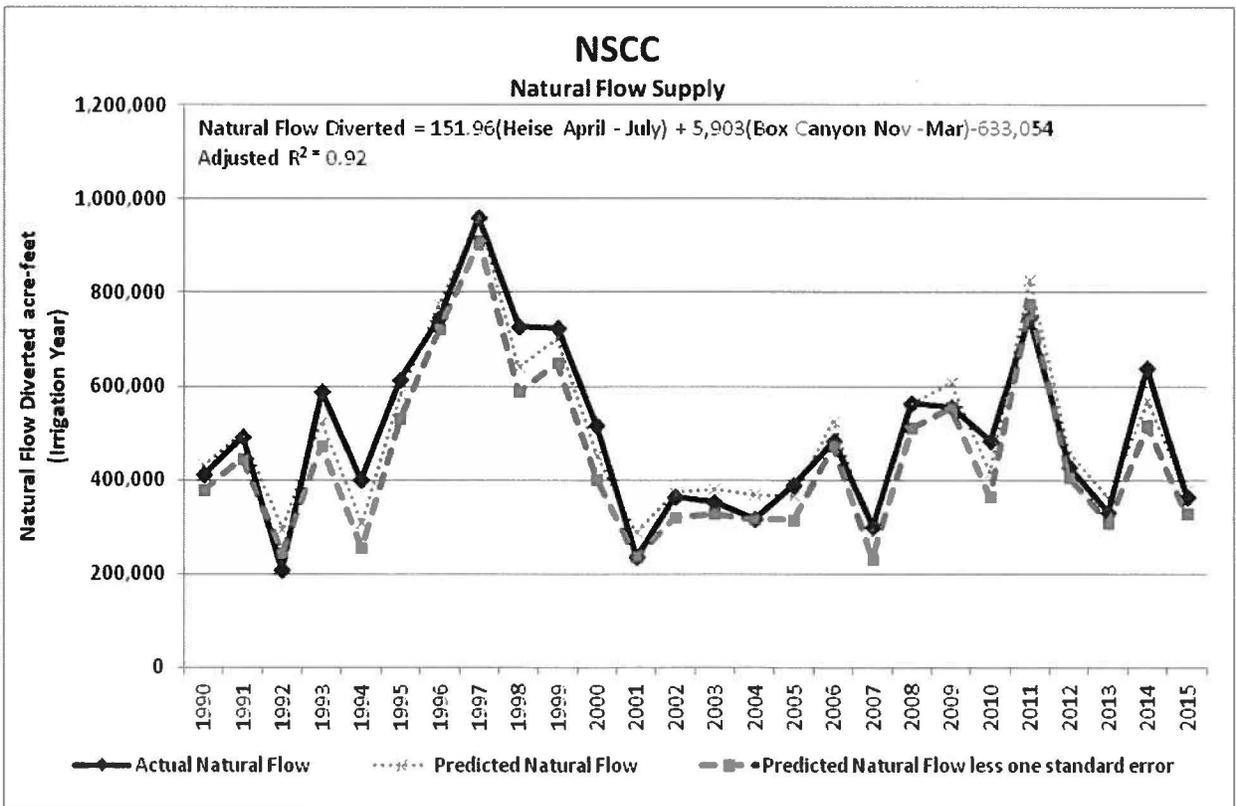
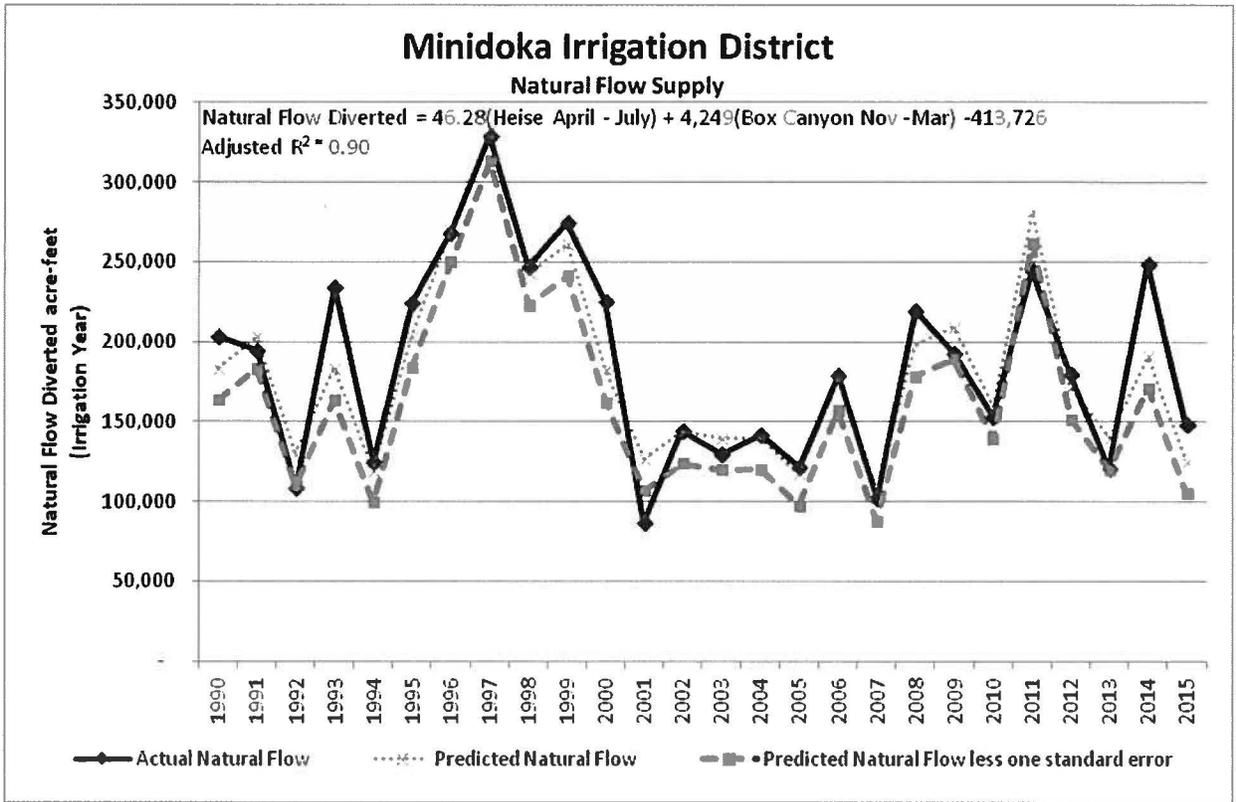
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<p>William A. Parsons Parsons, Smith & Stone, LLP P.O. Box 910 Burley, ID 83318 wparsons@pmt.org</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
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<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



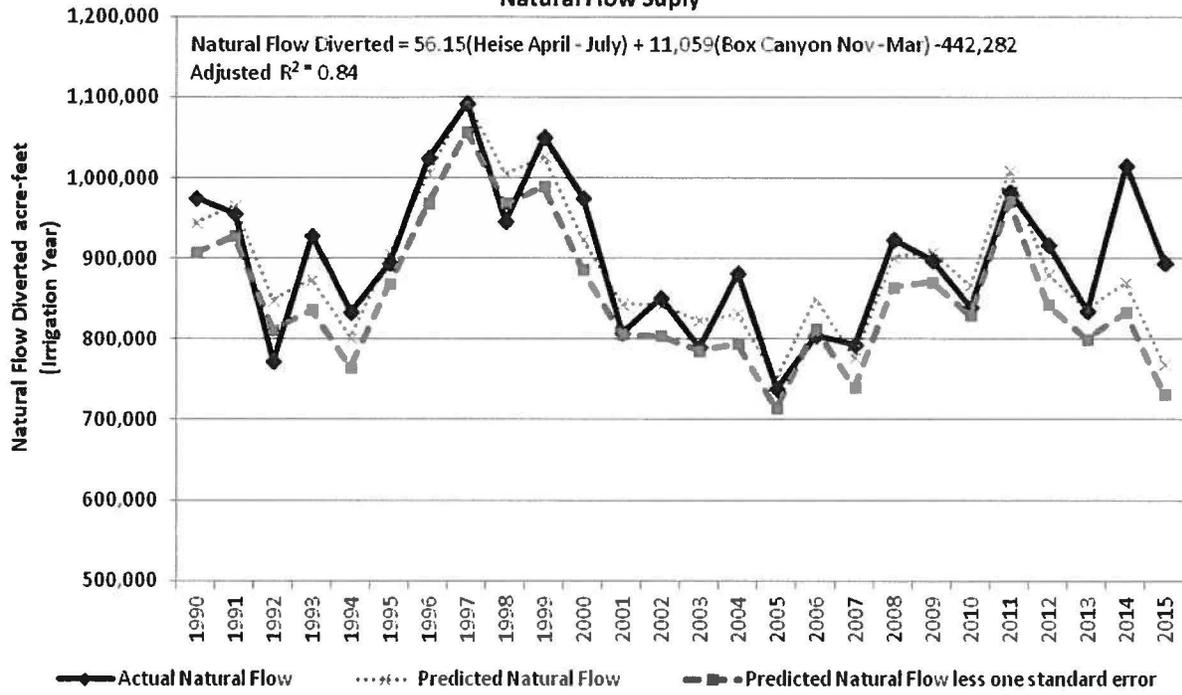




TFCC

Natural Flow Supply

Natural Flow Diverted = $56.15(\text{Heise April - July}) + 11,059(\text{Box Canyon Nov - Mar}) - 442,282$
Adjusted $R^2 = 0.84$



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.