

**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 2012**  
IRRIGATION DISTRICT, MINIDOKA IRRIGATION ) **FORECAST SUPPLY**  
DISTRICT, NORTH SIDE CANAL COMPANY, )  
AND TWIN FALLS CANAL COMPANY ) **(METHODOLOGY STEPS 1 - 8)**  
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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.

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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 is scheduled to occur on June 13, 2012.

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).

5. This order will apply Methodology steps 1, 2, 3, 4, 5, 6, 7, and 8 to the 2012 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. On January 19, 2012, the Department sent a letter to SWC managers requesting the above information. As of the issuance of this order, the only entity that responded to the request was the Minidoka Irrigation District (“Minidoka”). The information from Minidoka shows that its irrigated area has not changed by more than 5% since 2010.

8. In 2011, no SWC entity provided the information required in Step 1. *Final Order Regarding April 2011 Forecast Supply (Methodology Steps 1 – 8)* (April 18, 2011) at 2.

9. Even though SWC entities other than Minidoka did not comply with Step 1, the Department will not reexamine each entity’s irrigated area. This is because, as will be discussed below, the Department determines there will be no material injury during the 2012 irrigation season.

**B. Step 2**

10. 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. CWN stands for “Crop Water Need.”

11. The Department has initiated its ongoing calculation of cumulative CWN volume for the 2012 water year, and will continue this calculation throughout the irrigation season.

**C. Step 3**

12. 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.

13. On April 5, 2012, the Joint Forecast was announced, predicting an unregulated inflow of 3,250,000 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 91% percent of average and is most similar to the flow volume experienced in 2006. The Heise forecast was used in regression equations for each SWC entity to predict the natural flow supply.<sup>2</sup> Given the predicted supply, all storage accounts are predicted to fill. The 2011 storage allocation, which included 100 percent fill less the 2011 evaporation, was used as the 2012 predicted storage allocation.

14. 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	10,253	136,167		146,420	58,492	-
AFRD2	98,316	389,376	1,000	488,692	415,730	-
BID	110,282	224,084	5,130	339,496	250,977	-
Milner	14,719	88,502		103,221	46,332	-
Minidoka	158,033	362,666	8,370	529,069	362,884	-
NSCC	452,873	850,778	(7,750)	1,295,901	965,536	-
TFCC	836,955	243,322	(6,750)	1,073,527	1,045,382	-
					Total	0

**D. Step 4**

15. 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.

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

16. In 2011, the Director predicted no material injury to the SWC's reasonable carryover for the 2012 irrigation season. *Final Order Establishing 2011 Reasonable Carryover (Methodology Step 9)* at 3. As shown in the table above, the Director predicts no in-season material injury to members of the SWC in 2012.

#### **E. Steps 5, 6, 7, and 8**

17. 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 3,250,000 acre-feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 91% percent of average and is most similar to the flow volume experienced in 2006. Given the forecast, the Director concludes with reasonable certainty that all storage accounts will fill and that the SWC's irrigation needs will be met. Therefore, the Director concludes with reasonable certainty that no member of the SWC will be materially injured in the 2012 irrigation season.

5. In 2011, no SWC entities supplied the Department with information concerning irrigated area, as required by Step 1. In 2012, only Minidoka supplied the required information. In 2011 and 2012, the Department did not have to examine the SWC's irrigated area because no material injury was predicted. *See Final Order Regarding April 2011 Forecast Supply (Methodology Steps 1 – 8)* (April 18, 2011).

6. As stated in Step 1, "If an SWC member fails or refuses to identify the number of irrigated acres within its service area by April 1, the Department will be cautious about recognizing acres as being irrigated if there is uncertainty about whether the acres are or will be irrigated during the upcoming irrigation season." *Methodology Order* at 34. "If this information is not timely provided, the Department will determine the total irrigated acres based upon past year cropping patterns and current satellite and/or aerial imagery." *Id.*

7. Despite SWC entities other than Minidoka 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.

8. If, in the future, SWC entities do not provide the information required in Step 1, and the Department predicts a shortfall, the Department may examine SWC irrigated areas for acres that have been hardened, acres that have been urbanized, or acres where the supply of water is questionable or uncertain. If acres are removed from an SWC entity's irrigated area, the Department may reduce the amount of water required for irrigation. This may reduce the amount of water junior ground water users are required to mitigate.

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

10. 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 2012 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 13<sup>th</sup> day of April, 2012.


  
GARY SPACKMAN  
Interim Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13<sup>th</sup> day of April, 2012, the above and foregoing, was served by the method indicated below, and addressed to the following:

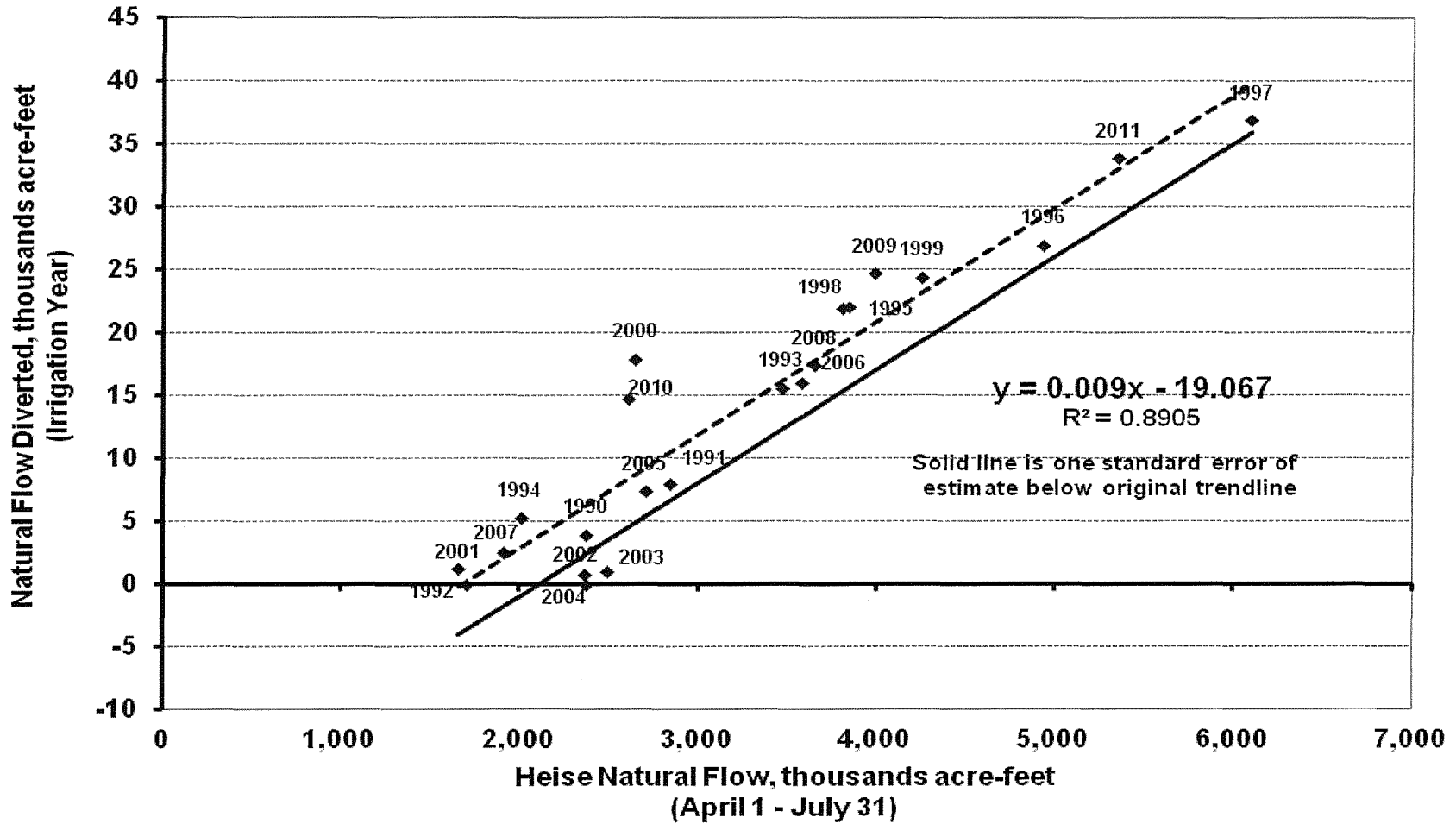
<p>John K. Simpson          Travis L. Thompson          Paul L. Arrington          BARKER ROSHOLT &amp; SIMPSON, LLP          P.O. Box 485          Twin Falls, ID 83303  <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>  <a href="mailto:ltt@idahowaters.com">ltt@idahowaters.com</a>  <a href="mailto:pla@idahowaters.com">pla@idahowaters.com</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>
<p>C. Thomas Arkoosh          CAPITOL LAW GROUP, PLLC          P.O. Box 32          Gooding, ID 83330-0032  <a href="mailto:tarkoosh@capitolawgroup.net">tarkoosh@capitolawgroup.net</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>W. Kent Fletcher          FLETCHER LAW OFFICE          P.O. Box 248          Burley, ID 83318  <a href="mailto:wkf@pmt.org">wkf@pmt.org</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>Randall C. Budge          Candice M. McHugh          Thomas J. Budge          RACINE OLSON          P.O. Box 1391          Pocatello, ID 83204-1391  <a href="mailto:rbc@racinelaw.net">rbc@racinelaw.net</a>  <a href="mailto:cmm@racinelaw.net">cmm@racinelaw.net</a>  <a href="mailto:tjb@racinelaw.net">tjb@racinelaw.net</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>Kathleen M. Carr          US Dept. Interior          960 Broadway Ste 400          Boise, ID 83706  <a href="mailto:kathleenmarion.carr@sol.doi.gov">kathleenmarion.carr@sol.doi.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>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@pn.usbr.gov">mhoward@pn.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
<p>Sarah A. Klahn  Mitra Pemberton  WHITE JANKOWSKI  511 16<sup>th</sup> St., Ste. 500  Denver, CO 80202  <a href="mailto:sarahk@white-jankowski.com">sarahk@white-jankowski.com</a>  <a href="mailto:mitrap@white-jankowski.com">mitrap@white-jankowski.com</a></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  <a href="mailto:dtranmer@pocatello.us">dtranmer@pocatello.us</a></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 &amp; Stone, LLP  P.O. Box 910  Burley, ID 83318  <a href="mailto:wparsons@pmt.org">wparsons@pmt.org</a></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  <a href="mailto:mcc@givenspursley.com">mcc@givenspursley.com</a>  <a href="mailto:jcf@givenspursley.com">jcf@givenspursley.com</a></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  <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

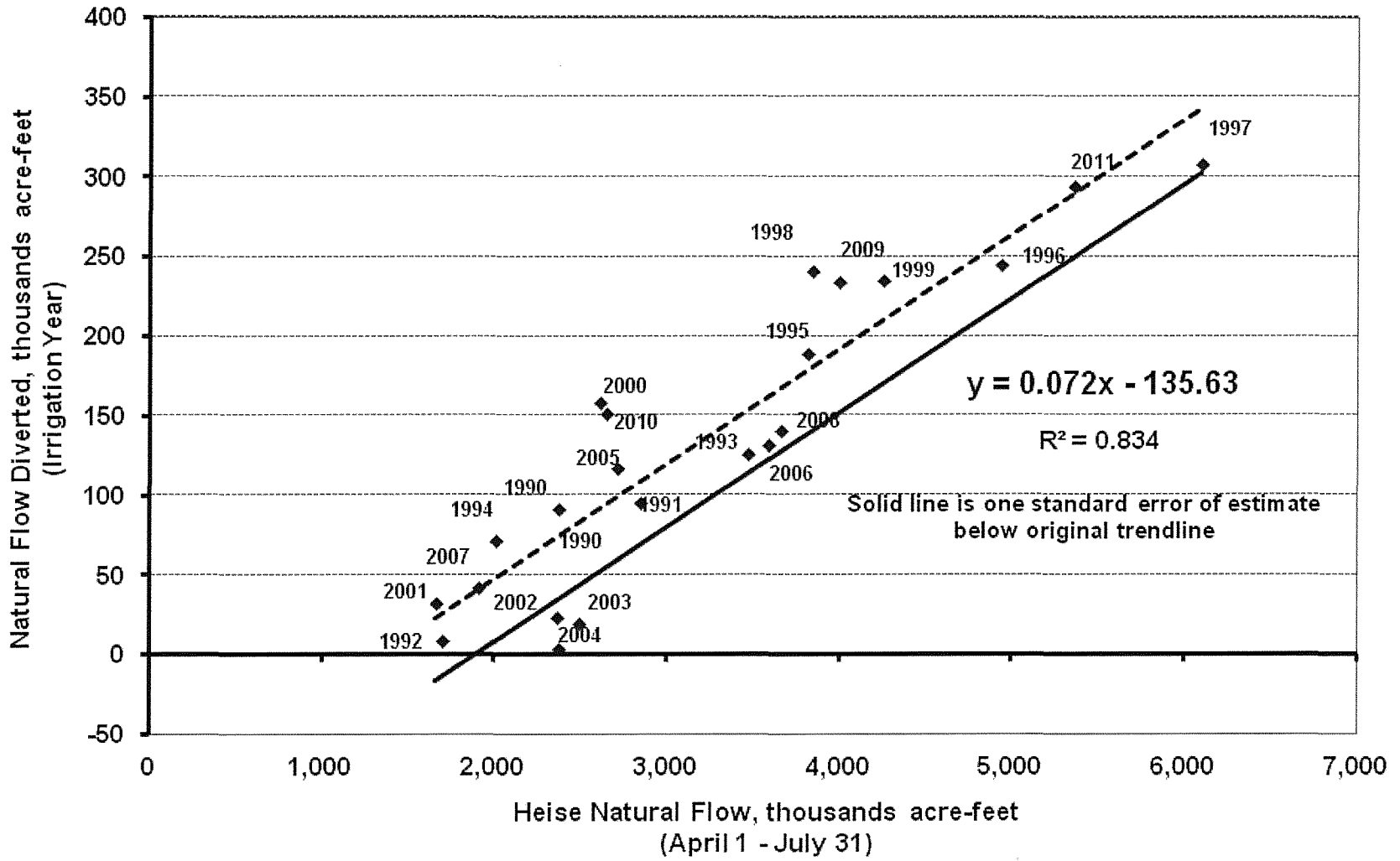
  
Victoria Wigle  
Administrative Assistant



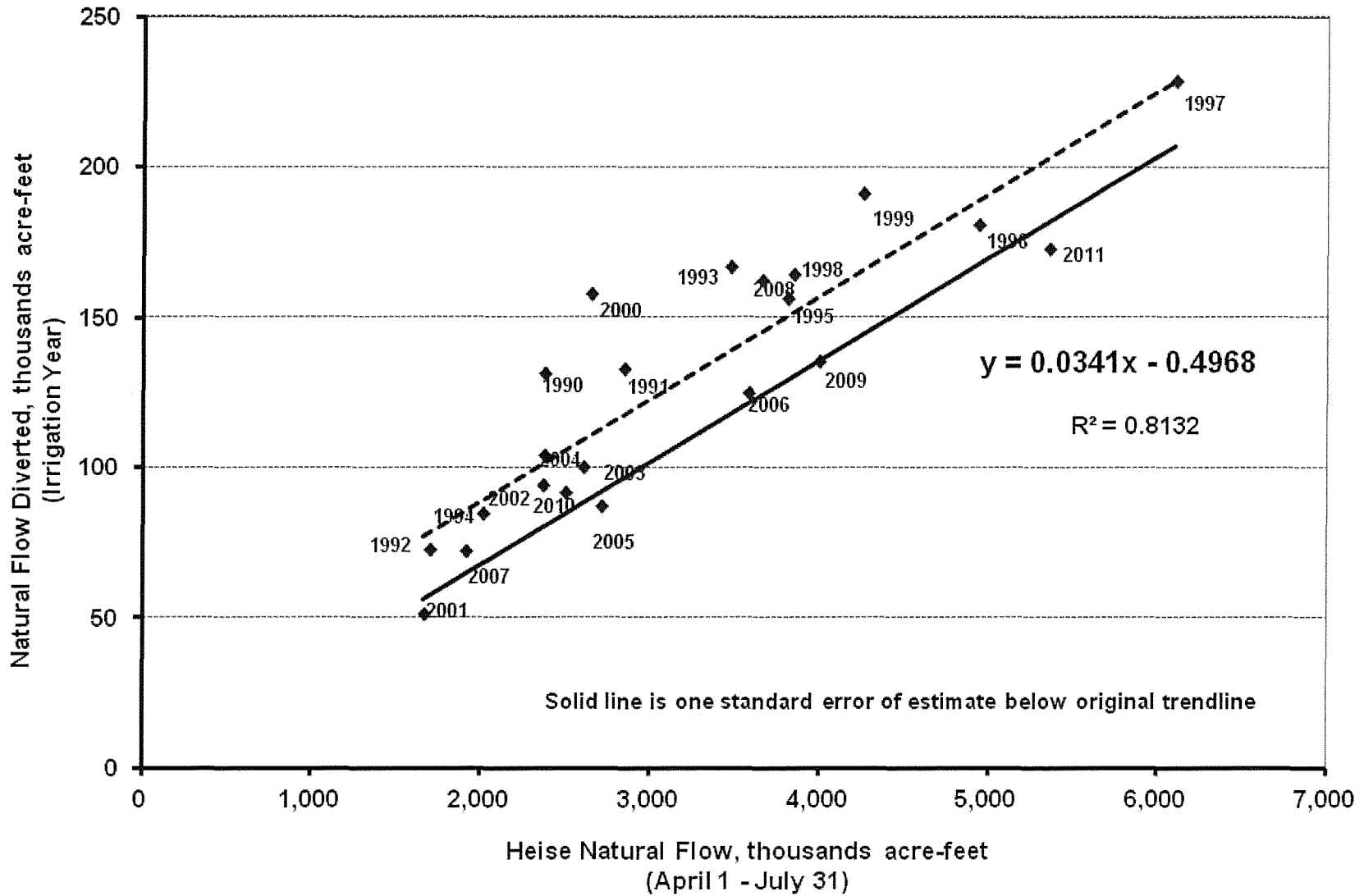
### A & B IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



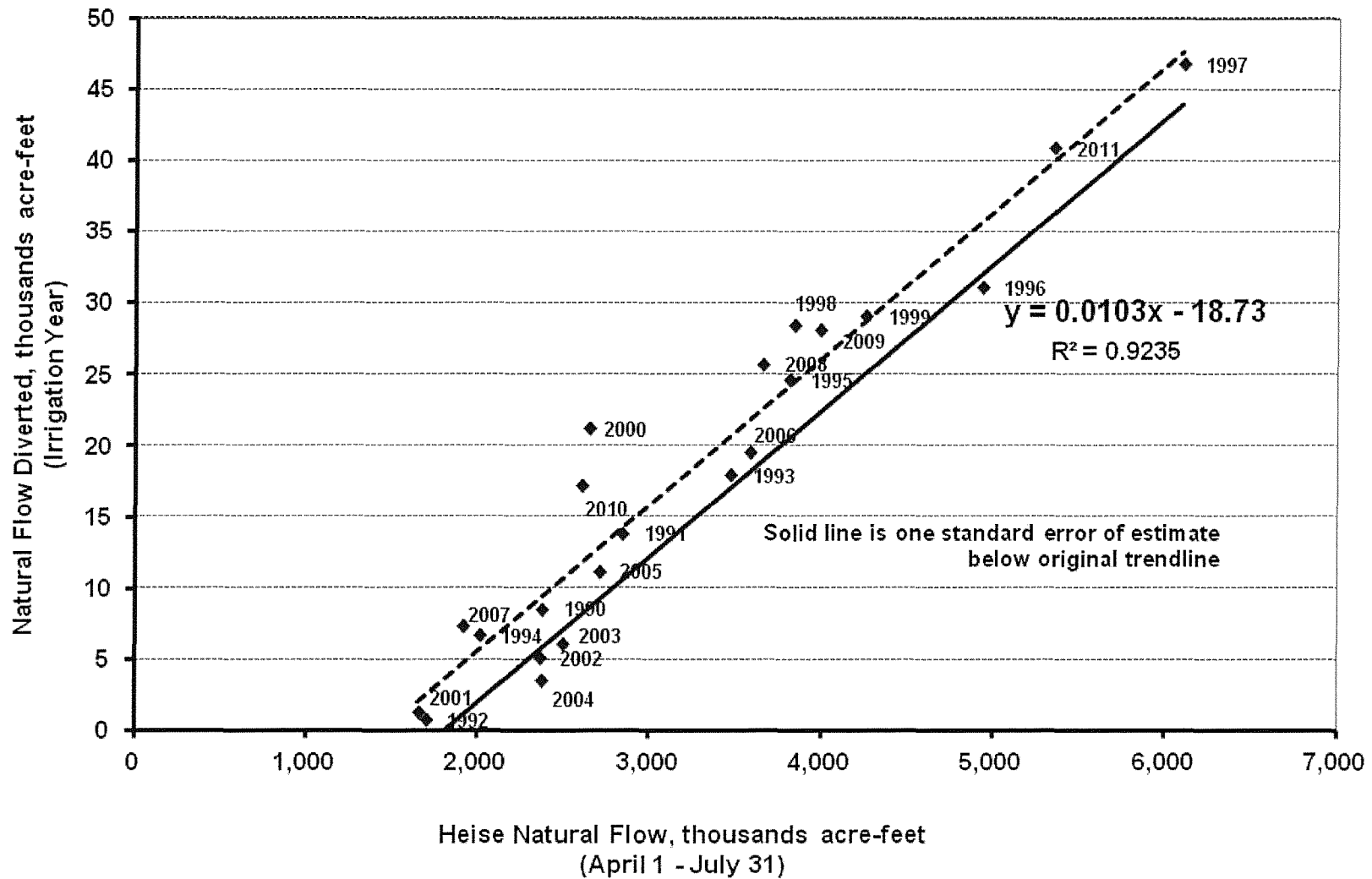
## AMERICAN FALLS RESERVOIR DISTRICT #2 Natural Flow Diversions with Heise Inflow



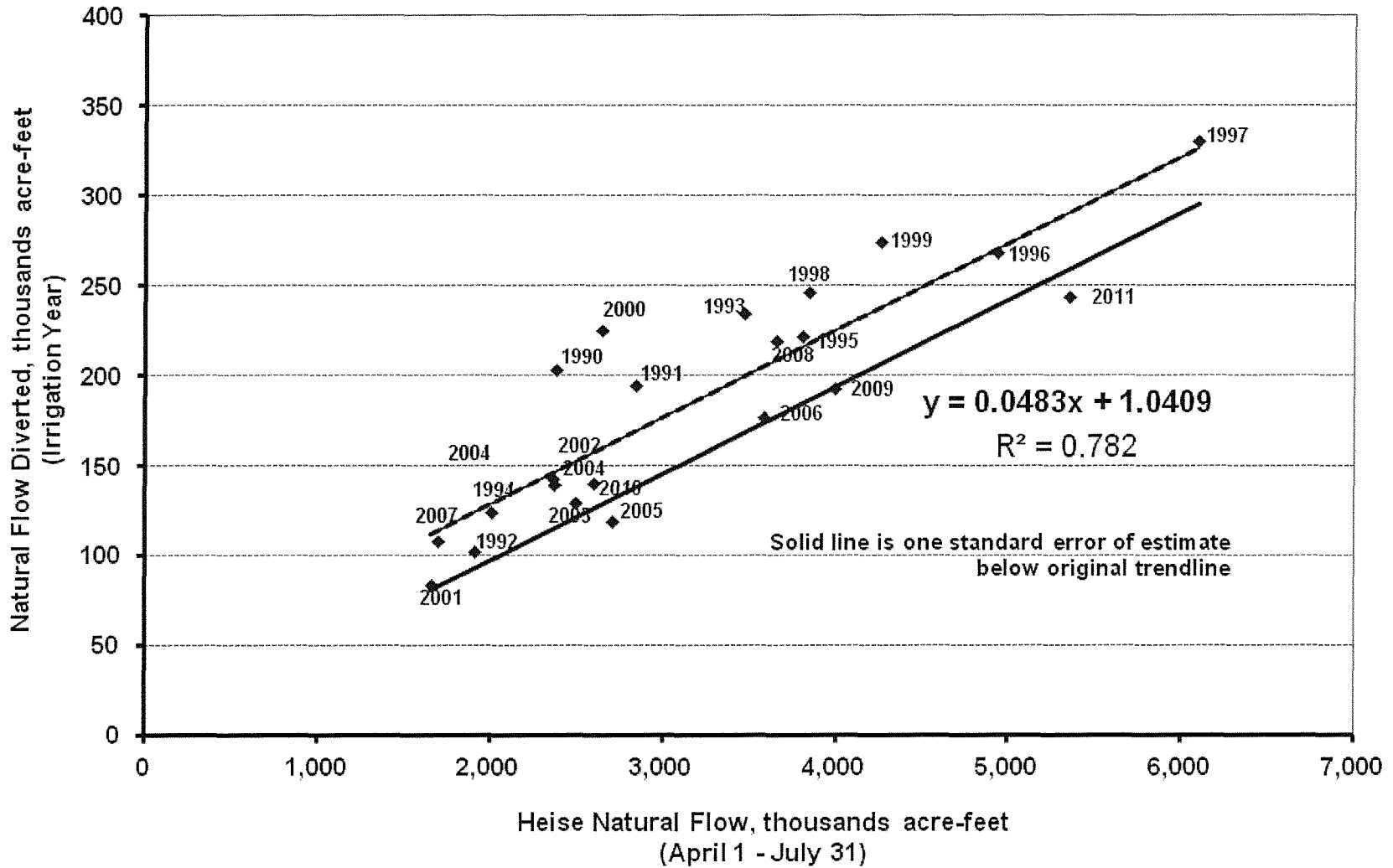
### BURLEY IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



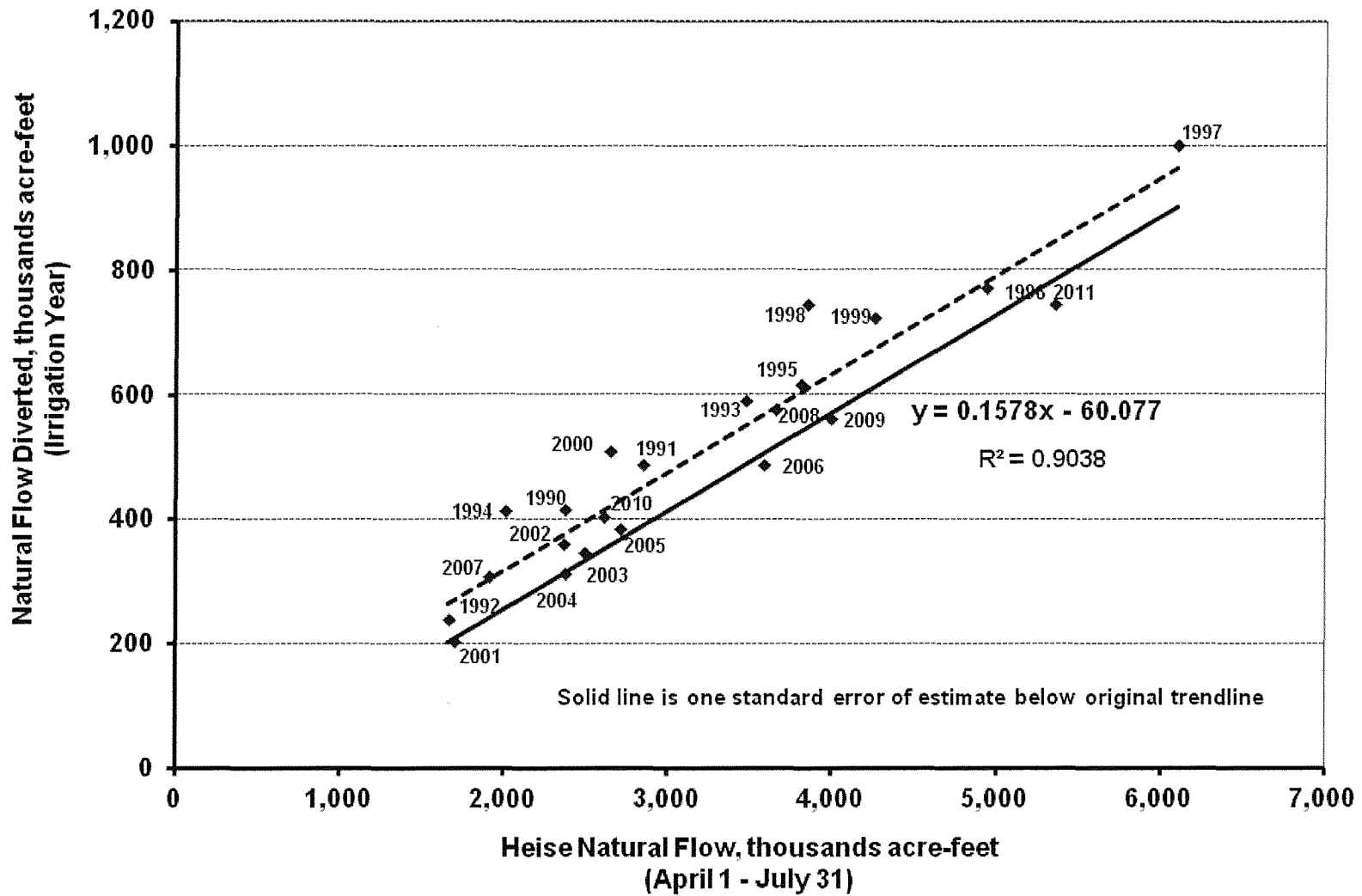
### MILNER IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



## 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

