

**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
BURLEY IRRIGATION DISTRICT, MILNER)	REGARDING APRIL 2011
IRRIGATION DISTRICT, MINIDOKA IRRIGATION)	FORECAST SUPPLY
DISTRICT, NORTH SIDE CANAL COMPANY,)	
AND TWIN FALLS CANAL COMPANY)	(METHODOLOGY STEPS 1 - 8)

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 GWU, Pocatello, 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."¹ 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).

¹ Related issues to the SWC delivery call are before the Idaho Supreme Court, consolidated under case number 38191-2010.

5. This order will apply Methodology steps 1, 2, 3, 4, 5, 6, 7, and 8 to the 2011 irrigation season.

A. Step 1

6. 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.*

7. To date, the SWC has not provided electronic shape files or written confirmation of its irrigated area to the Department. Consequently, the Department will employ the 2010 irrigated area for its 2011 calculations to determine whether there is material injury. Because of this year’s ample snowpack and projected water supply, this order determines there will be no material injury during the 2011 irrigation season, without reassessing irrigated acres for the 2011 irrigation season.

B. Step 2

8. Step 2 states that “[s]tarting 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.

9. The Department has initiated its ongoing calculation of cumulative CWN volume for the 2011 water year, and will continue this calculation throughout the irrigation season.

C. Step 3

10. 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.

11. On April 4, 2011, the Joint Forecast was announced, predicting an unregulated inflow of 4,260,000 acre-feet at the Snake River near Heise gage for the period of April through July.² 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 120 percent of average and is similar to the flow volume experienced in 1999. The Heise forecast was used in regression equations for each SWC entity to predict the natural flow supply. Given the high runoff forecast, all storage accounts are predicted to fill. The 2010

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

storage allocation, which included 100 percent fill less the 2010 evaporation, was used as the 2011 predicted storage allocation.

12. Based upon the above, the Director predicts as follows:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 2006/2008	Shortfall
A&B	19,137	135,432		154,569	58,492	-
AFRD2	169,203	387,277	1,000	557,480	415,730	-
BID	150,110	222,877	5,130	378,117	250,977	-
Milner	24,892	88,025		112,917	46,332	-
Minidoka	215,182	360,711	8,370	584,263	362,884	-
NSCC	631,135	846,191	(7,750)	1,469,576	965,536	-
TFCC	912,867	242,010	(6,750)	1,148,127	1,045,382	-
					Total	0

D. Step 4

13. 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.

Id. at 35-36.

14. In 2010, the Director predicted no material injury to the SWC's reasonable carryover for the 2011 irrigation season. *Final Order Establishing 2010 Reasonable Carryover (Methodology Step 9)* at 4. As shown in the table above, the Director predicts no in-season material injury to members of the SWC in 2011.

E. Steps 5, 6, 7, and 8

15. According to the Methodology Order, "If there is no projected demand shortfall in the April Forecast Supply, steps 5, 6, 7, and 8 will not be implemented for in-season purposes." *Methodology Order* at 36.

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. The Joint Forecast, which is the best tool available for predicting material injury, predicts an unregulated inflow of 4,260,000 acre-feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 120 percent of average. Given the high runoff forecast, the Director concludes with reasonable certainty that all storage accounts will fill and that the SWC's irrigation needs will be satisfied. Therefore, the Director concludes with reasonable certainty that no member of the SWC will be materially injured in the 2011 irrigation season.

5. Despite the SWC not providing the information required in Step 1, the Director will not reassess the 2010 irrigated area because he concludes that no member of the SWC will be materially injured.

6. The Department will start calculating the cumulative CWN volume, and will continue this calculation throughout the irrigation season, as described in Step 2.

7. Because the Director concludes that no member of the SWC will be materially injured, "steps 5, 6, 7, and 8 will not be implemented for in-season purposes." *Methodology Order* at 36.

ORDER

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

For the 2011 irrigation season, no material injury is predicted to members of the SWC. Because no material injury is predicted, the Director will not implement *Methodology* steps 5, 6, 7, and 8.

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 18th day of April, 2011.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2011, the above and foregoing, was served by the method indicated below, and addressed to the following:

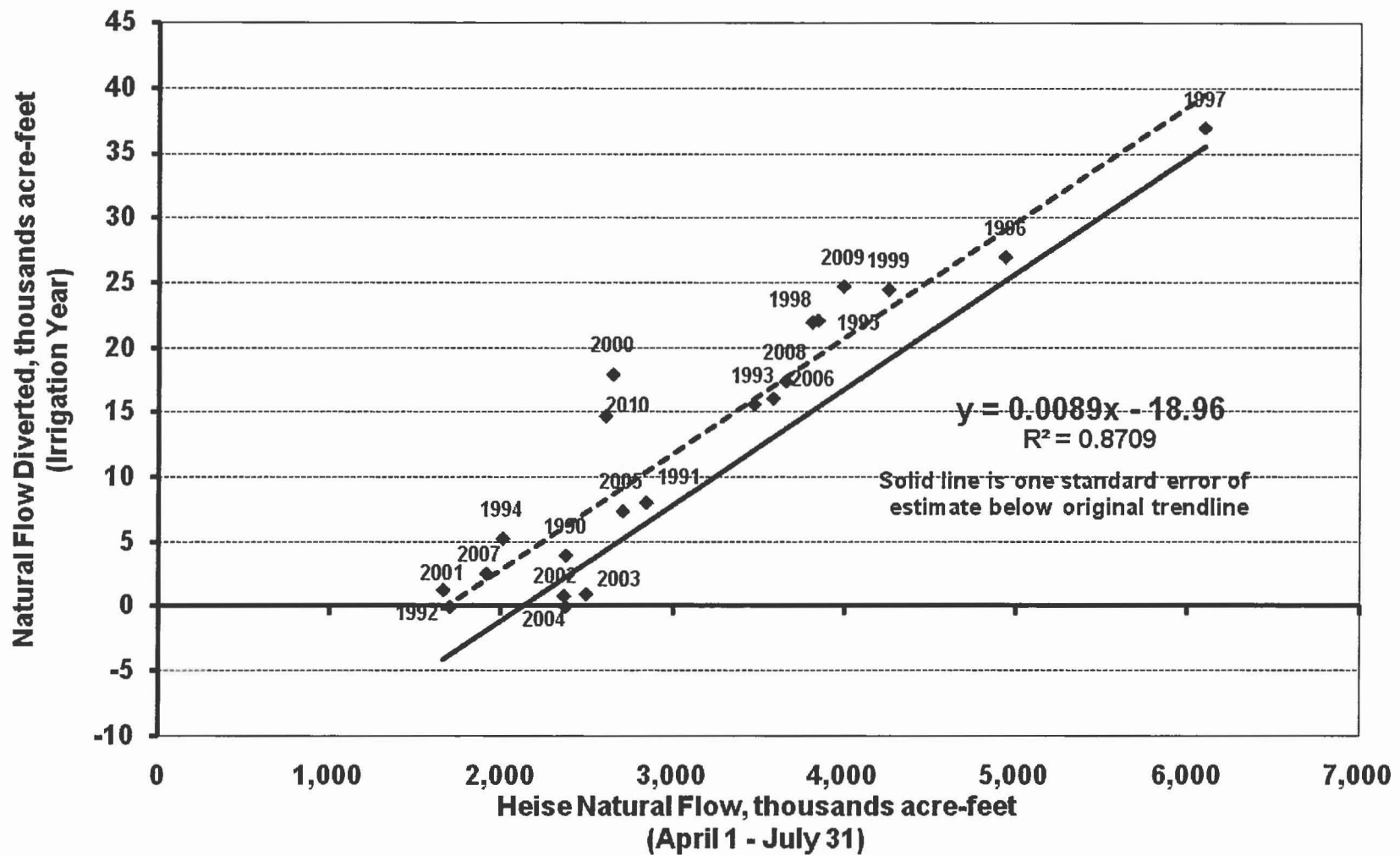
John K. Simpson Travis L. Thompson Paul L. Arrington BARKER ROSHOLT & SIMPSON, LLP P.O. Box 485 Twin Falls, ID 83303 jks@idahowaters.com tlt@idahowaters.com pla@idahowaters.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83330-0032 tarkoosh@capitollawgroup.net	<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
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	<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
Randall C. Budge Candice M. McHugh Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 rcb@racinelaw.net cmm@racinelaw.net tjb@racinelaw.net	<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
Kathleen M. Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov	<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
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18 th Street South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov	<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>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@pn.usbr.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>Sarah A. Klahn Mitra Pemberton WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.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>Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us</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>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
<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 Idaho Falls, ID 83402-6105 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



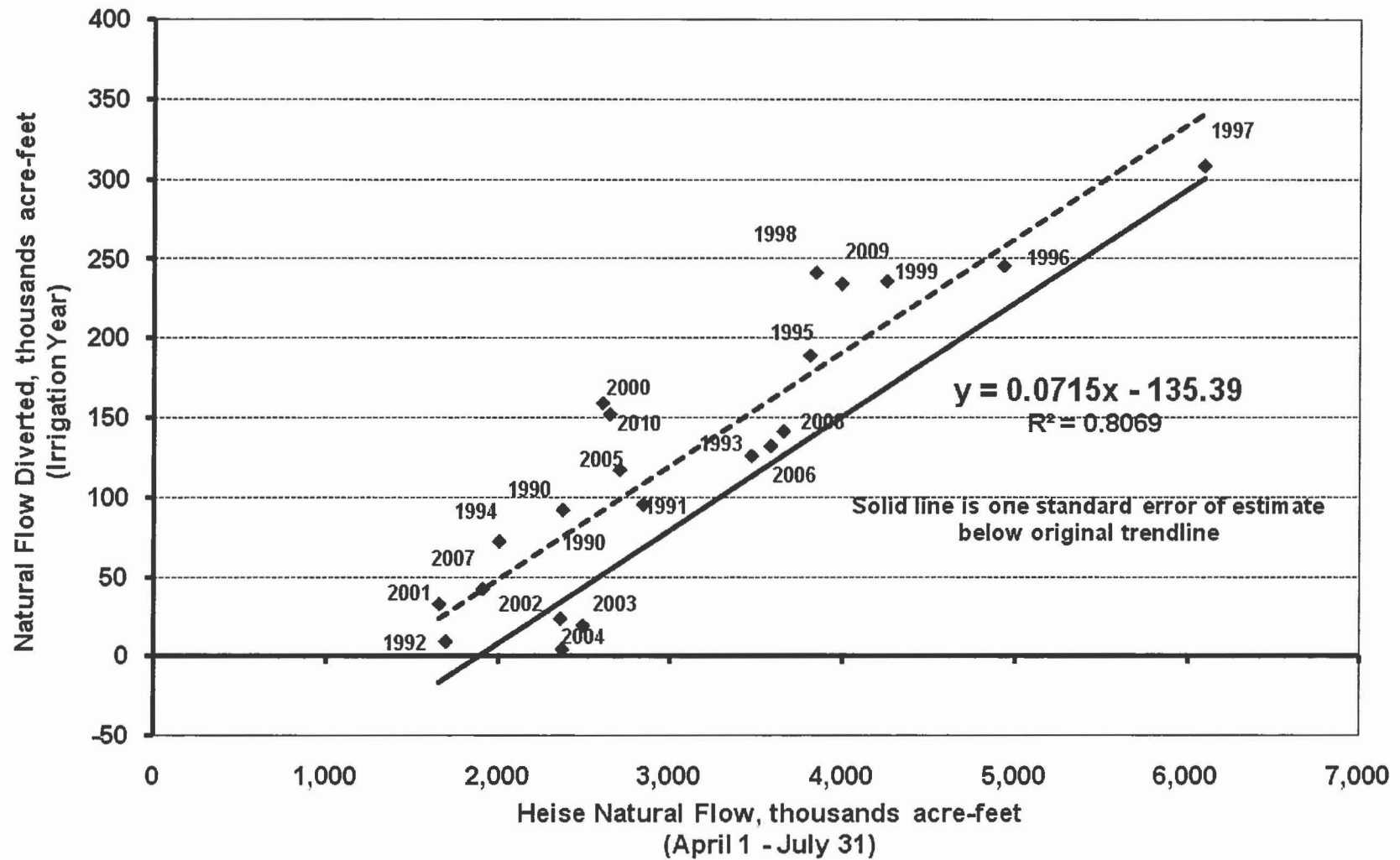
Deborah Gibson
Administrative Assistant

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

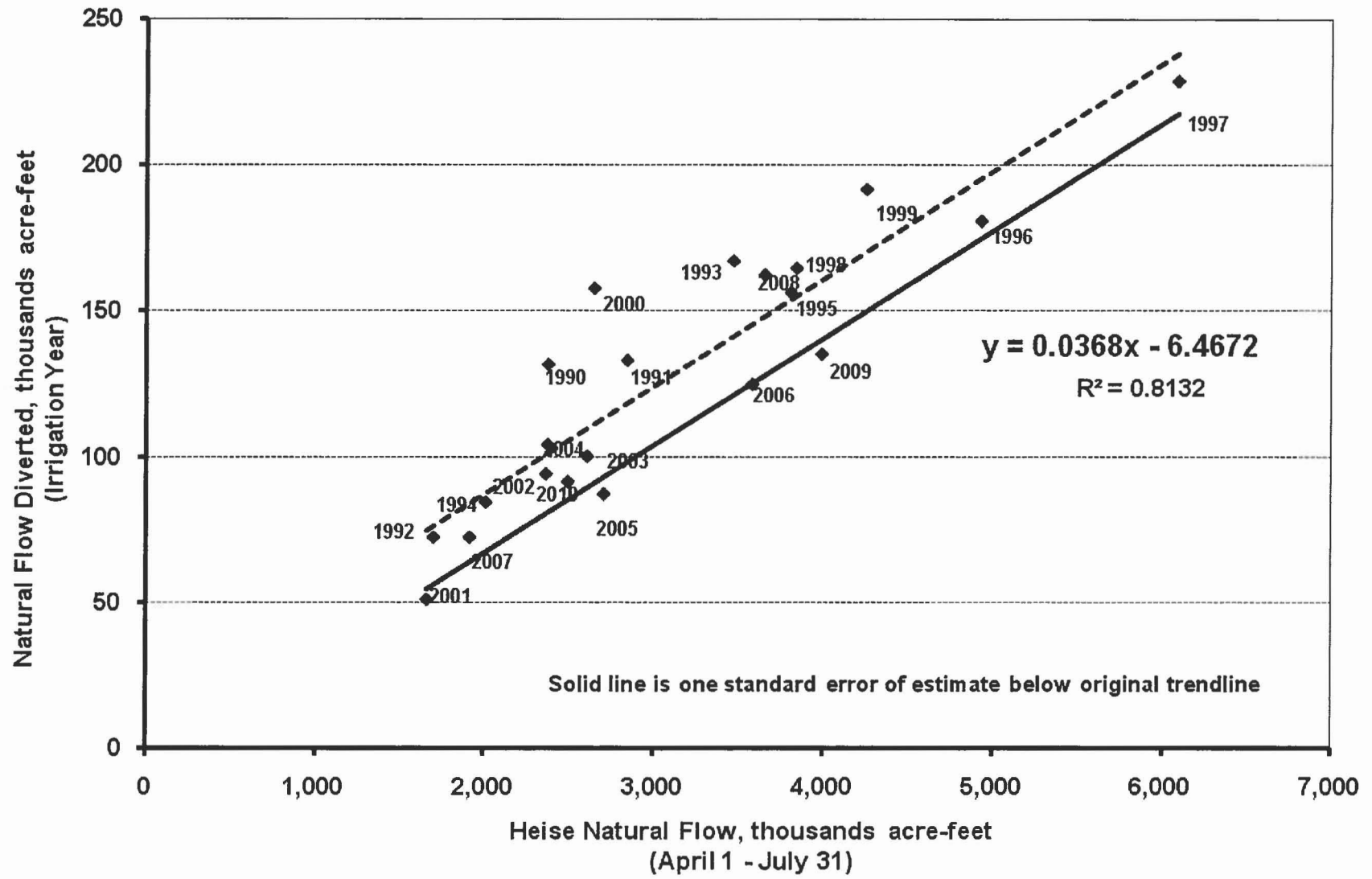


AMERICAN FALLS RESERVOIR DISTRICT #2

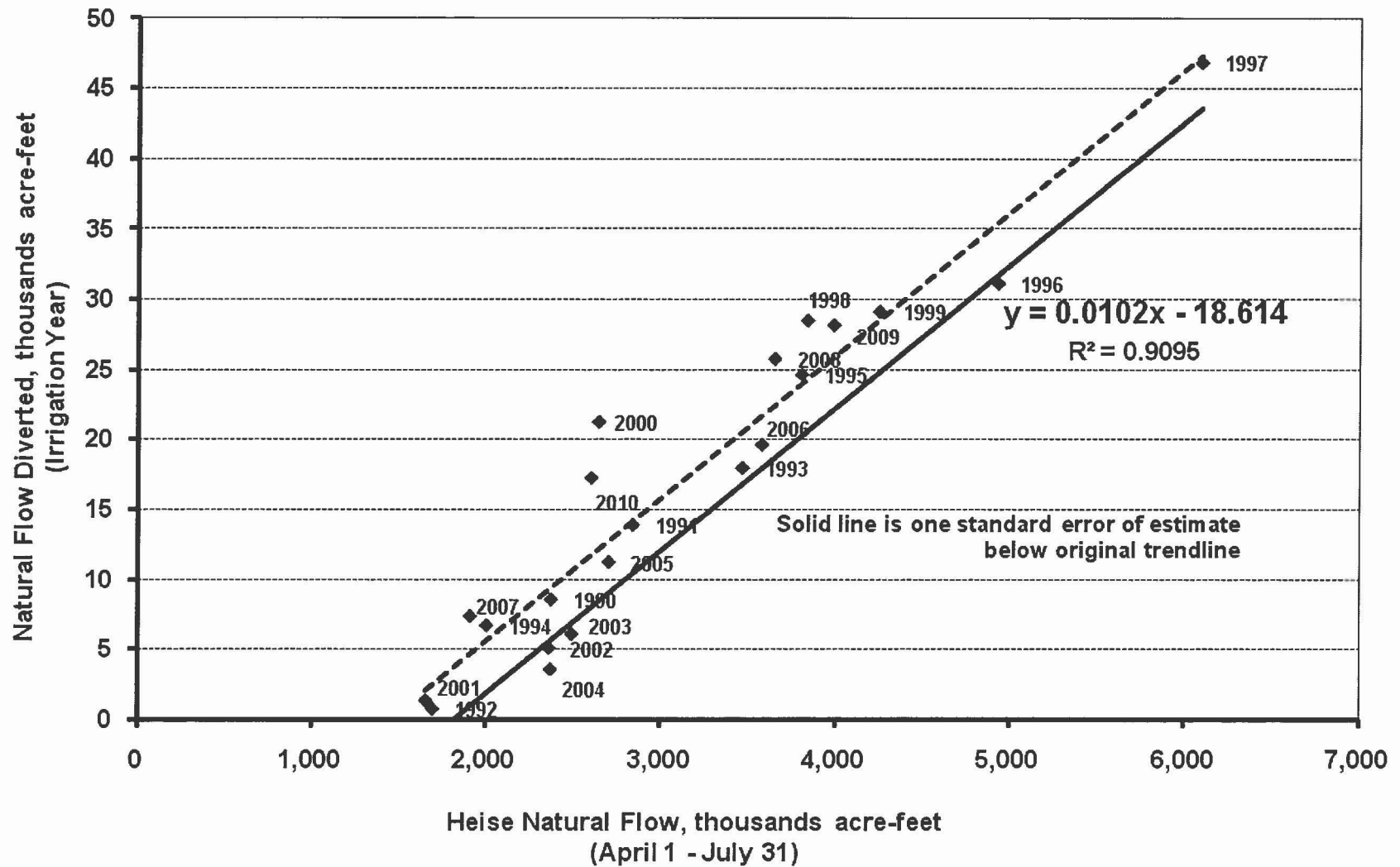
Natural Flow Diversions with Heise Inflow



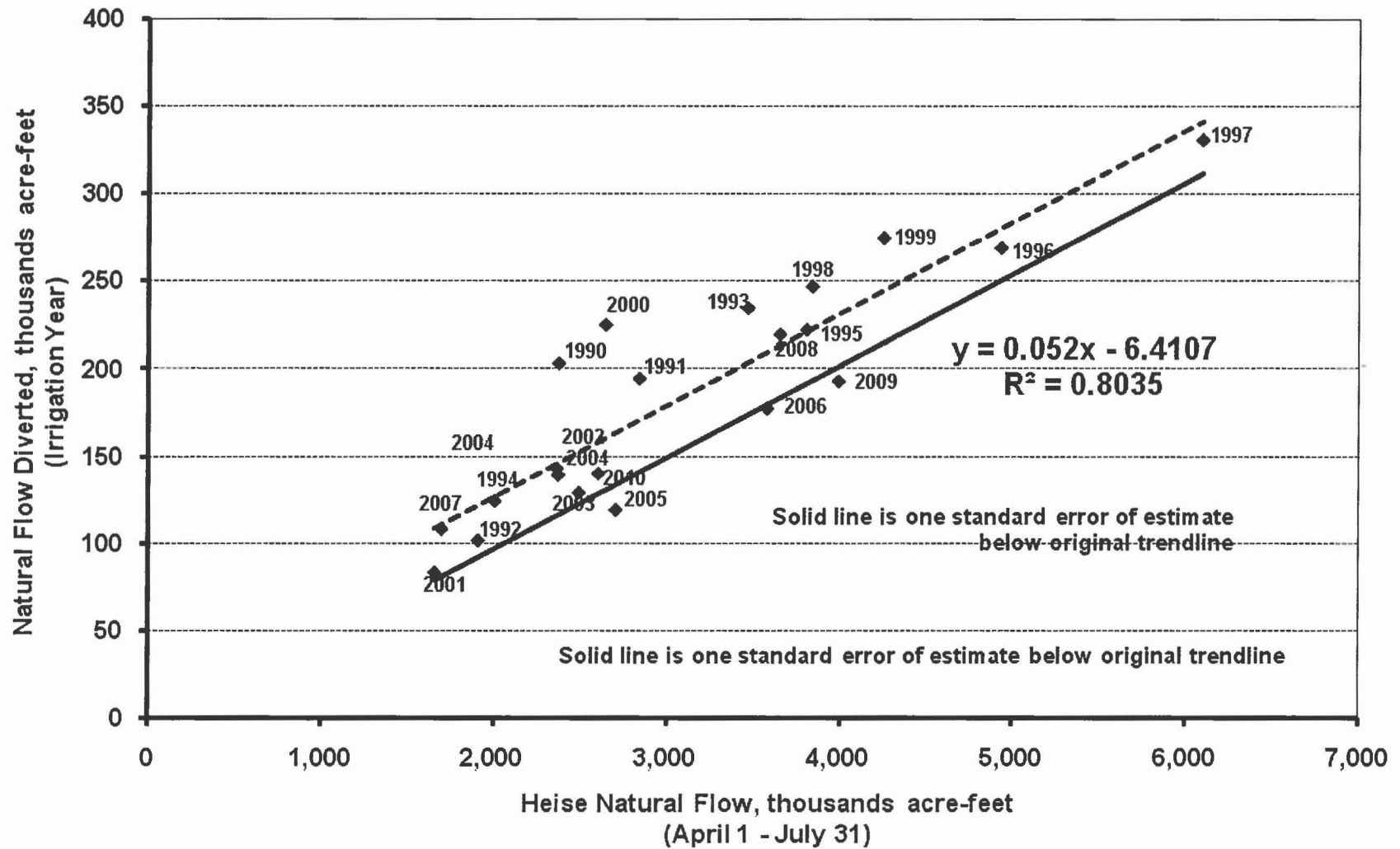
BURLEY IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



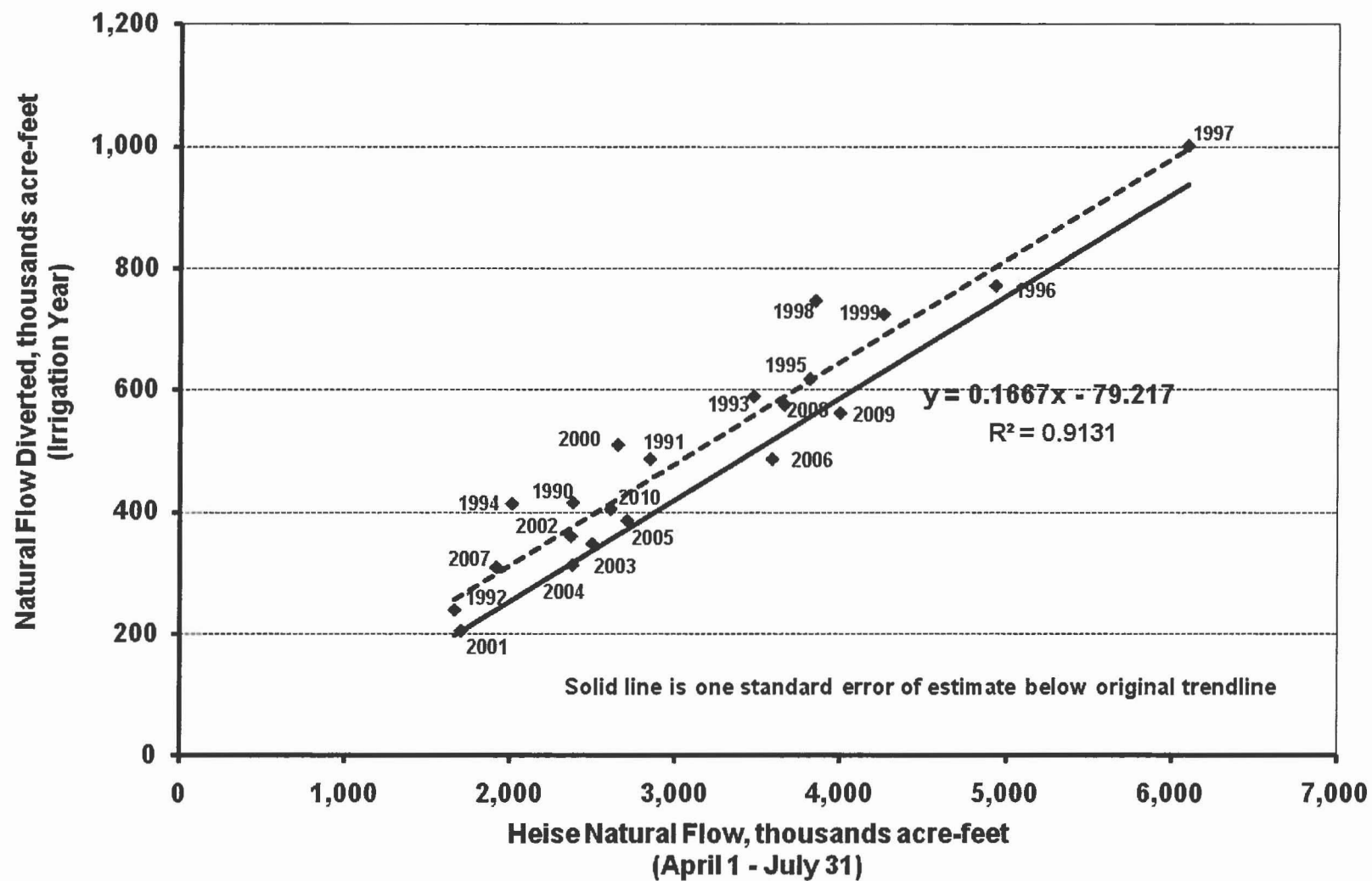
MILNER IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



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

