

**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, )	<b>FINAL ORDER REGARDING</b>
BURLEY IRRIGATION DISTRICT, MILNER )	<b>APRIL 2014 FORECAST</b>
IRRIGATION DISTRICT, MINIDOKA IRRIGATION )	<b>SUPPLY</b>
DISTRICT, NORTH SIDE CANAL COMPANY, )	
AND TWIN FALLS CANAL COMPANY )	<b>(METHODOLOGY STEPS 1 – 8)</b>
_____ )	

**FINDINGS OF FACT**

1. On June 23, 2010, the Director (“Director”) of the Idaho Department of Water Resources (“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 the 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 occurred 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. On December 17, 2013, the Idaho Supreme Court issued its decision in the SWC Supreme Court Appeal, affirming that a baseline methodology approach such as the approach taken with this methodology order is permitted as starting point for administration proceedings. *In Matter of Distribution of Water to Various Water Rights Held By or For Ben. of A & B Irrigation Dist.*, 155 Idaho 640, \_\_\_, 315 P.3d 828, 841 (2013). The stay is now lifted and a new scheduling order has been issued, with oral argument in the matter set for July 9, 2014. *Order Amending In Part Procedural Order Governing Judicial Review of Final Orders of Director of Idaho Department of Water Resources*, CV-2010-382 (Fifth Jud. Dist. Feb. 24, 2014).

6. The Director has applied the Methodology Order in 2010, 2011, 2012, and 2013.

7. This order will apply Methodology steps 1, 2, 3, and 4, and address steps 5, 6, 7 and 8.

**A. Step 1**

8. 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.*

9. On March 20, 2014, the Department received a letter from American Falls Reservoir District #2 stating that its total number of irrigated acres for 2014 will not vary by more than 5% from the previously submitted electronic shape files. On April 16, 2014, MID submitted its electronic shape files delineating its total irrigated acres to the Department. On March 25, 2014, the attorney for the remaining members of the SWC sent a letter confirming that the expected irrigated acres within each project has not varied by more than 5% from existing electronic shape files.

**B. Step 2**

10. 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.”

11. The Department has initiated its ongoing calculation of cumulative CWN volume for the 2014 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 4, 2014, the Joint Forecast was announced, predicting an unregulated inflow of 4,370,000 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 135% percent of average<sup>2</sup> and is most 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.<sup>3</sup> Given the above normal runoff forecast, it is anticipated that all storage rights will fill. The storage allocation is based on a full reservoir allocation less evaporation charges.

14. Based on 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	20,478	135,852		156,330	58,492	-
AFRD2	183,025	388,477	1,000	572,502	415,730	-
BID	147,687	223,568	5,130	376,385	250,977	-
Milner	25,198	92,138		117,336	46,332	-
Minidoka	214,100	361,829	8,370	584,299	362,884	-
NSCC	629,458	848,814	(7,750)	1,470,522	965,536	-
TFCC	913,796	242,760	(6,750)	1,149,806	1,045,382	-
					<b>Total</b>	<b>0</b>

**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

<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.

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.

Step 4 states as follows:

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. 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 2014, each SWC entity 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 2014 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 4,370,000 acre-feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 135% percent of average and is most similar to the flow volume experienced in 1999. The storage allocation is based on a full allocation. Given the above, the Director concludes with reasonable certainty that the SWC will experience no in-season shortfalls this year.

## **ORDER**

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

For the 2014 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 this is a FINAL ORDER of the agency. Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

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 18<sup>th</sup> day of April, 2014.



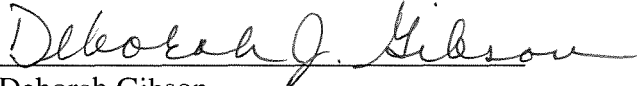
GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18<sup>th</sup> day of April, 2014, the above and foregoing, was served by the method indicated below, and addressed to the following:

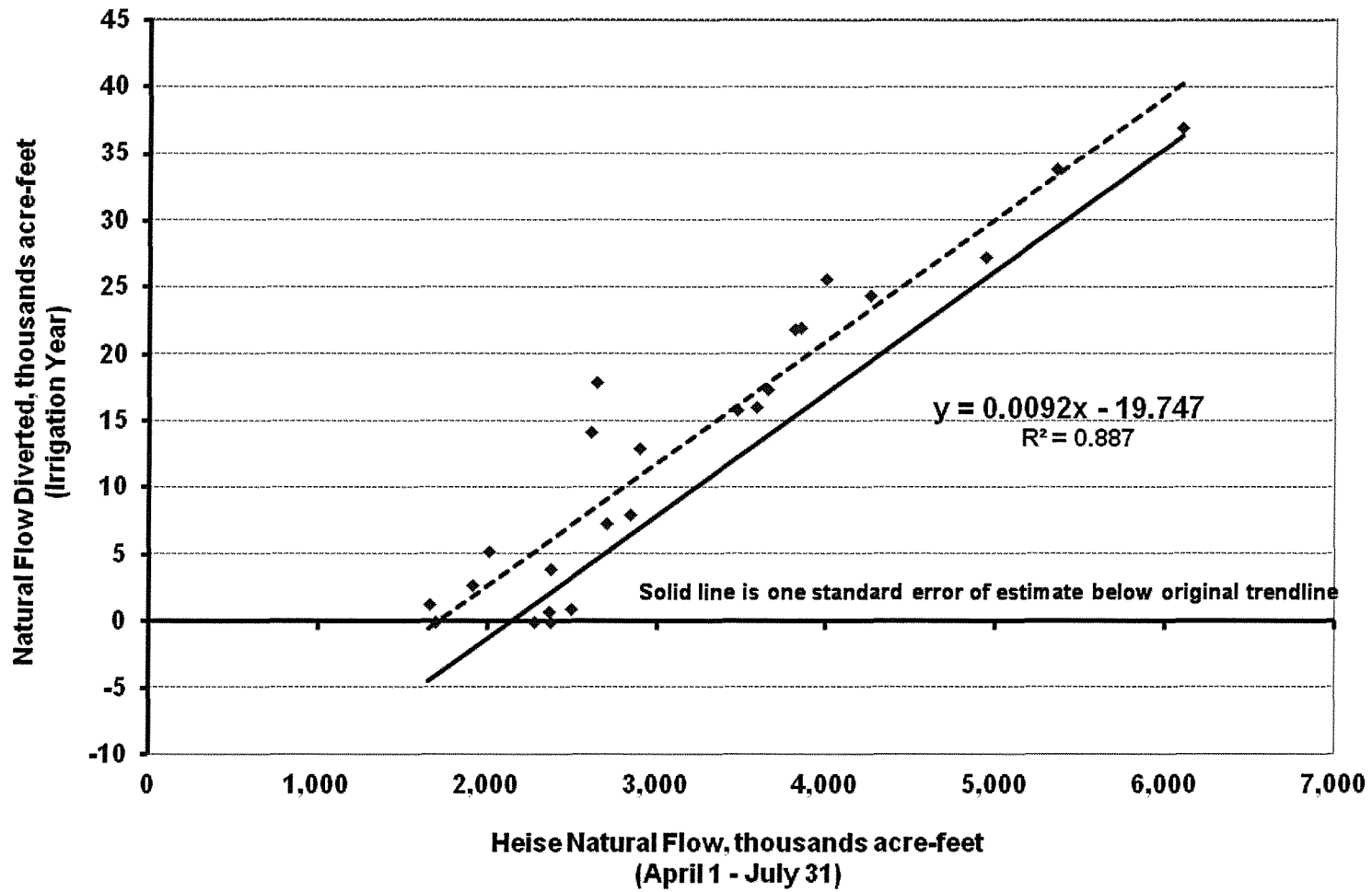
<p>John K. Simpson          Travis L. Thompson          Paul L. Arrington          BARKER ROSHOLT &amp; SIMPSON, LLP          195 River Vista Place, Ste. 204          Twin Falls, ID 83301-3029  <a href="mailto:jks@idahowaters.com">jks@idahowaters.com</a>  <a href="mailto:tlt@idahowaters.com">tlt@idahowaters.com</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>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          Thomas J. Budge          RACINE OLSON          P.O. Box 1391          Pocatello, ID 83204-1391  <a href="mailto:rcb@racinelaw.net">rcb@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@usbr.gov">mhoward@usbr.gov</a></p>	<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>

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<p>A. Dean 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, 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

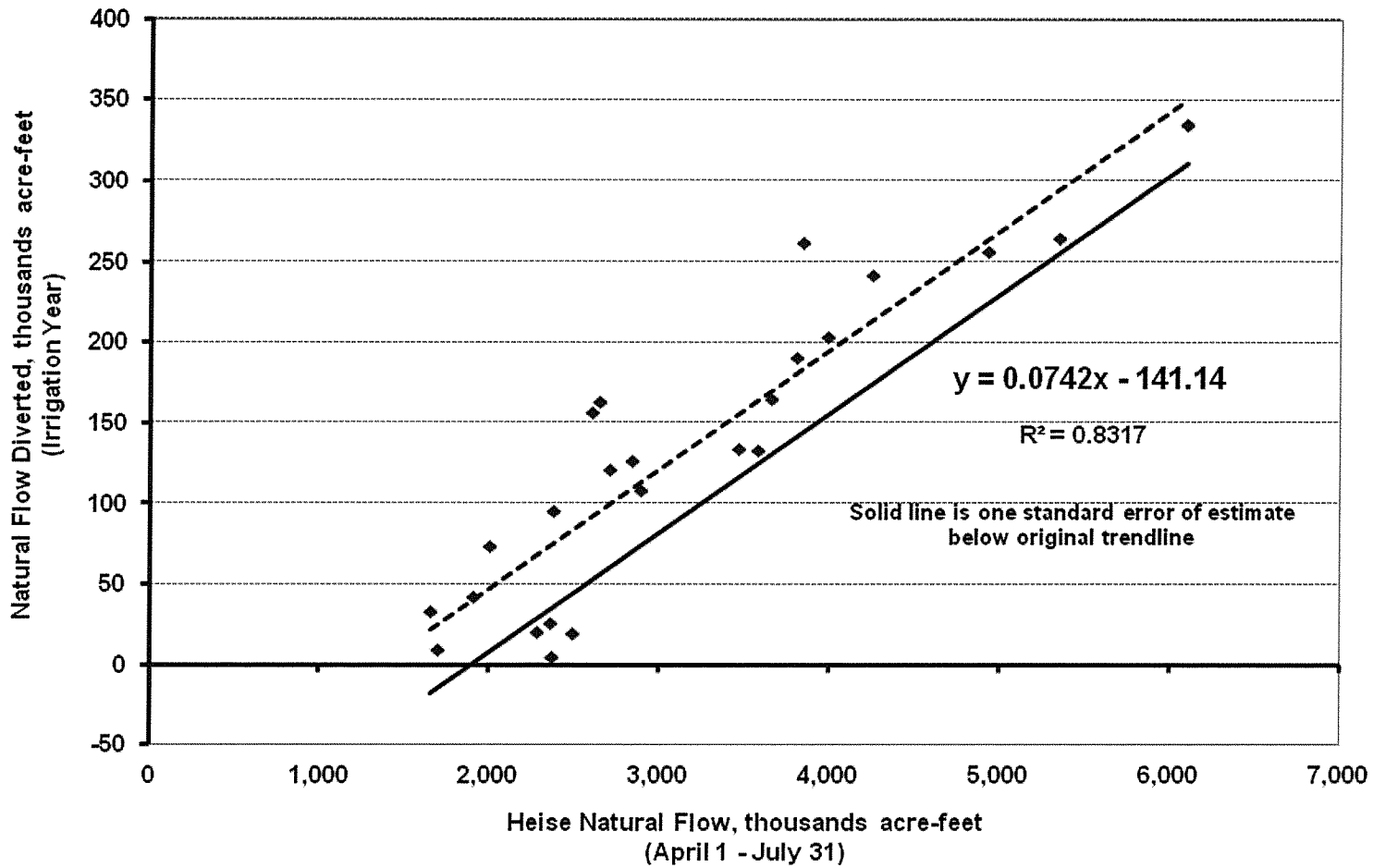
  
Deborah Gibson  
Administrative Assistant



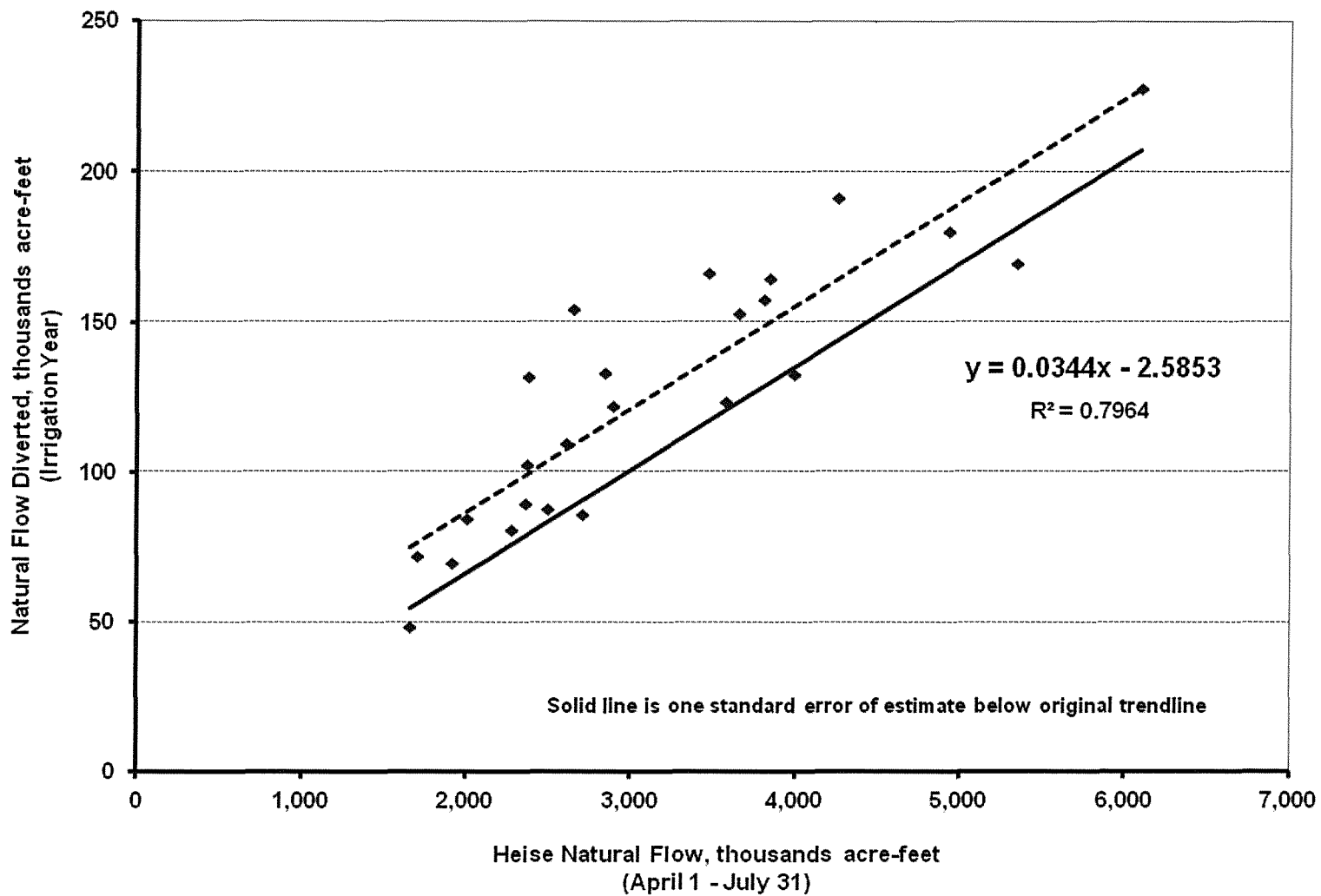
**A & B IRRIGATION DISTRICT**  
**Natural Flow Diversions with Heise Inflow**



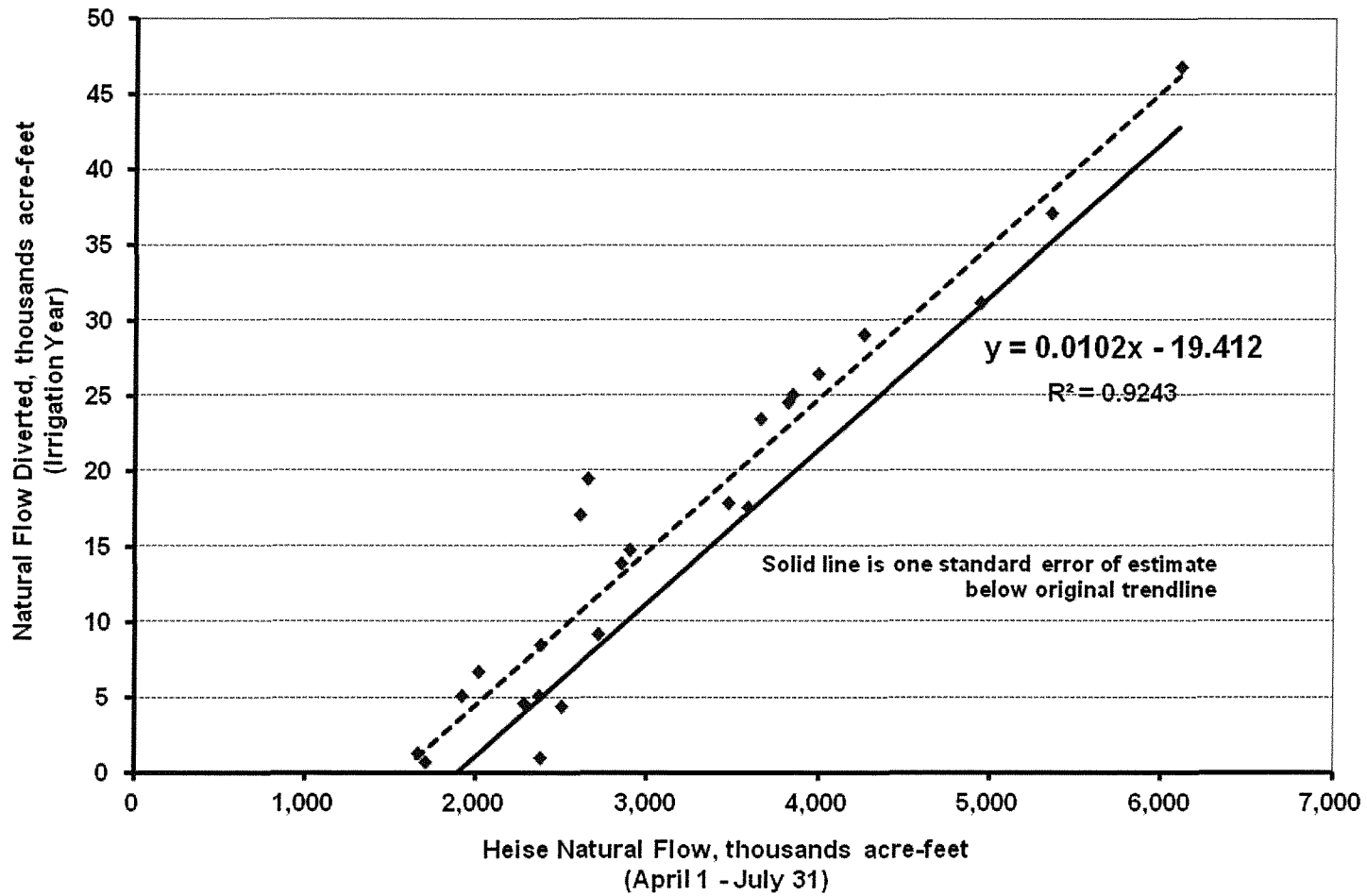
**AMERICAN FALLS RESERVOIR DISTRICT #2**  
**Natural Flow Diversions with Heise Inflow**  
**Updated Regression**



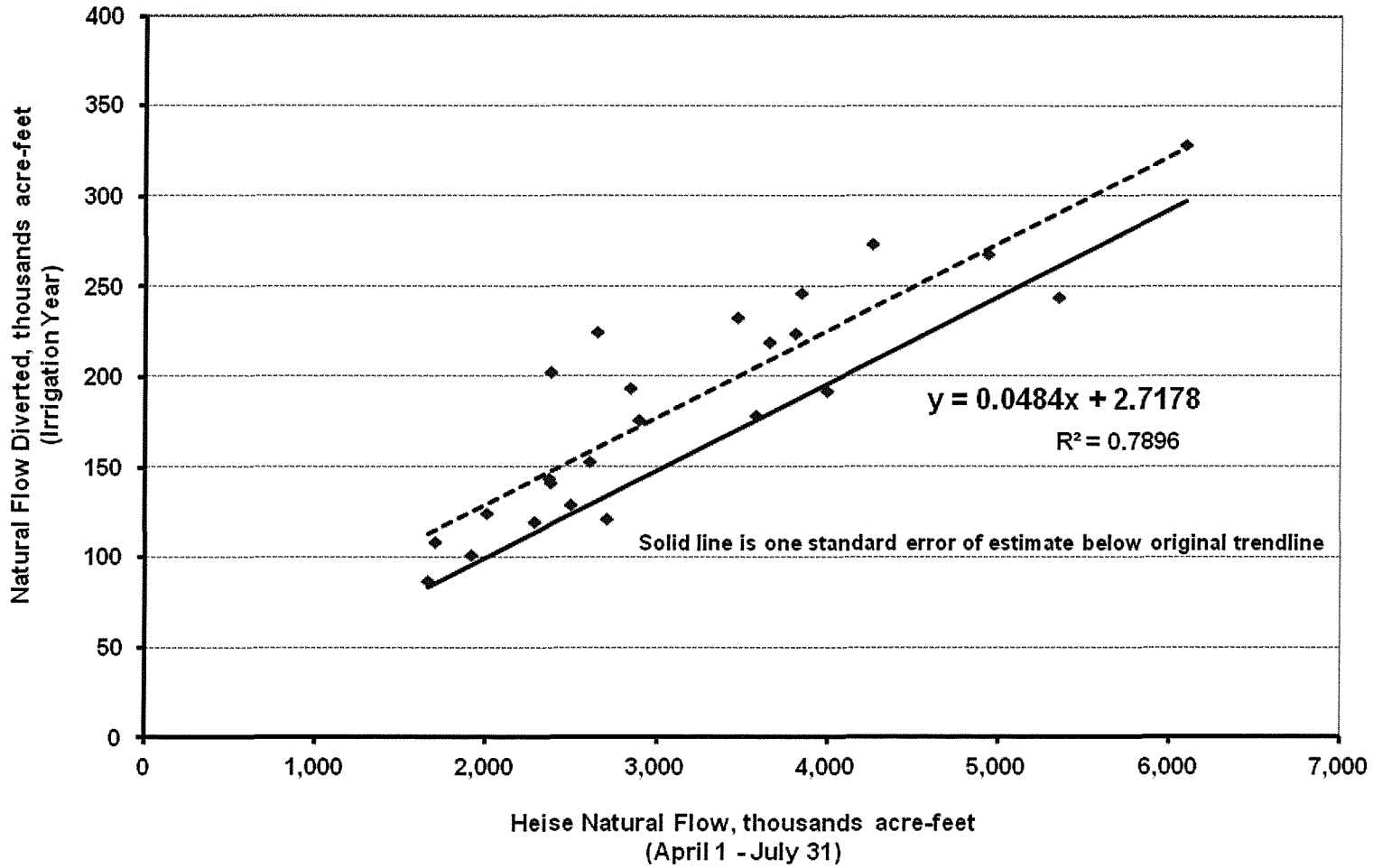
### BURLEY IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



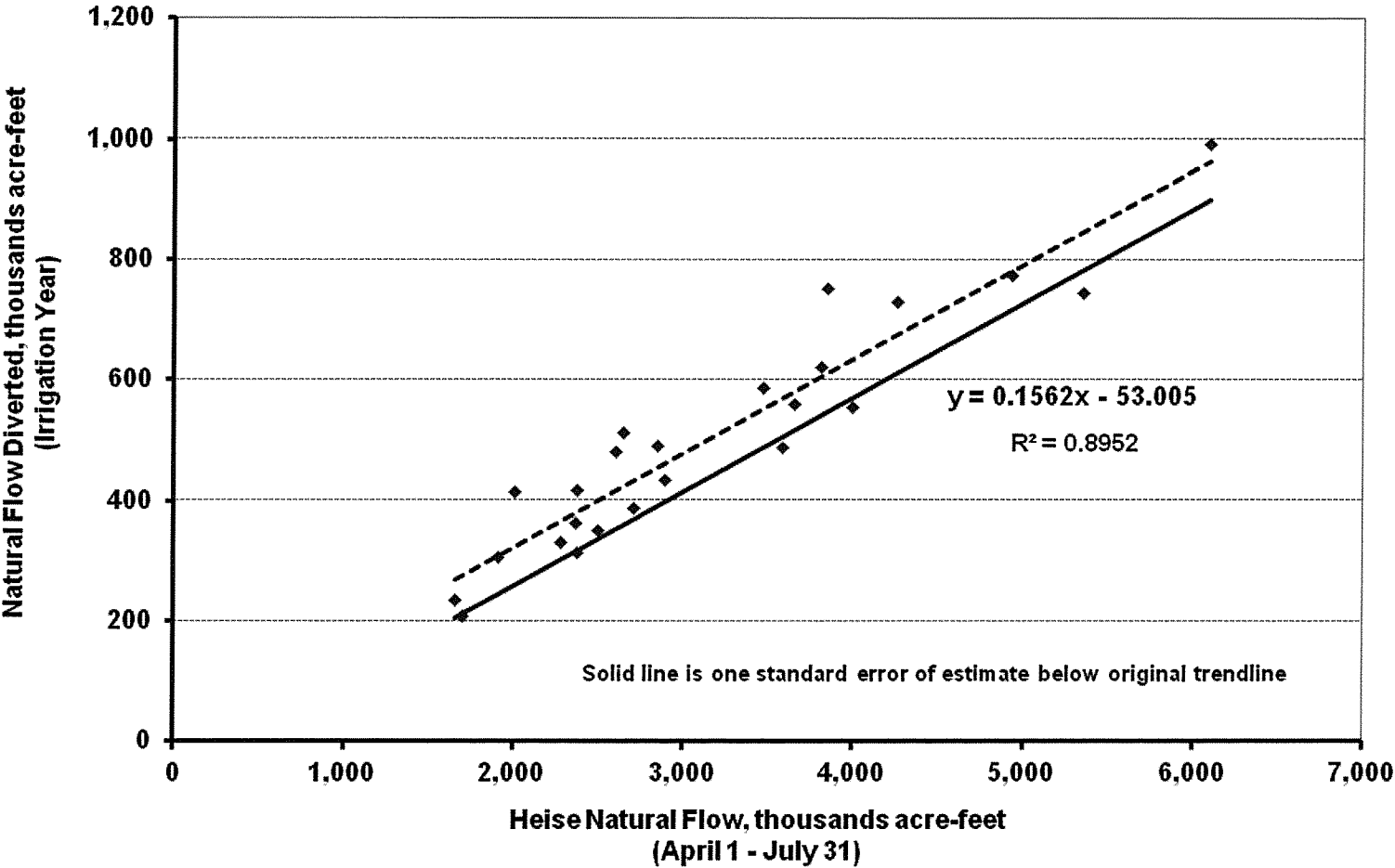
### MILNER IRRIGATION DISTRICT Natural Flow Diversions with Heise Inflow



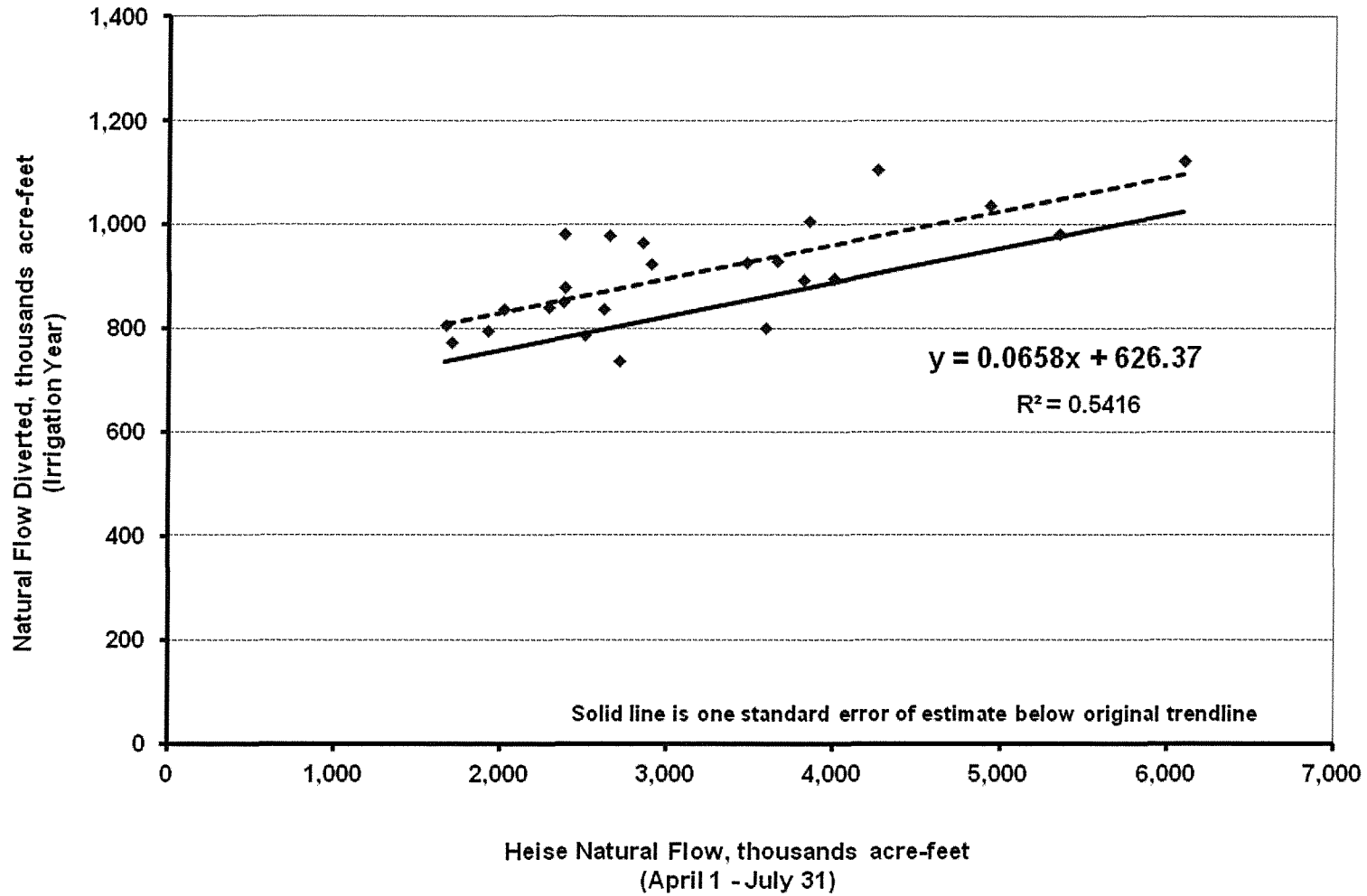
**MINIDOKA IRRIGATION DISTRICT**  
**Natural Flow Diversions with Heise Inflow**



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



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



## **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.