C. Thomas Arkoosh, ISB #2253
CAPITOL LAW GROUP, PLLC
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for American Falls Reservoir District #2

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DEPARTMENT OF WATER RESOURCES

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
113 Main Avenue West, Suite 303
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

TWIN FALLS CANAL COMPANY, NORTH SIDE CANAL COMPANY, A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT#2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, and **MINIDOKA IRRIGATION DISTRICT,**	CASE NO. CV-12-2096
	Fee Category L.3 - $88.00
Petitioners,	**NOTICE OF APPEAL AND PETITION FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION**
vs.	**(April 2012 Forecast Supply Order)**
GARY SPACKMAN, in his capacity as Interim Director of the Idaho Department of Water	

Resources, and **THE IDAHO DEPARTMENT OF WATER RESOURCES,**

Respondents.

IN THE MATTER OF DISTRIBUTION OF WATER TO VARIOUS WATER RIGHTS HELD BY OR FOR THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY

COME NOW, Petitioners, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively hereafter referred to as the "Surface Water Coalition", "Coalition", or "SWC"), by and through their undersigned counsel, and hereby file this Petition seeking judicial review of a final agency action by the Idaho Department of Water Resources.

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 67-5270 and 67-5279 seeking judicial review of final orders issued by the Interim Director of the Idaho Department of Water Resources, Gary Spackman, on April 13th and May 9th 2012.

2. On April 13, 2012, Gary Spackman, Interim Director of the Idaho Department of Water Resources, issued the *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1 – 8)* (April 13, 2012), determining that there would be no material injury to senior water

rights held by members of the Coalition during the 2012 irrigation season. A copy of the April 13, 2012 *Order* is included with this Petition as Attachment A.

3. On April 27, 2012, the Coalition filed the *Surface Water Coalition's Petition Requesting Hearing on Director's Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1 – 8) / Motion to Authorize Discovery*, seeking reconsideration of the April 13, 2012 *Order* and requesting a hearing. A copy of the Coalition's motion is included with this Petition as Attachment B.

4. On May 9, 2012, the Interim Director issued the *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing (Methodology Steps 1 – 8)* (May 9, 2012). A copy of the May 9, 2012 *Order* is included with this Petition as Attachment C.

5. In the May 9, 2012 *Order,* the Interim Director denied the Coalition's request for reconsideration and discovery and refused to hold an administrative hearing as provided by I.C. § 42-1701A(3).

JURISDICTION AND VENUE

6. This petition is authorized by Idaho Code §§ 67-5270 and 67-5279.

7. This Court has jurisdiction over this action pursuant to Idaho Code § 67-5272.

8. Venue lies in this Court pursuant to Idaho Code § 67-5272 because Petitioner, TFCC does business in Twin Falls County, Idaho and certain water rights, which are the subject of the agency action, are delivered to the company's shareholders that own property located in Twin Falls County.

9. Pursuant to the Idaho Supreme Court's *Administrative Order* issued on December 9, 2009 "all petitions for judicial review of any decision regarding administration of water rights

from the Department of Water Resources shall be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District." The SRBA Court's procedures instruct the clerk of the district court in which the petition is filed to issue a *Notice of Reassignment*. The Coalition has attached a copy of the SRBA Court's *Notice of Reassignment* form for the convenience of the clerk. Attachment D.

10. The Director's May 9, 2012 *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing (Methodology Steps 1 - 8)*("*Final Order*") is a final agency action subject to judicial review pursuant to Idaho Code § 67-5270(3).

PARTIES

8. Petitioner, American Falls Reservoir District #2 ("AFRD #2"), is an irrigation district organized and existing under the laws of the state of Idaho, with its principal place of business in Shoshone, Idaho. AFRD #2 delivers water to its landowners in Jerome, Lincoln, and Gooding Counties.

9. Petitioner, A&B Irrigation District ("A&B"), is an irrigation district organized and existing under the laws of the state of Idaho, with its principal place of business in Rupert, Idaho. A&B delivers water to its landowners in Jerome and Minidoka Counties.

10. Petitioner, Burley Irrigation District ("BID"), is an irrigation district organized and existing under the laws of the state of Idaho with its principal place of business in Burley, Idaho. BID delivers water to its landowners in Cassia County.

11. Petitioner, Milner Irrigation District ("Milner"), is an irrigation district organized and existing under the laws of the state of Idaho with its principal place of business in Murtaugh, Idaho. Milner delivers water to its landowners in Cassia and Twin Falls Counties.

12. Petitioner, Minidoka Irrigation District ("MID"), is an irrigation district organized and existing under the laws of the state of Idaho with its principal place of business in Rupert, Idaho. MID delivers water to its landowners in Cassia and Minidoka Counties.

13. Petitioner, North Side Canal Company ("NSCC"), is a non-profit corporation organized and existing pursuant to the Carey Act (43 USC 641, *et seq.*) and the laws of the state of Idaho, with its principal place of business in Jerome, Idaho. NSCC delivers water to its shareholders in Jerome, Gooding, and Elmore Counties.

14. Petitioner, Twin Falls Canal Company ("TFCC"), is a non-profit corporation organized and existing pursuant to the Carey Act (43 USC §§ 641, *et seq.*) and the laws of the state of Idaho, with its principal place of business in Twin Falls County. TFCC delivers water to its shareholders in Twin Falls County.

15. Respondent, Gary Spackman is the Interim Director of the Idaho Department of Water Resources, and a resident of Ada County.

16. Respondent, Idaho Department of Water Resources ("Department"), is the executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701, *et seq.*, with its state office located at 322 E. Front St., Boise, Ada County, Idaho.

STATEMENT OF INITIAL ISSUES

17. The Petitioners intend to assert the following issues on judicial review:

a. Whether the Director's *Final Order* is supported by substantial evidence?

b. Whether the Director's application of his methodology in the *Final Order* violates Idaho law?

c. Whether the Director's actions are arbitrary and capricious or otherwise not in accordance with the law?

d. Whether the Director's denial of the Petitioners' request for a hearing violates their constitutional right to due process and the statutory right to a hearing pursuant to I.C. § 42-1701A(3)?

18. Pursuant to I.R.C.P. 84(d)(5), the Coalition reserves the right to assert additional issues and/or clarify or further specify the issues for judicial review stated herein which become later discovered.

AGENCY RECORD

19. Judicial review is sought of the Director's May 9, 2012 *Final Order*.

20. The Department and Interim Director refused to hold an administrative hearing on the matter so no transcript of a hearing is available. The only documents in the record to the Coalition's knowledge consist of the following:

e. January 19, 2012 letter from Interim Director to SWC entities;

f. Response from MID;

g. March 9, 2012 letter from AFRD #2 to IDWR;

h. Interim Director's *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1 – 8)* (April 13, 2012);

i. *Surface Water Coalition's Petition Requesting Hearing on Director's Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1 – 8) / Motion to Authorize Discovery* (April 27, 2012);

j. Interim Director's *Order Denying Petition for Reconsideration; Denying Motion to Authorize Discovery; Denying Request for Hearing (Methodology Steps 1 – 8)* (May 9, 2012);

k. CD with data used by Department in the April 13, 2012 order.

21. The Coalition anticipates that it can reach a stipulation regarding the agency record with the Respondents and the other parties, and will pay its necessary share of the fee for preparation of the record at such time.

22. Service of this Petition for Judicial Review of Agency Action has been made on the Respondents at the time of the filing of this Petition.

REQUEST FOR ADDITIONAL EVIDENCE / EXPEDITED HEARING

23. Given the Interim Director's refusal to hold an administrative hearing on the matter, the Coalition requests leave to discover and present additional evidence as it relates to the validity of the agency action pursuant to I.C. § 67-5276.

24. Given the 2012 irrigation season has begun, that climatic and water supply conditions have changed, the Coalition requests an expedited hearing in this matter so that a proper decision can be reached for purposes of conjunctive administration to immediately protect the Coalition's senior water rights.

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DATED this 18th day of May, 2012.

CAPITOL LAW GROUP, PLLC

C. Tom Arkoosh

Attorneys for American Falls Reservoir District #2

FLETCHER LAW OFFICE

W. Kent Fletcher

Attorneys for Minidoka Irrigation District

BARKER ROSHOLT & SIMPSON LLP

John K. Simpson
Travis L. Thompson
Paul L. Arrington

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, Twin Falls Canal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2012, I served true and correct copies of the *Notice of Appeal and Petition for Judicial Review of Final Agency Action* upon the following by the method indicated:

Twin Falls County Court 425 Shoshone St. N. P.O. Box 126 Twin Falls, ID 83303	PLNG U.S. Mail, Postage Prepaid X Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Courtesy Copy Snake River Basin Adjudication 427 Shoshone Street N. P.O. Box 126 Twin Falls, ID 83303	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Garrick Baxter Chris Bromley Deputy Attorneys General Idaho Department of Water Resources P.O. Box 83720 Boise, Idaho 83720-0098	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Randy Budge Candice McHugh P.O. Box 1391 Pocatello, Idaho 83204-1391	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Sarah Klahn Mitra Pemberton White & Jankowski LLP 511 16th St., Suite 500 Denver, CO 80202	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Dean Tranmer City of Pocatello P.O. Box 4169 Pocatello, Idaho 83205	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email

Kathleen Carr U.S. Dept. of Interior 960 Broadway Ste. 400 Boise, Idaho 83706	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Road Boise, Idaho 83706-1234	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Lyle Swank IDWR 900 N .Skyline Dr. Idaho Falls, Idaho 83402-6105	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Allen Merritt Cindy Yenter IDWR 1341 Fillmore St., Suite 200 Twin Falls, Idaho 83301	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
William A. Parsons Parsons, Smith & Stone, LLP P.O. Box 910 Burley, ID 83318	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
Michael C. Creamer Jeffrey C. Fereday 601 W. Bannock P.O. Box 2720 Boise, Idaho 83701-2720	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email
David W. Gehlert Natural Resources Section U.S. Department of Justice 1961 Stout Street, 8th Floor Denver, CO 80294	X U.S. Mail, Postage Prepaid ____ Hand Delivery ____ Overnight Mail ____ Facsimile ____ Email

Travis L. Thompson

Attachment
A

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 THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	Docket No. CM-DC-2010-001 **FINAL ORDER REGARDING APRIL 2012 FORECAST SUPPLY** **(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 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." [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.

[1] 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.[2] 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.

[2] 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 patters 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.

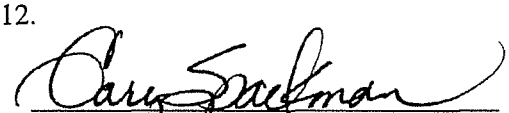
ORDER

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 13th day of April, 2012.



GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

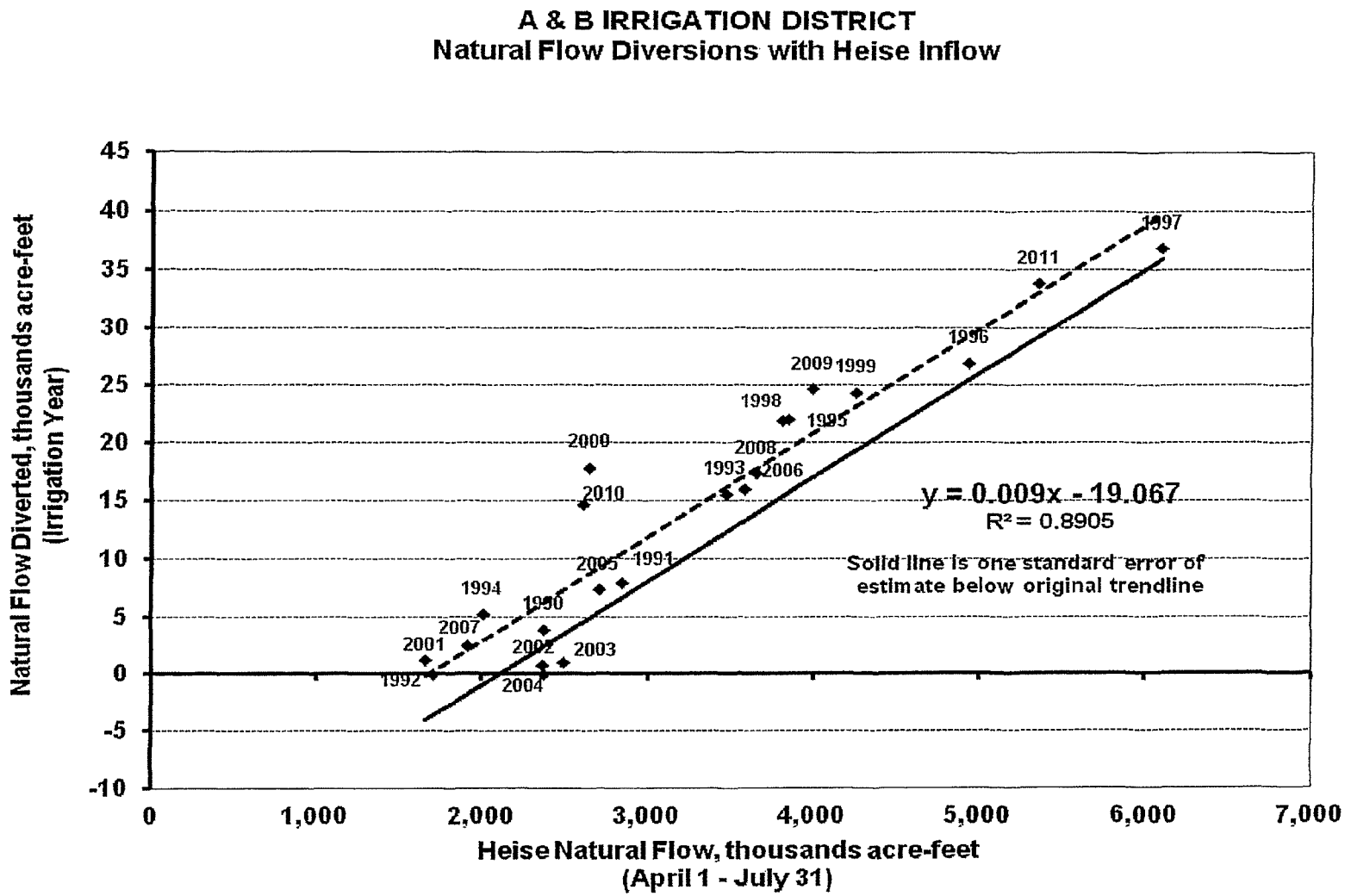
I HEREBY CERTIFY that on this 13th day of April, 2012, the above and foregoing, was served by the method indicated below, and addressed to the following:

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	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
C. Thomas Arkoosh CAPITOL LAW GROUP, PLLC P.O. Box 32 Gooding, ID 83330-0032 tarkoosh@capitollawgroup.net	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ 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	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Kathleen M. Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th Street South Terrace, Suite 370Denver, CO 80202 david.gehlert@usdoj.gov	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

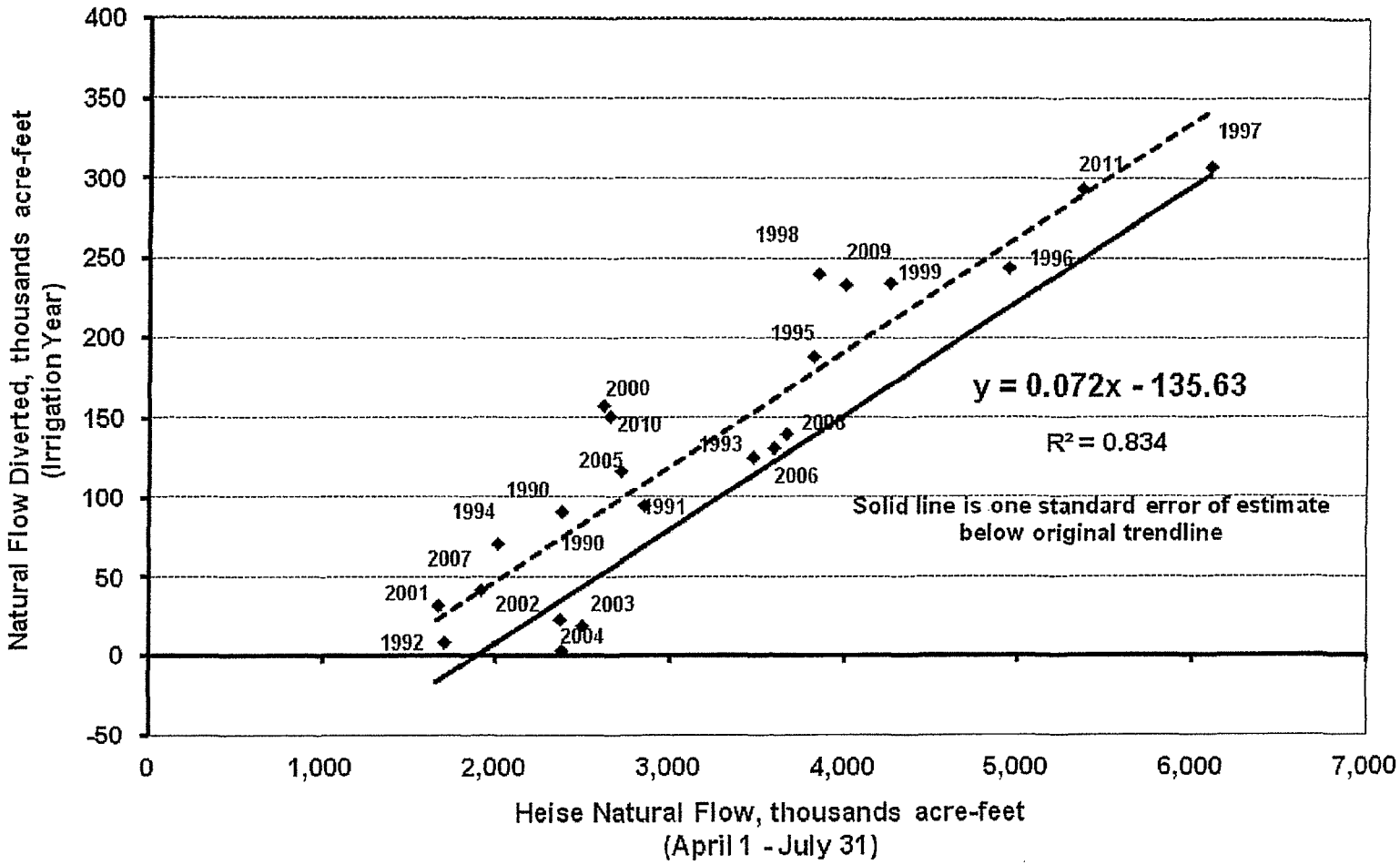
Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@pn.usbr.gov	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Sarah A. Klahn Mitra Pemberton WHITE JANKOWSKI 511 16th St., Ste. 500 Denver, CO 80202 sarahk@white-jankowski.com mitrap@white-jankowski.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Dean A. Tranmer City of Pocatello P.O. Box 4169 Pocatello, ID 83205 dtranmer@pocatello.us	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
William A. Parsons Parsons, Smith & Stone, LLP P.O. Box 910 Burley, ID 83318 wparsons@pmt.org	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Michael C. Creamer Jeffrey C. Fereday GIVENS PURSLEY LLP P.O. Box 2720 Boise, ID 83701-2720 mcc@givenspursley.com jcf@givenspursley.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
Lyle Swank IDWR—Eastern Region 900 N. Skyline Drive Idaho Falls, ID 83402-6105 lyle.swank@idwr.idaho.gov	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
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	☐ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

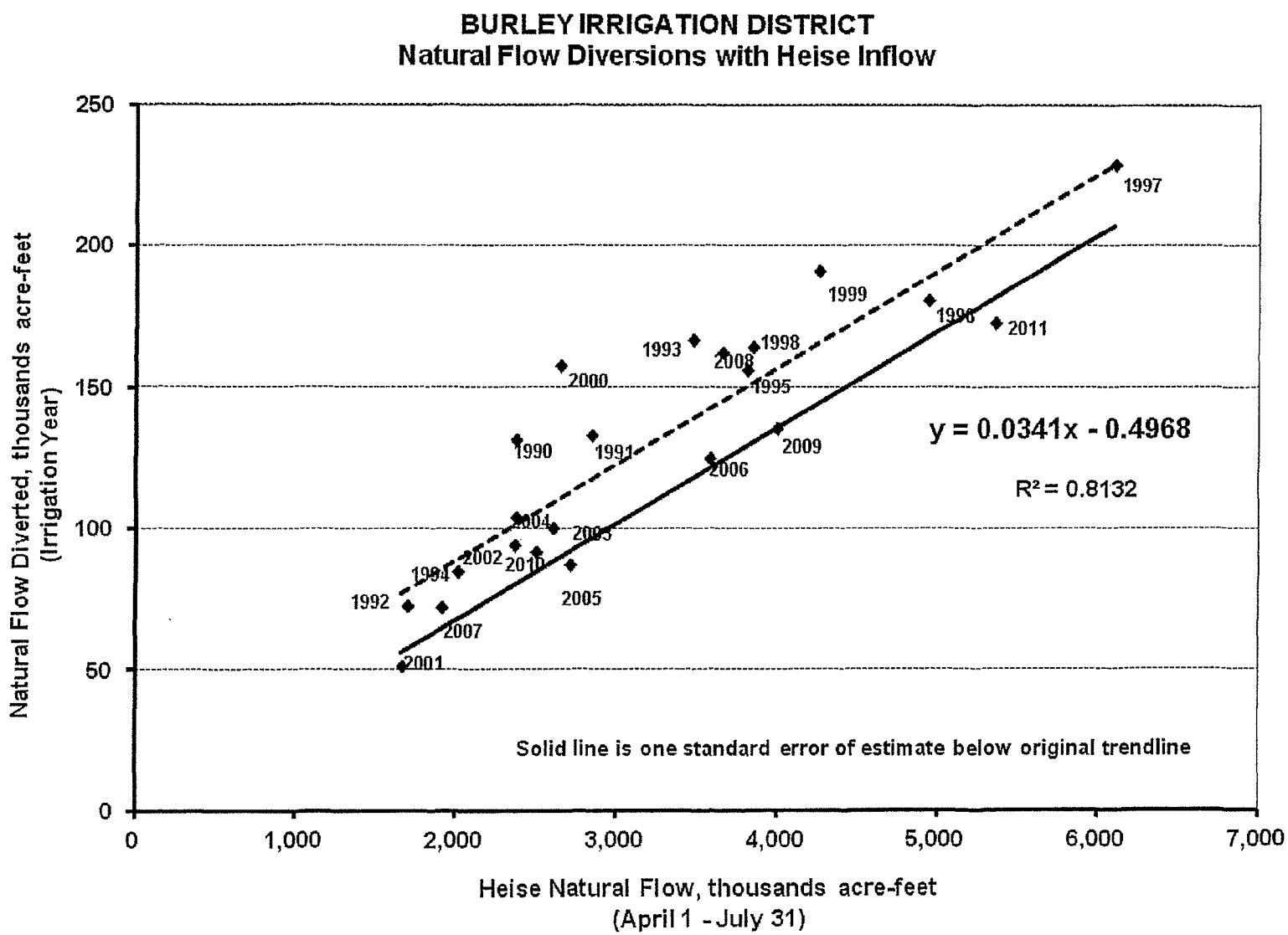
Victoria Wigle

Victoria Wigle
Administrative Assistant

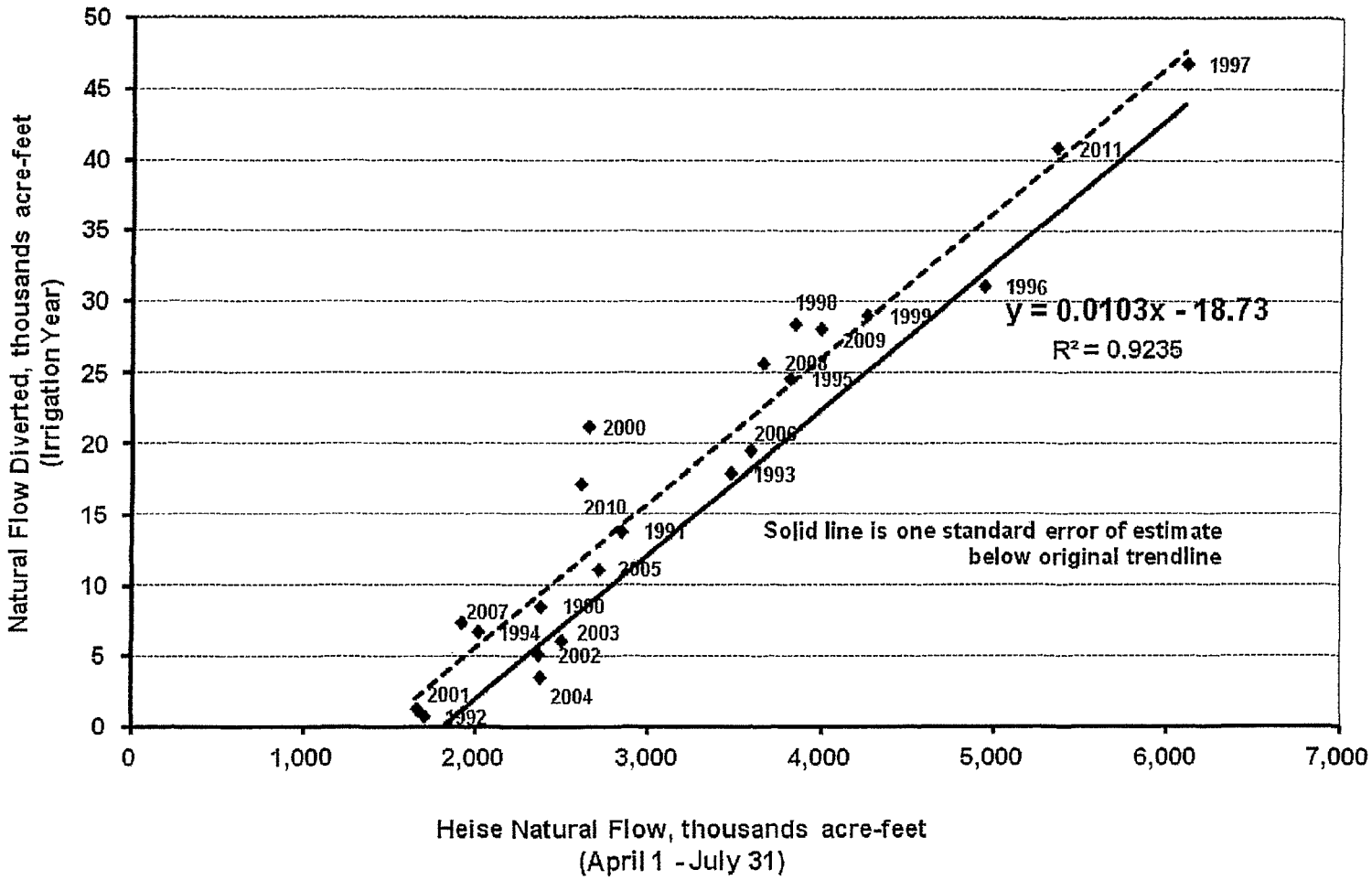

A & B IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow
Natural Flow Diverted, thousands acre-feet (Irrigation Year)
Heise Natural Flow, thousands acre-feet (April 1 - July 31)
45
40
35
30
25
20
15
10
5
0
-5
-10
0
1,000
2,000
3,000
4,000
5,000
6,000
7,000
1997
2011
1996
2009
1999
1998
1995
2000
2008
1993
2006
2010
2005
1991
1994
1990
2007
2001
2002
2003
1992
2004
y = 0.009x - 19.067
R² = 0.8905
Solid line is one standard error of estimate below original trendline

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

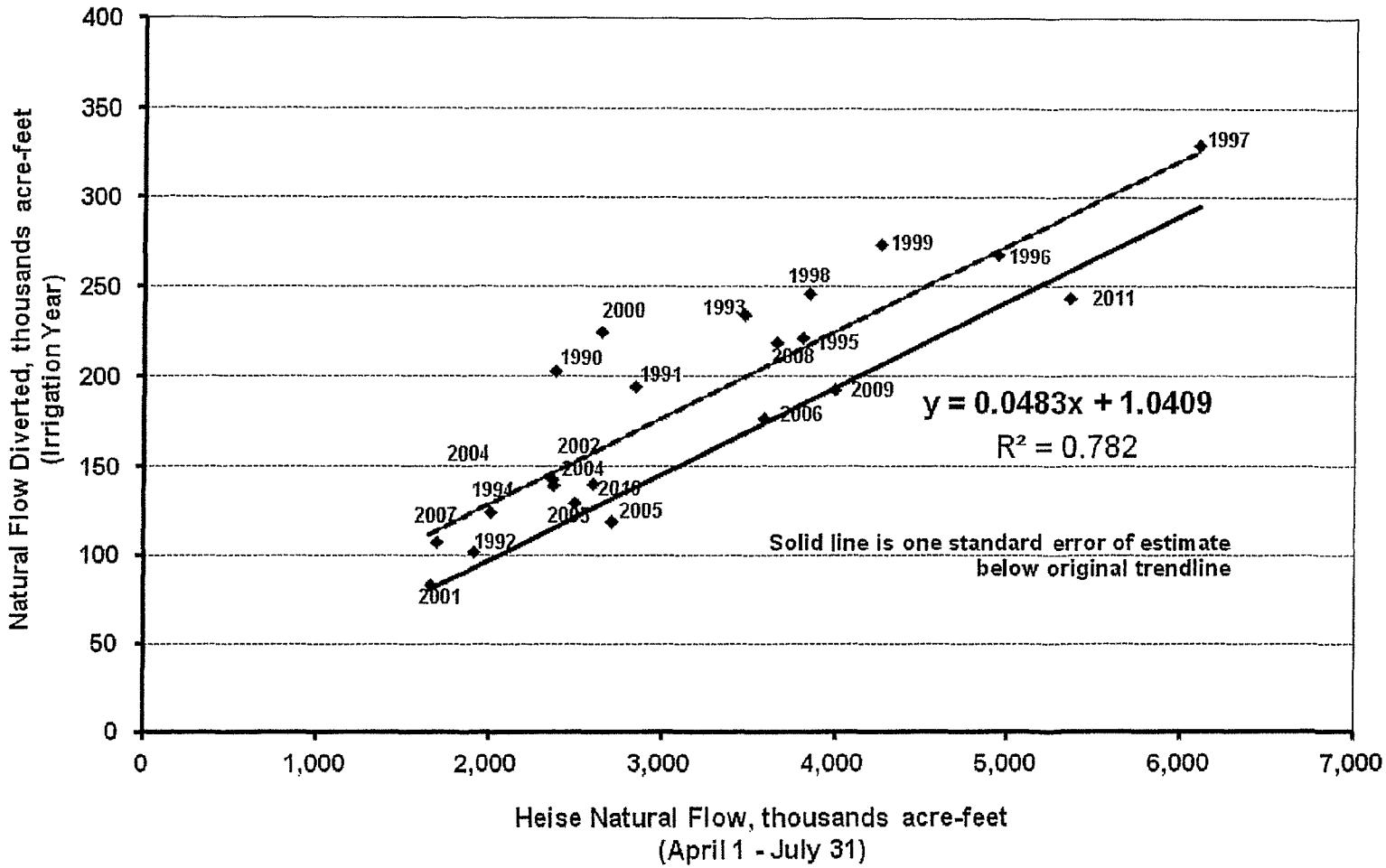


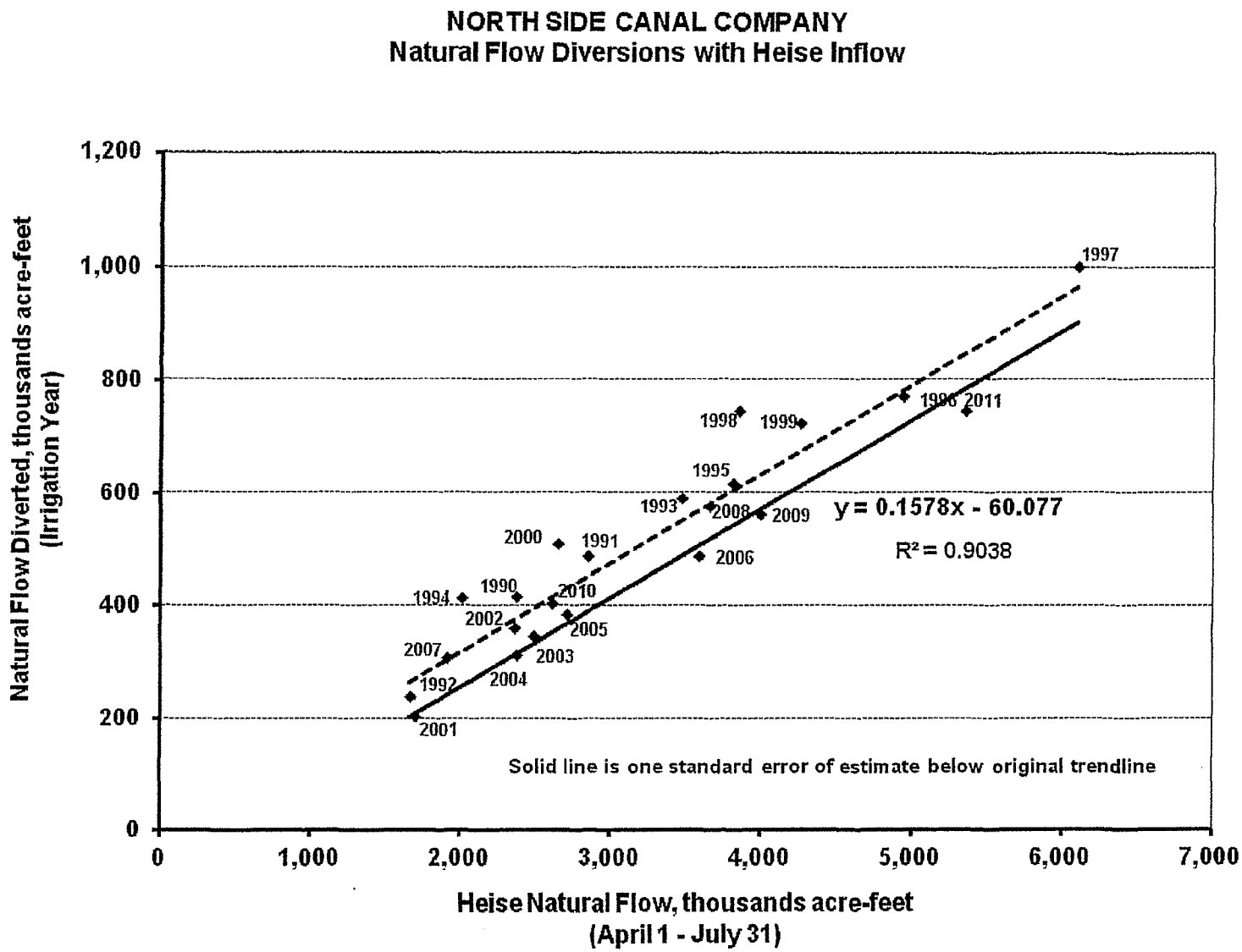

BURLEY IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow
Natural Flow Diverted, thousands acre-feet
(Irrigation Year)
Heise Natural Flow, thousands acre-feet
(April 1 - July 31)
y = 0.0341x - 0.4968
R² = 0.8132
Solid line is one standard error of estimate below original trendline
0
50
100
150
200
250
0
1,000
2,000
3,000
4,000
5,000
6,000
7,000
1997
1999
1996
2011
1993
1998
2008
1995
2000
1990
1991
2009
2006
2004
2003
2002
2010
1994
1992
2005
2007
2001

MILNER IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow

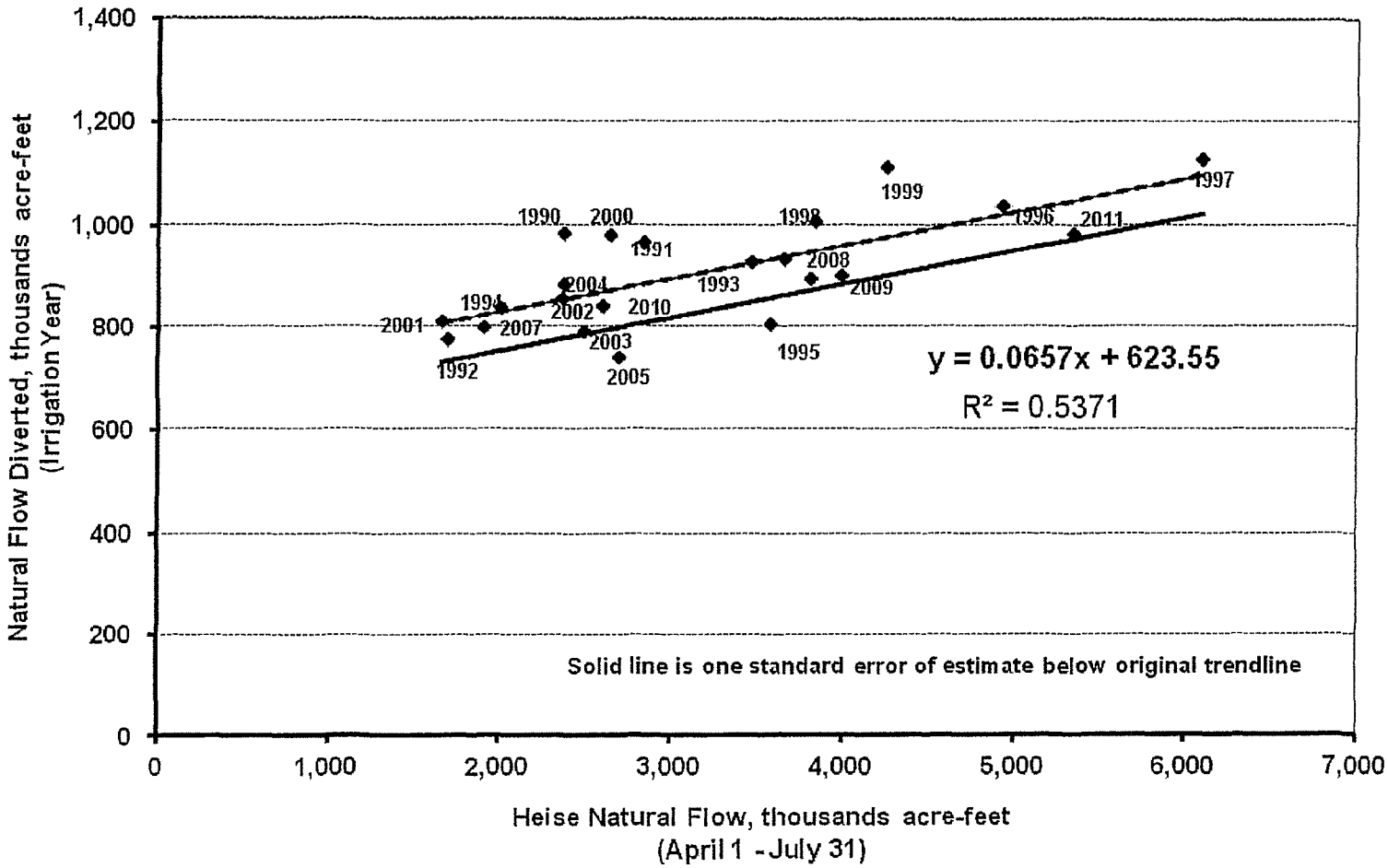


MINIDOKA IRRIGATION DISTRICT
Natural Flow Diversions with Heise Inflow




NORTH SIDE CANAL COMPANY
Natural Flow Diversions with Heise Inflow
Natural Flow Diverted, thousands acre-feet (Irrigation Year)
Heise Natural Flow, thousands acre-feet (April 1 - July 31)
1,200
1,000
800
600
400
200
0
0
1,000
2,000
3,000
4,000
5,000
6,000
7,000
1997
1998
1999
1996
2011
1995
1993
2008
2009
2000
1991
2006
1990
1994
2010
2002
2005
2007
2003
1992
2004
2001
y = 0.1578x - 60.077
R² = 0.9038
Solid line is one standard error of estimate below original trendline

TWIN FALLS CANAL COMPANY
Natural Flow Diversions with Heise Inflow



Attachment
B

John K. Simpson, ISB #4242
Travis L. Thompson, ISB #6168
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
P.O. Box 485
Twin Falls, Idaho 83303-0485
Telephone: (208) 733-0700
Facsimile: (208) 735-2444

Attorneys for A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company, and Twin Falls Canal Company

W. Kent Fletcher, ISB #2248
FLETCHER LAW OFFICE
P.O. Box 248
Burley, Idaho 83318
Telephone: (208) 678-3250
Facsimile: (208) 878-2548

Attorneys for Minidoka Irrigation District

C. Thomas Arkoosh, ISB #2253
CAPITOL LAW GROUP PLLC
P.O. Box 32
Gooding, Idaho 83330
Telephone: (208) 934-8872
Facsimile: (208) 934-8873

Attorneys for American Falls Reservoir District #2

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 THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	Docket No. CM-DC-2010-001 **SURFACE WATER COALITION'S PETITION REQUESTING HEARING ON DIRECTOR'S *FINAL ORDER REGARDING APRIL 2012 FORECAST SUPPLY (METHODOLOGY STEPS 1-8)* / MOTION TO AUTHORIZE DISCOVERY**

COME NOW, A&B Irrigation District, American Falls Reservoir District #2, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company (collectively hereafter referred to as the "Surface Water Coalition", "Coalition", or "SWC"), by and through counsel of record, and hereby submit their *Petition Requesting Hearing on Final Order Regarding April 2012 Forecast Supply / Motion to Authorize Discovery* pursuant to Idaho Code § 42-1701A(3) and the Department's Rules of Procedure (IDAPA 37.01.01. *et seq.*).[1]

INITIAL REASONS FOR PETITION

On April 12, 2012 the Interim Director issued the *Final Order Regarding April 2012 Forecast Supply* ("April Forecast Order"). The April Forecast Order purports to implement Steps 1-8 of the *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* ("Methodology Order").[2]

With respect to Step 1, the Director notes that no parties other than Minidoka Irrigation District submitted electronic shape files delineating the total irrigated acres to the Department by April 1. Notwithstanding that the Director's entire methodology is disputed and subject to challenge before the District Court, there was no reason to submit such information to IDWR. First, Step 1 asks the SWC "to confirm in writing that the existing electronic shape file from the previous year has not varied by more than 5%." Based upon representations by IDWR's counsel in mid-March, it was the SWC's understanding that IDWR would use the same shape files that it did in 2011, which were the recommendations for the SWC's water rights in the SRBA. Although the rest of the SWC did not confirm this "in writing" in 2011, IDWR used its

[1] Although the Director's order does not contain the standard reference allowing parties to petition for a hearing under Idaho Code § 42-1701A(3), the Coalition is entitled to request one pursuant to the statute.
[2] The Director's Methodology Order is currently on appeal to the Twin Falls County District Court (consolidated cases CV-2010-382 *et al.*). The district court judicial review proceeding is stayed until the Idaho Supreme Court issues a decision in consolidated appeal no. 38191-2010.

recommendations in implementing the Methodology Order in 2011. Based upon IDWR's actions in 2011, and the representations that it would use the same information in 2012, the SWC believed that Step 1 would be implemented the same way without the requirement to provide further information.

With respect to Step 3, the Methodology Order provides the following:

> Typically within the first two weeks of April, the USBR and USACE issue their Joint Forecast that predicts an unregulated inflow volume at the Heise Gage for the period April 1 through July 31. Within fourteen (14) days after issuance of the Joint Forecast, 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.

In the April Forecast Order the Director implements the above-referenced Step 3 as follows:

> 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. 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.

April Forecast Order at 3.

Based upon information and belief, the Director relied upon the wrong, or an outdated joint forecast for the unregulated inflow of the Snake River at Heise (April – July) at the time he issued the April Forecast Order on Friday April 13, 2012. It is the SWC's understanding that the joint forecast used by U.S. Bureau of Reclamation and the U.S. Army Corps of Engineers, as

well as Water District 01, was only 85% of average, not the 91% used by the Director. Accordingly, the predicted natural flow supply is in error. In addition, the Director's reliance upon 2011 storage allocations as representing the 2012 storage allocation may also be incorrect. The April Forecast Order should be revised to use the correct joint forecast, including the most current and accurate information available to the Director at the time he issued the order.

MOTION TO AUTHORIZE DISCOVERY

The SWC hereby moves for order authorizing discovery in this matter pursuant to Rule 521 of the Department's Rules of Procedure. The SWC requests the opportunity to discover the factual basis and analysis performed by the Director in issuing the April Forecast Order.

REQUEST FOR HEARING

The SWC, pursuant to Idaho Code § 42-1701A(3) and Rule 740.02.b of the Department's Rules of Procedure, hereby requests a hearing on the Director's April Forecast Order. The SWC reserves the right to amend this petition as necessary.

DATED this 27th day of April, 2012.

BARKER ROSHOLT & SIMPSON LLP

Travis L. Thompson

Attorneys for A&B Irrigation District, Burley Irrigation District, Twin Falls Canal Company, North Side Canal Company, and Milner Irrigation District

FLETCHER LAW OFFICE

W. Kent Fletcher

Attorneys for Minidoka Irrigation District

CAPITOL LAW GROUP PLLC

C. Thomas Arkoosh

Attorneys for American Falls Reservoir District #2

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2012, I served a true and correct copy of the foregoing *Surface Water Coalition's Petition Requesting Hearing on Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8) / Motion to Authorize Discovery* on the following by the method indicated:

Interim Director Gary Spackman c/o Victoria Wigle State of Idaho Dept of Water Resources 322 E Front St Boise ID 83720-0098 *** service by electronic mail facsimile – 208-287-6700 gary.spackman@idwr.idaho.gov victoria.wigle@idwr.idaho.gov	Matt Howard U.S. Bureau of Reclamation 1150 N. Curtis Rd. Boise ID 83706-1234 *** service by electronic mail only mhoward@pn.usbr.gov emcgarry@pn.usbr.gov	IDWR – Eastern Region 900 N. Skyline Dr., Suite A Idaho Falls, ID 83402-1718 *** service by electronic mail only lyle.swank@idwr.idaho.gov
Randy Budge Candice McHugh Racine Olson PO Box 1391 Pocatello ID 83204-1391 *** service by electronic mail only rcb@racinelaw.net cmm@racinelaw.net	Sarah A. Klahn Mitra Pemberton White & Jankowski, LLP 511 Sixteenth Street, Suite 500 Denver, CO 80202 *** service by electronic mail only facsimile – 303-825-5632 sarahk@white-jankowski.com mitrap@white-jankowski.com	David Gehlert ENRD – DOJ 999 18th St. South Terrace, Suite 370 Denver, CO 80202 *** service by electronic mail only david.gehlert@usdoj.gov
A. Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 *** service by electronic mail only facsimile – 208-234-6297 dtranmer@pocatello.us	William A. Parsons Parsons, Smith & Stone LLP P.O. Box 910 Burley, ID 83318 *** service by electronic mail only wparsons@pmt.org	IDWR – Southern Region 1341 Fillmore St., Suite 200 Twin Falls, ID 83301-3380 *** service by electronic mail only allen.merritt@idwr.idaho.gov cindy.yenter@idwr.idaho.gov
Michael C Creamer Jeffrey C. Fereday Givens Pursley 601 W Bannock St Ste 200 PO Box 2720 Boise ID 83701-2720 *** service by electronic mail only mcc@givenspursley.com jcf@givenspursley.com	Kathleen Carr US Dept Interior, Office of Solicitor Pacific Northwest Region, Boise 960 Broadway Ste 400 Boise ID 83706 *** service by electronic mail only facsimile – 208-334-1918 kathleenmarion.carr@sol.doi.gov	

Travis L. Thompson

Attachment
C

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 THE BENEFIT OF A&B IRRIGATION DISTRICT, AMERICAN FALLS RESERVOIR DISTRICT #2, BURLEY IRRIGATION DISTRICT, MILNER IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, NORTH SIDE CANAL COMPANY, AND TWIN FALLS CANAL COMPANY	Docket No. CM-DC-2010-001 **ORDER DENYING PETITION FOR RECONSIDERATION; DENYING MOTION TO AUTHORIZE DISCOVERY; DENYING REQUEST FOR HEARING** **(METHODOLOGY STEPS 1 - 8)**

On April 27, 2012, the Surface Water Coalition ("SWC") filed a *Petition Requesting Hearing on Director's Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8) / Motion to Authorize Discovery* ("Petition") with the Idaho Department of Water Resources ("Director" or "Department"). The Petition seeks three forms of relief. First, the Petition asks the Director to reconsider findings of fact and conclusions of law made in the April 13, 2012 *Final Order Regarding April 2012 Forecast Supply (Methodology Steps 1-8)* ("April Forecast Order") concerning Step 1 and Step 3. Second, the Petition asks the Director to authorize discovery in order "to discover the factual basis and analysis performed by the Director in issuing the April Forecast Order." *Petition* at 4. Lastly, the Petition "requests a hearing on the Director's April Forecast Order." *Id.*

A. Reconsideration of Steps 1 and 3

The Petition asks the Director to reconsider findings of fact and conclusions of law in the April Forecast Order concerning Step 1 and Step 3. While not captioned specifically as a petition for reconsideration, the Director will treat the request as a petition for reconsideration. IDAPA 37.01.01.740.02.a.

1. Step 1

Step 1 of the Methodology Order[1] requires the SWC to "confirm in writing [by April 1] that the existing electronic shape file from the previous year has not varied by more than 5% . . . ." *April Forecast Order* at 2 (emphasis added). For the 2012 irrigation season, Minidoka Irrigation District, confirmed its irrigated area in writing with the Department. In addition, after the SWC filed its Petition, the Director discovered that on February 23, 2012, American Falls Reservoir District No. 2 sent a letter to the Director stating: "Based on our records from the previous year we haven't varied by more than 5% of the number of acres shown in the previous information filed by the District." The Department received the letter on March 9, 2012.

In its Petition, the SWC states:

> Based upon representations by IDWR's counsel in mid-March, it was the SWC's understanding that IDWR would use the same shape files that it did in 2011, which were the recommendations for the SWC's water rights in the SRBA. . . . . Based upon IDWR's actions in 2011, and the representations that it would use the same information in 2012, the SWC believed that Step 1 would be implemented the same way without the requirement to provide further information.

Petition at 2-3.

Counsel for the Department had a conversation with an attorney for the SWC concerning Step 1. Counsel for the Department explained the Step 1 requirement that a document be submitted concerning 2012 irrigated area. Whether or not there was a misunderstanding between counsel is immaterial, as Step 1 requires written documentation of each entity's irrigated area. Minidoka Irrigation District and American Falls Reservoir District No. 2 understood the requirement for a written response.

To the extent the SWC seeks reconsideration of determinations concerning Step 1, the Director denies the request. Step 1 requires SWC entities to submit a "writing" concerning irrigated area by April 1 of each year.

2. Step 3

i. 2012 Joint Forecast

In order to predict material injury, the Department uses the April forecast ("Joint Forecast"), prepared annually by the United States Bureau of Reclamation ("USBR") and the United States Army Corp of Engineers ("USCOE"). *Methodology Order* at 9. The Joint

[1] "Methodology Order" refers to the June 23, 2010 *Second Amended Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover.* The Methodology Order established 10 steps for determining material injury to members of the SWC. 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 nos. CV-2010-382 *et al.* The judicial review proceedings are stayed pending a decision by the Idaho Supreme Court in the SWC delivery call, consolidated before the Idaho Supreme Court in case no. 38191-2010.

Forecast, "for the period April 1 through July 31 is generally as accurate a forecast as is possible using current data gathering and forecasting techniques." *Id.* (emphasis added). The Joint Forecast is typically issued "within the first week of April." *Id.* at 19. "The actual natural flow volume that will be used in the Director's Forecast Supply will be one standard error below the regression line, which underestimates the available supply." *Id.* (emphasis added). "By using one standard error of estimate, the Director purposefully underestimates the water supply that is predicted in the Joint Forecast. . . . . The Director's prediction of material injury . . . is purposefully conservative." *Id.* at 31. The regression analyses were included as attachments to the April Forecast Order.

For 2012, the Joint Forecast was issued on April 5, predicting a 91% of average supply of natural flow. *April Forecast Order* at 3. Applying the Joint Forecast to Step 3, and purposefully underestimating natural flow supply by one standard error, the Director found no member of the SWC would be materially injured in 2012. *Id.*

In its Petition, the SWC alleges as follows:

> Based upon information and belief, the Director relied upon the wrong, or an outdated joint forecast for the unregulated inflow of the Snake River at Heise (April – July) at the time he issued the April Forecast Supply Order on Friday April 13, 2012. It is the SWC's understanding that the joint forecast used by the U.S. Bureau of Reclamation and the U.S. Army Corp of Engineers, as well as Water District 01, was only 85% of average, not the 91% used by the Director. Accordingly, the predicted natural flow supply is in error. . . . . The April Forecast Order should be revised to use the correct joint forecast, including the most current and accurate information available to the Director at the time he issued the order.

Petition at 3-4.

On April 16, 2012, the USBR and USCOE issued a mid-month forecast, for the period April 16 to July 31. The mid-month forecast predicted 85% of average natural flow. Although not expressly identified as such by the SWC, it appears the mid-month forecast is the "joint forecast" referred to in the SWC Petition.

The Methodology Order requires the Director to use the actual Joint Forecast (April 1 – July 31), not a mid-month forecast (April 16 – July 31). *Methodology Order* at 9. Consistent with the Methodology Order and as stated in the April Forecast Order, the Department used the Joint Forecast, which was issued on April 5. The April Forecast Order was signed and served on April 13, 2012. The mid-month "joint forecast" referred to by the SWC is not the actual Joint Forecast. Moreover, the mid-month "joint forecast" was issued after the April Forecast Order, and was not available for the Director to consider. The SWC is therefore incorrect in stating, "the Director relied upon the wrong, or an outdated joint forecast for the unregulated inflow of the Snake River at Heise (April – July) at the time he issued the April Forecast Order on Friday April 13, 2012."

Even if the Director were to consider the mid-month "joint forecast" and do an after-the-fact revision to the April Forecast Order, the Director would still predict no material injury, as is shown in the following table:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Supply	BLY 2006/2008	Shortfall
A&B	9,269	136,167		145,436	58,492	-
AFRD2	90,470	389,376	1,000	480,846	415,730	-
BID	106,567	224,084	5,130	335,781	250,977	-
Milner	13,597	88,502		102,099	46,332	-
Minidoka	152,768	362,666	8,370	523,804	362,884	-
NSCC	435,669	850,778	(7,750)	1,278,697	965,536	-
TFCC	829,798	243,322	(6,750)	1,066,370	1,045,382	-
					Total	0

Compare with April Forecast Order at 3 (finding "0" shortfall).

ii. 2012 Storage Allocation

In its Petition, the SWC states as follows: "[T]he Director's reliance upon 2011 storage allocations as representing the 2012 storage allocation may also be incorrect." *Petition* at 4. To predict the storage allocation for each SWC entity the Department "evaluate[s] the current reservoir conditions and the current water supply outlook to determine historical analogous year or years to predict reservoir fill." *Methodology Order* at 20. At the April 11, 2012 Water Supply Committee Meeting in Boise, the USBR presented that the Upper Snake Reservoir system was at approximately 83% of capacity with approximately 660,600 acre-feet of total space available. Given the Joint Forecast of 91% of average supply of natural flow, the USBR reported it expected the reservoir system to fill. In order to predict each SWC entity's storage allocation for 2012, the Department examined a recent, analogous year. In 2011, all storage account filled. Given that the system is expected to fill, in the April Forecast Order, the Department used the actual 2011 storage allocation as the predicted 2012 storage allocation.

The Director denies the SWC's petition for reconsideration as it pertains to Step 3. The Director used the actual Joint Forecast for predicting natural flow and predicted storage allocations consistent with the Methodology Order.

B. Motion to Authorize Discovery

According to the Petition, the SWC "requests the opportunity to discover the factual basis and analysis performed by the Director in issuing the April Forecast Order." *Petition* at 4. The April Forecast Order followed the requirements of the Methodology Order. The Director therefore denies the request for discovery.

As the Department has done with prior orders, included herewith is a CD with data used by the Department in the April Forecast Order.

C. Request for Hearing

Citing Idaho Code § 42-1701A(3) and IDAPA 37.01.01.740.02.b, the SWC seeks a hearing on the April Forecast Order. Idaho Code § 42-1701A(3) states as follows:

> Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any 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.

Emphasis added.

Parties to this proceeding have previously been afforded hearings—once in 2008 and again in 2010. The Department applied the steps discussed in the Methodology Order, and did not deviate from those steps. Since the steps and processes used in this order did not change from those used in orders that were the subject of previous hearings, the SWC is not entitled to another hearing.

ORDER

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

The Director DENIES the SWC's petition for reconsideration concerning Methodology Step 1 and Step 3.

The Director DENIES the SWC's motion to authorize discovery.

The Director DENIES the SWC's request for hearing.

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 9th day of May, 2012.

GARY SPACKMAN
Interim Director

Attachment D

IN THE DISTRICT COURT OF THE _____ JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF _____.

RE: PETITIONS FOR JUDICIAL REVIEW OR ACTIONS FOR DECLARATORY RELIEF OF DECISIONS FROM THE IDAHO DEPARTMENT OF WATER RESOURCES	)	**CASE NO. _____**
	)	**NOTICE OF REASSIGNMENT**

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, declares that all petitions for judicial review made pursuant to I.C. § 42-1701A of any decision from the Department of Water Resources be assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District, and

WHEREAS Idaho Supreme Court Administrative Order dated December 9, 2009, vests in the Snake River Basin Adjudication District Court the authority to adopt procedural rules necessary to implement said Order, and

WHEREAS on July 1, 2010, the Snake River Basin Adjudication District Court issued an Administrative Order regarding the Rule of Procedure Governing Petitions for Judicial Review or Actions for Declaratory Relief of Decisions from the Idaho Department of Water Resources.

THEREFORE THE FOLLOWING ARE HEREBY ORDERED:

1. The above-matter is hereby assigned to the presiding judge of the Snake River Basin Adjudication District Court of the Fifth Judicial District for disposition and further proceedings.

2. All further documents filed or otherwise submitted in this matter, and all further filing fees filed or otherwise submitted in this matter, shall be filed with the Snake River Basin Adjudication District Court of the Fifth Judicial District at P.O. Box 2707, Twin Falls, Idaho

83303-2707, provided that checks representing further filing fees shall be made payable to the county where the original petition for judicial review or action for declaratory judgment was filed.

DATED this ___ day of _____, 2010.

CLERK OF THE DISTRICT COURT

By:_____
Deputy Clerk