

**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 2024 FORECAST SUPPLY
(METHODOLOGY STEPS 1-3)**

FINDINGS OF FACT

1. On July 19, 2023, the Idaho Department of Water Resources (“Department”) issued its *Sixth Final Order Regarding Methodology for Determining Material Injury to Reasonable In-Season Demand and Reasonable Carryover* (“*Methodology Order*”). The *Methodology Order* established nine steps for determining material injury to members of the Surface Water Coalition (“SWC”). This order applies steps 1, 2, and 3 of the *Methodology Order*.¹

A. Step 1

2. By April 1 of each year, Step 1 requires members of the SWC to submit to the Department electronic shapefiles delineating the total anticipated irrigated acres for the upcoming year “or confirm in writing that the existing electronic shape file submitted by SWC has not varied by more than five percent.” *Methodology Order* ¶ 1 at 41.

3. On February 21, 2024, the Department received a letter from American Falls Reservoir District #2 (“AFRD2”), stating that its total number of irrigated acres has not varied by more than five percent.

4. On March 5, 2024, Minidoka Irrigation District (“Minidoka”) submitted its electronic shapefile delineating its total irrigated acres to the Department.

5. On April 1, 2024, the Department received a letter from A&B Irrigation District (“A&B”), Burley Irrigation District (“BID”), Milner Irrigation District (“Milner”), North Side Canal Company (“NSCC”) and Twin Falls Canal Company (“TFCC”). In the letter, A&B, BID, Milner, and NSCC confirmed that their total number of irrigated acres for 2024 will not vary by

¹ Shortly after the *Methodology Order* was issued, the Idaho Ground Water Appropriators, Inc., and certain Idaho cities filed petitions for judicial review in Ada County (Nos. CV01-23-13173 and CV01-23-13238). The filing of a petition for judicial review does not stay the effectiveness of the order. I.C. § 67-5274. No party to the judicial review proceedings has requested a stay of the *Methodology Order*. Accordingly, the Director will apply the *Methodology Order* in this order.

more than five percent from the electronic shapefiles submitted in prior years. With the letter, TFCC submitted an electronic shapefile delineating its total irrigated acres.

6. Based on the information submitted by the SWC, the Department will use the following total irrigated acres:

	Total Irrigated Acres ²	Data Source
A&B	15,924 ³	SRBA Partial Decree
AFRD2	62,361	SRBA Partial Decree
BID	46,035	2013 shapefile submitted by BID, reduced by the Department for overlapping acres and acres outside of service area.
Milner	13,264	2010 service area shapefile, reduced by the Department for overlapping acres and acres outside of service area.
Minidoka	74,725	2024 shapefile submitted by Minidoka, reduced by the Department for overlapping acres and acres outside of the service area.
NSSC	154,067	SRBA Partial Decree
TFCC	196,162	SRBA Partial Decree

B. Step 2

7. Step 2 states that, within fourteen days of the issuance of the joint forecast prepared by the United States Bureau of Reclamation (“USBR”) and the United States Army Corp of Engineers (“USACE”), the Director “will issue a final order predicting the April [Forecast Supply] for the water year for each SWC entity. The Director will compare the April [Forecast Supply] for each SWC entity to the [Baseline Demand] for each SWC entity to determine if an in-season demand shortfall (“IDS”) is anticipated for the upcoming irrigation season.” *Methodology Order* ¶ 3 at 42.

8. On April 4, 2024, the USBR and USACE issued their joint forecast (“Joint Forecast”), predicting an unregulated inflow of 3,370,000 acre-feet at the Snake River near Heise gage for the period of April through July. The forecasted flow volume equates to 102% percent of the average.⁴ The Joint Forecast “is generally as accurate a forecast as is possible using current data gathering and forecasting techniques.” *Id.* ¶ 49 at 19 (citation omitted).

² “The number of irrigated acres used in this methodology order is the number of reported acres unless that number is larger than the decreed irrigated acres, and if so, then the decreed acres are used.” *Methodology Order* ¶ 22 at 11.

³ The question of whether A&B’s enlargement acres should be included in A&B’s total irrigated acreage count is an issue raised in the appeal of the *Methodology Order* currently pending before Judge Wildman in Ada County (No. CV01-23-13238). Because the matter is still under consideration and because there is no shortfall predicted for A&B, the Department has not modified the total irrigated acreage count for A&B.

⁴ The average is based on the years 1991–2020. The Joint Forecast relies on a “30-Year Climate Normal” to calculate an average April through July runoff volume.

9. The April–July Heise natural flow data from the years 1990–2023 were data inputs for the development of regression equations for A&B and Milner to predict the natural flow supply.⁵ Data greater or less than two standard deviations from average were excluded from the regression development.

10. The April–July Heise natural flow data from the years 1990–2023 and Box Canyon November–March total discharge data for the period 1989–2023, were data inputs for the development of multiple linear regression equations to predict the natural flow supplies for AFRD2, BID, Minidoka, NSCC, and TFCC. *Methodology Order* ¶ 49 at 19. The U.S. Geological Survey measures and monitors the flow at the Box Canyon stream flow measurement gage. The Box Canyon November–March total discharge used by the Director in the regression models for 2024 totaled 92,979 acre-feet.

11. The storage allocations were predicted for each SWC member. As of April 8, 2024, Water District No. 1’s preliminary water right accounting indicates water rights for Jackson Lake 1906, Lake Walcott, Jackson Lake 1910, Jackson Lake 1913, Henrys Lake 1917, Palisades Winter Water Savings, Island Park 1921, American Falls Winter Water Savings, American Falls, and Henrys Lake 1965 are satisfied. The remaining reservoir rights are 271,024 acre-feet short of satisfaction. Based on a comparison of the current Heise natural flow forecast to the analogous year of 2020, the Director anticipates the remaining reservoir water rights will be satisfied, and the SWC will receive a full storage allocation. The storage allocations are based on the anticipated full allocation minus evaporation charges.

12. Based on the above, the Director projects the following shortfalls:

	Predicted Natural Flow Supply	Predicted Storage Allocation	Minidoka Credit Adjustment	Total Forecast Supply	Baseline Demand (BLY 2018)	In-Season Demand Shortfall
A&B	11,752	135,194		146,946	64,192	0
AFRD2	97,606	386,596	1,000	485,202	458,890	0
BID	102,178	222,485	5,130	329,793	262,211	0
Milner	15,166	87,870		103,036	58,417	0
Minidoka	146,201	360,077	8,370	514,648	354,851	0
NSCC	421,878	844,703	-7,750	1,258,831	1,026,661	0
TFCC	812,780	241,584	-6,750	1,047,614	1,121,717	74,100
Total Predicted April In-Season Demand Shortfall (AF)						74,100

⁵ Attached hereto, as Attachment A, are the regression analyses for each SWC entity used to predict natural flow supply.

C. Step 3

13. Step 3 requires the following:

Step 3: By May 1, or within fourteen (14) days from issuance of the final order predicting the April [Forecast Supply], whichever is later in time, junior ground water users with approved mitigation plans for delivery of water must secure, to the satisfaction of the Director, a volume of water equal to their proportionate share of the April IDS unless the April IDS is revised as explained below in paragraph 6. If junior ground water users secured water for a reasonable carryover shortfall to an individual SWC member in the previous year, the current-year mitigation obligation to the individual SWC member will be reduced by the quantity of water secured for the reasonable carryover shortfall. The secured water will not be required to be delivered to the injured members of the SWC until the Time of Need.

Methodology Order ¶ 4 at 42.

14. The predicted April IDS for TFCC is 74,100 acre-feet. Because the TFCC is the only SWC entity with a predicted shortfall, the total predicted April IDS is 74,100 acre-feet.

15. The Eastern Snake Plain Aquifer Model (“ESPAM”) is used to predict the junior priority water rights that must be curtailed to produce the volume of water equal to the predicted April IDS in the near Blackfoot to Minidoka reach. The ESPAM is updated periodically as new field measurements and advancements in modeling technology become available. ESPAM Version 2.2 (“ESPAM2.2”) is the latest model version.⁶

16. The Department ran ESPAM2.2 to predict the junior priority water rights within the area of common ground water supply that must be curtailed to produce the volume of water equal to the predicted April IDS between the May 1 and September 30 of this irrigation season pursuant to the *Methodology Order*. Ground water rights bearing priority dates junior to March 31, 1954, must be curtailed to produce the volume of water equal to the predicted April IDS in the near Blackfoot to Minidoka reach.

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. *See* Mem. Decision & Order on Pets. for Jud. Rev., *A&B Irr. Dist., Inc. v. Idaho Dep’t of Water Res.*, No. CV-2009-647 (Minidoka Cnty. Dist. Ct. Idaho May 4, 2010); Mem. Decision & Order on Pets. for Reh’g, *A&B Irr. Dist., Inc. v. Idaho Dep’t of Water Res.*, No. CV-2009-647 (Minidoka Cnty. Dist. Ct. Idaho Nov. 2, 2010).

⁶ The Department finalized ESPAM2.2 model documentation reports (including a model calibration report, a predictive uncertainty analysis, a superposition model scenario, and a curtailment scenario) on May 27, 2021. *See* Idaho Dep’t of Water Res., *ESPAM2.2 Reports* (2021), [https:// research.idwr.idaho.gov/files/projects/espam/browse/ESPAM22_Reports/](https://research.idwr.idaho.gov/files/projects/espam/browse/ESPAM22_Reports/).

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 Dep’t of Health & Welfare v. Doe*, 150 Idaho 36, 41, 244 P.3d 180, 185 (2010).

3. The Director must utilize the best available technology for determining the impact of junior ground water diversions. See *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 814, 252 P.3d 71, 95 (2011). ESPAM 1.1 and 2.1 are the model versions utilized previously in SWC delivery call proceedings. Previously, the Director determined that ESPAM 2.1 was the best available scientific tool for predicting the effects of ground water pumping. See *Idaho Ground Water Assoc. v. Idaho Dep’t of Water Res.*, 160 Idaho 119, 124, 369 P.3d 897, 902 (2016). ESPAM 2.2 is the latest version of the ESPAM model. The improvements incorporated into ESPAM 2.2, as discussed in Finding of Fact 15, make it the best available scientific tool for predicting the effects of ground water pumping in this proceeding.

4. In 2024, the Director will have sufficient information to quantify the irrigated areas for each of the SWC members as required by Step 1.

5. The USBR-USACE April Joint Forecast predicts an unregulated inflow of 3,370,000 acre-feet at the Snake River near Heise gage from April to July. The forecasted volume equates to 102% of the average.

6. The predicted April IDS is 74,100 acre-feet. Junior ground water users holding consumptive water rights bearing priority dates junior to March 31, 1954, within the Eastern Snake Plain Aquifer area of common ground water supply⁷ must mitigate for their proportionate share of the predicted April IDS in accordance with an approved mitigation plan.⁸ Junior ground

⁷ During the 2024 legislative session, the Idaho Legislature passed Senate Bill 1341 – ESPA Area of Common Groundwater Supply Expansion Act. This bill modifies the definition of the ESPA area of common ground water supply. Because the legislation does not become effective until July 1, 2024, the Department will continue to use the definition set forth in Rule 50 of the Department’s Rules for Conjunctive Management of Surface and Ground Water Resources until July 1, 2024.

⁸ There are seven approved mitigation plans responding to the SWC delivery call. The plans were filed by: 1) A&B Irrigation District, 2) Southwest Irrigation District and Goose Creek Irrigation District (collectively, “SWID”), 3) the Idaho Ground Water Appropriators, Inc. (“IGWA”), 4) certain cities commonly referred to as the “Coalition of Cities”, and 5) certain entities commonly referred to as the “Water Mitigation Coalition.” Recently, seven new mitigation plans were filed with the Department, but they have not been approved. Given the nature of certain plans, the Department must calculate the proportionate share of the predicted IDS. With regard to A&B Irrigation District’s mitigation plan, A&B Irrigation District’s proportionate share of the predicted April IDS of 74,100 acre-feet is 455 acre-feet. Due to the nature of the mitigation plans for SWID, the Coalition of Cities, and the Water Mitigation Coalition, these entities do not need to establish that they can mitigate for their proportionate share of the predicted IDS. IGWA has two approved mitigation plans. While uncertainty exists regarding the status of the plans, the Department will address the proportionate share obligated under each plan. Regarding IGWA’s mitigation plan CM-MP-2016-001 (the 2016 SWC/IGWA settlement agreement mitigation plan), IGWA does not need to establish that

water users mitigating for their proportionate share of the predicted April IDS with a secured volume of water pursuant to an approved mitigation plan must, to the satisfaction of the Director, secure their proportionate share for delivery to the injured members of the SWC on or before May 2, 2024. Because there was no carryover shortfall in the fall of 2023, junior ground water users have not previously secured mitigation water for a carryover shortfall. Accordingly, there is no adjustment to the mitigation obligation.

7. If, on or before May 2, 2024, ground water users holding consumptive water rights bearing priority dates junior to March 31, 1954, within the Eastern Snake Plain Aquifer area of common ground water supply fail to establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted April IDS of 74,100 acre-feet in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user. Junior ground water users who are mitigating with a secured volume of water are not required to assign the secured volume of water until after the Director issues a subsequent order requiring the assignment of the water.

8. If, at any time prior to the Director's final determination of the April Forecast Supply, the Director can determine with certainty that any member of the SWC has diverted more natural flow than predicted, or has accrued more storage than predicted, the Director will revise his initial, predicted IDS determination.

ORDER

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

The Director predicts an April IDS of 74,100 acre-feet. On or before May 2, 2024, ground water users holding consumptive water rights bearing priority dates junior to March 31, 1954, within the Eastern Snake Plain Aquifer area of common ground water supply shall establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted April IDS of 74,100 acre-feet in accordance with an approved mitigation plan. If a junior ground water user cannot establish, to the satisfaction of the Director, that they can mitigate for their proportionate share of the predicted April IDS in accordance with an approved mitigation plan, the Director will issue an order curtailing the junior-priority ground water user.

Dated this 18th day of April 2024.



MATHEW WEAVER
Director

it can mitigate its proportionate share of the predicted IDS. Regarding IGWA's 2009 storage water delivery mitigation plan CM-MP-2009-007, IGWA's obligation is 74,100 acre-feet, consistent with the rationale identified in the May 23, 2023 *Order Determining Deficiency in IGWA's Notice of Secured Water*. See *Order Determining Deficiency* at 4 (“[T]he plan clearly states that IGWA will mitigate for all ground water users, not just its members and non-member participants . . .”). Issues regarding the status of the plans will not be addressed here.

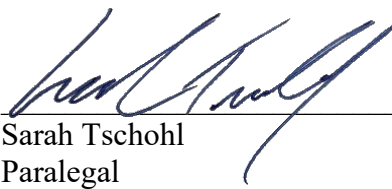
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April 2024, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>John K. Simpson MARTEN LAW LLP PO Box 2139 Boise, ID 83701-2139 jsimpson@martenlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Travis L. Thompson Abigail Bitzenburg MARTEN LAW LLP PO Box 63 Twin Falls, ID 83303-0063 tthompson@martenlaw.com abitzenburg@martenlaw.com jnielsen@martenlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE PO Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
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<p>David W. Gehlert Natural Resources Section Environment and Natural Resources Division U.S. Department of Justice 999 18th St., South Terrace, Suite 370 Denver, CO 80202 david.gehlert@usdoj.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Matt Howard US Bureau of Reclamation 1150 N Curtis Road Boise, ID 83706-1234 mhoward@usbr.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Sarah A Klahn Maximilian C. Bricker Somach Simmons & Dunn 1155 Canyon Blvd, Ste. 110 Boulder, CO 80302 sklahn@somachlaw.com mbricker@somachlaw.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>

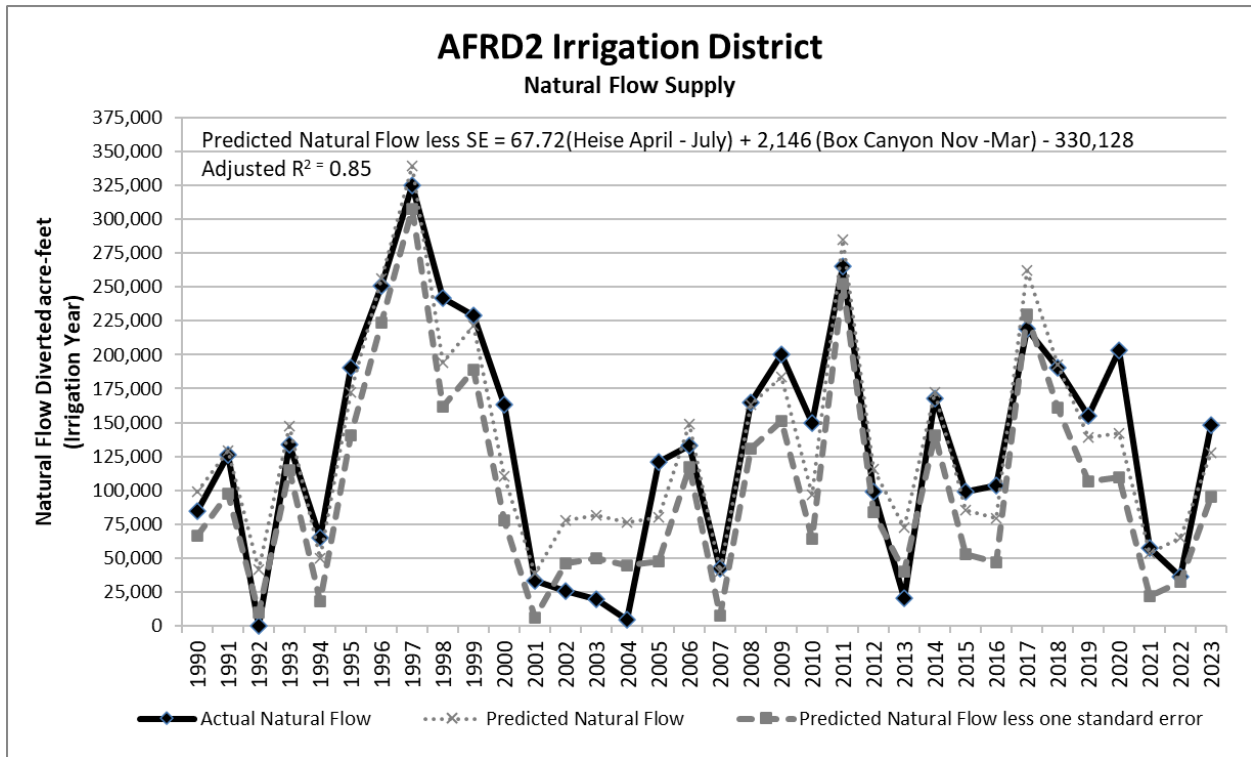
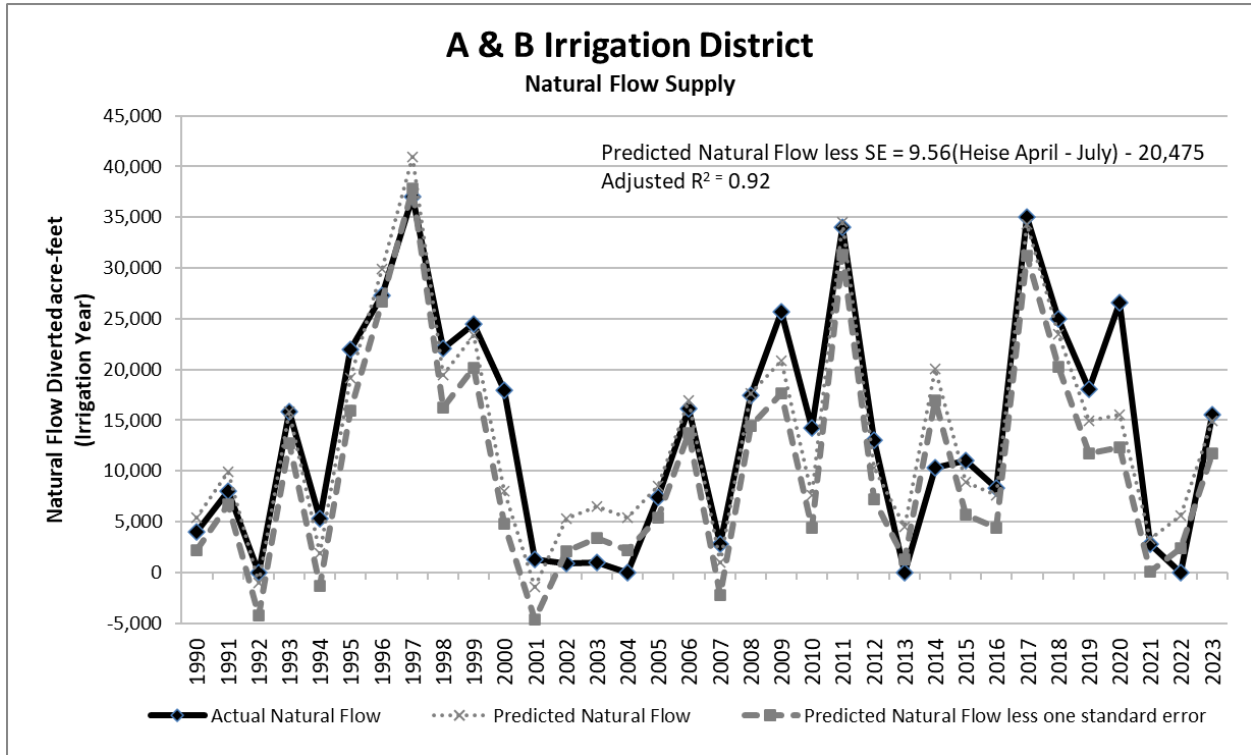
<p>Rich Diehl City of Pocatello PO Box 4169 Pocatello, ID 83205 rdiehl@pocatello.us</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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<p>Dylan Anderson DYLAN ANDERSON LAW PLLC PO Box 35 Rexburg, Idaho 83440 dylan@dylanandersonlaw.com</p>	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email
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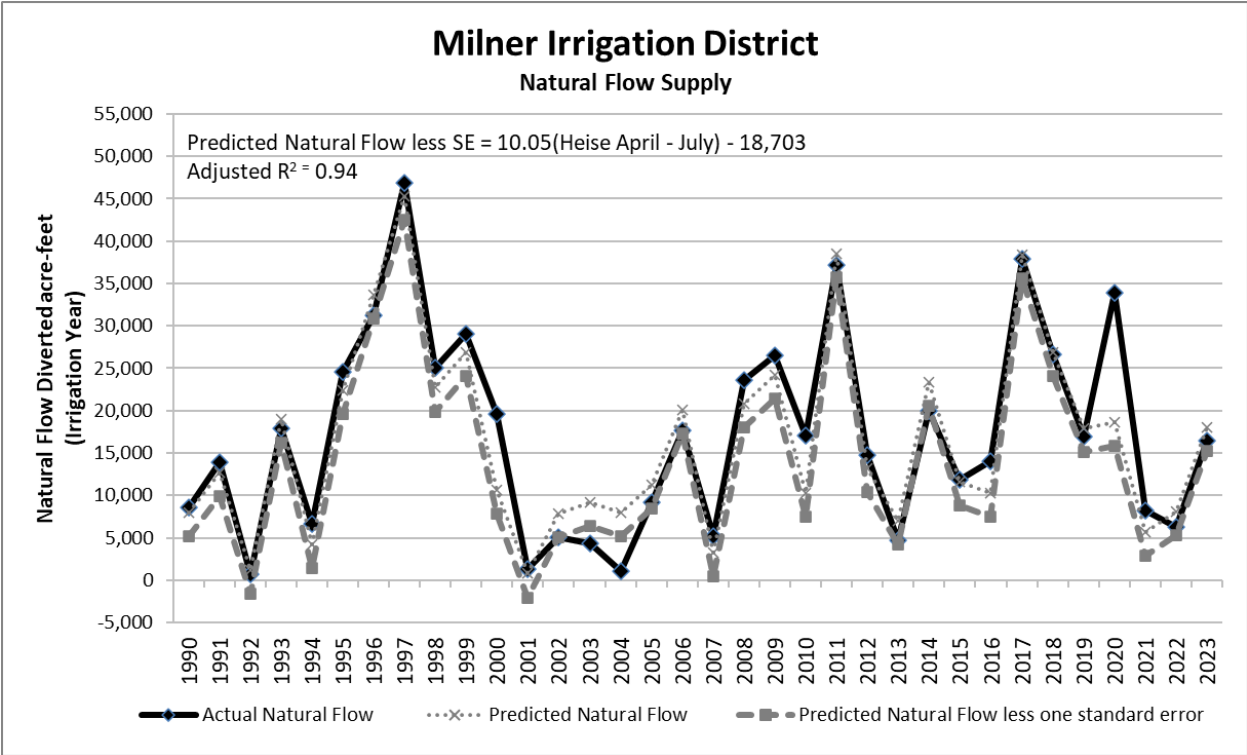
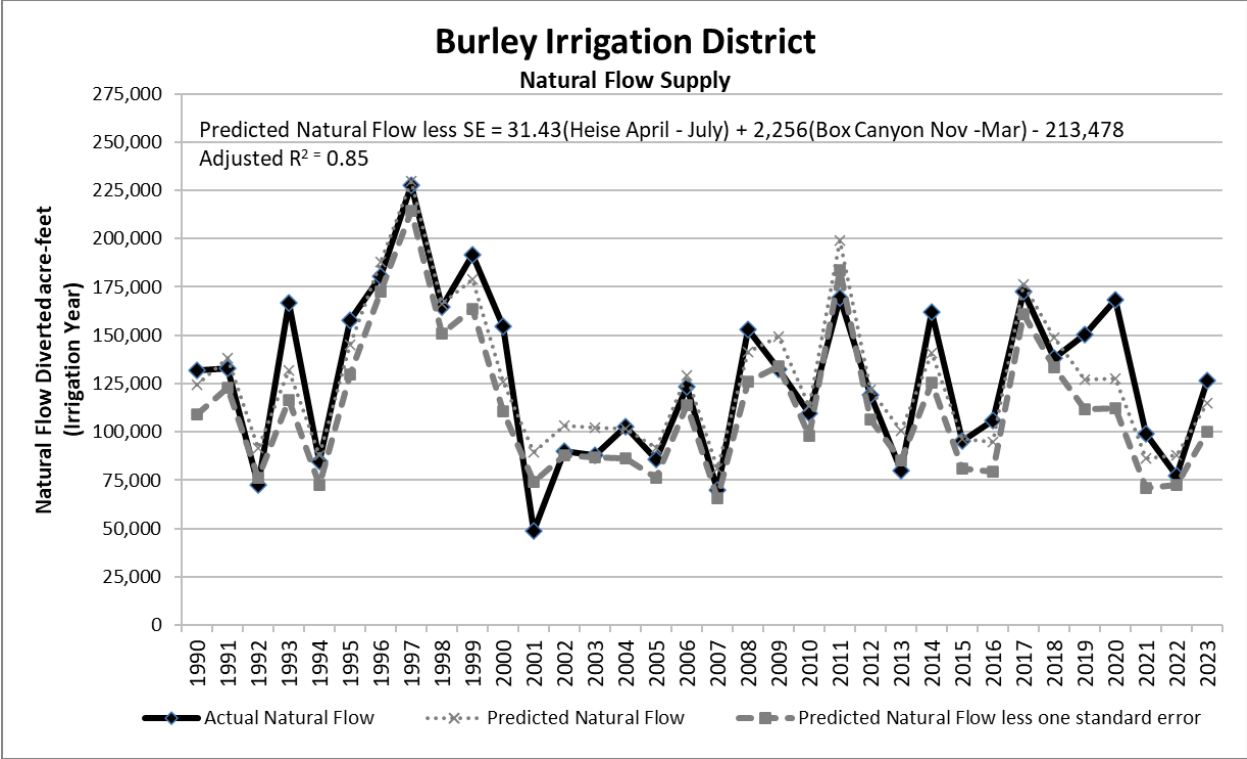
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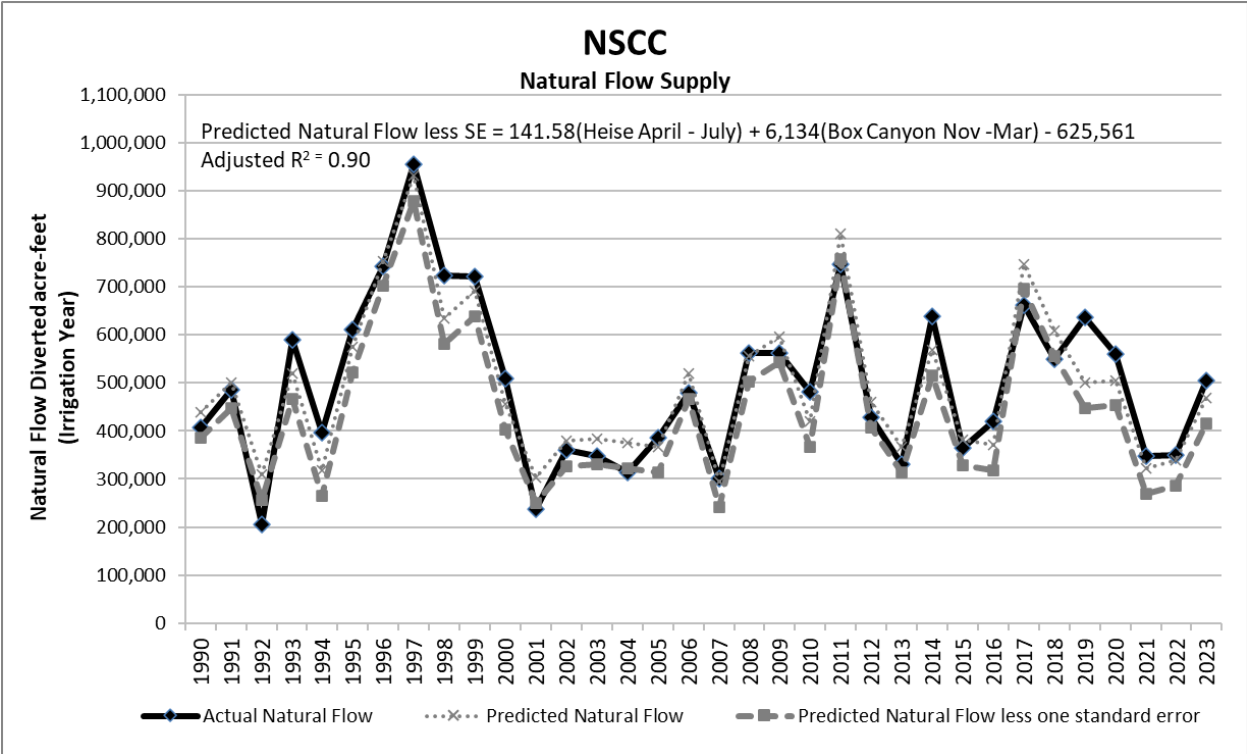
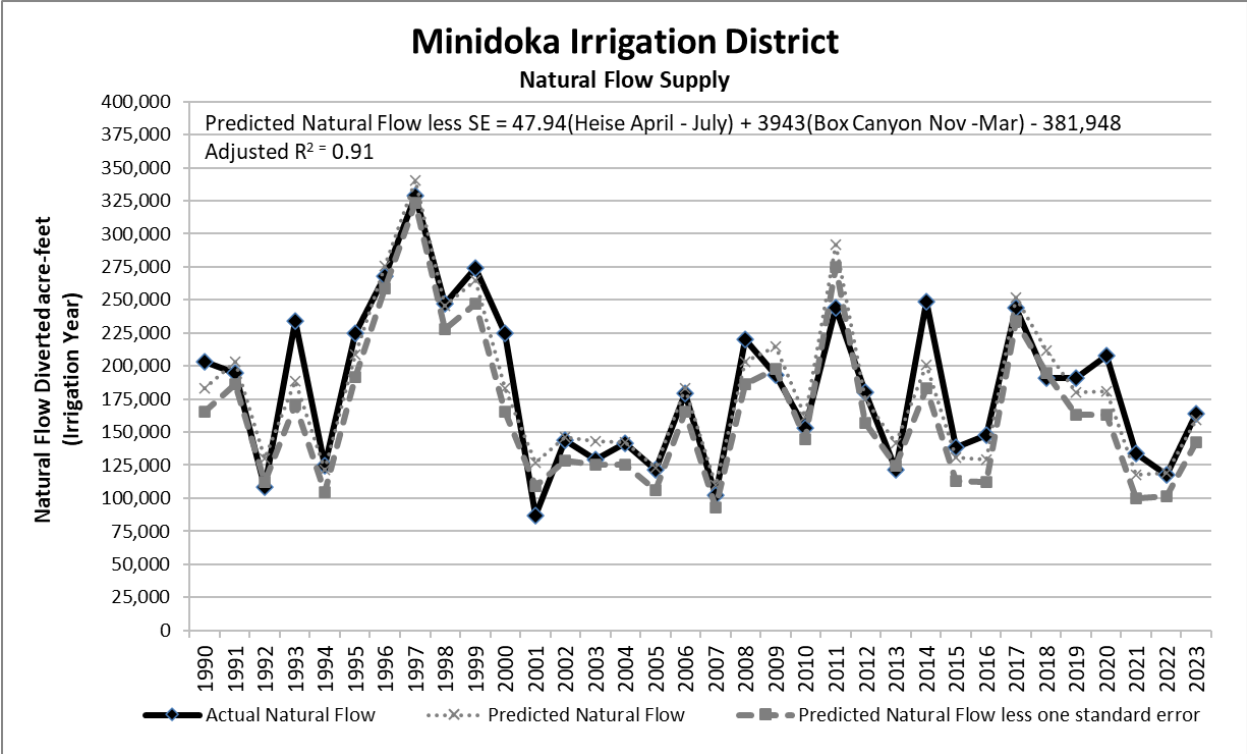


Sarah Tschohl
Paralegal

ATTACHMENT A

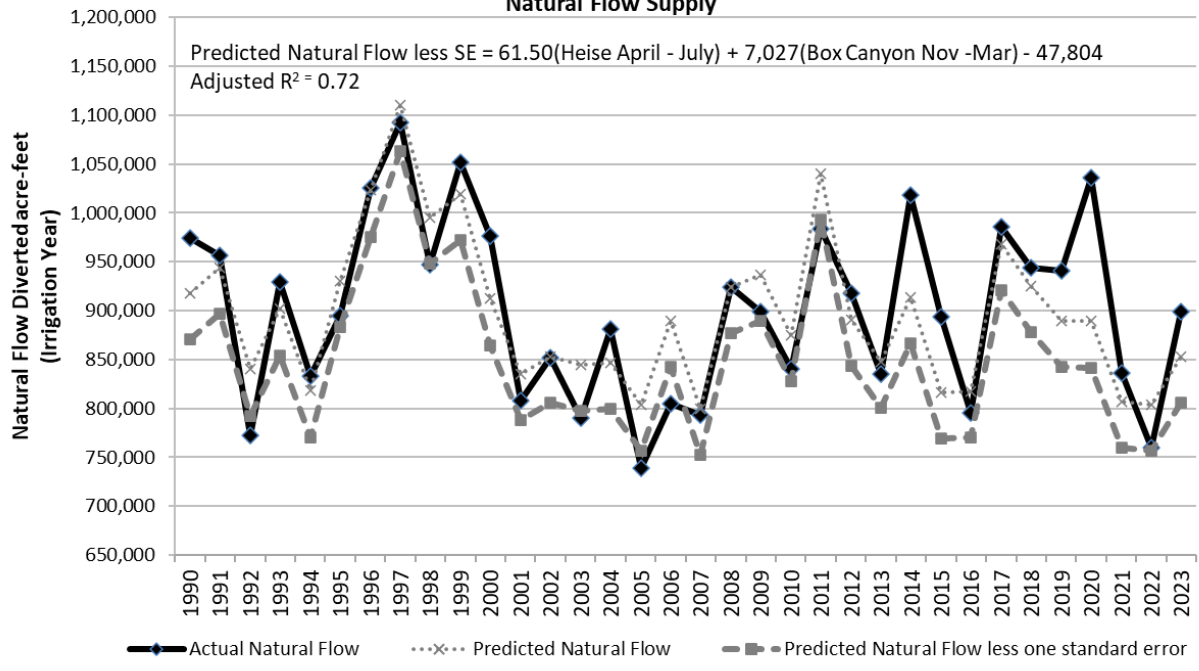






TFCC

Natural Flow Supply



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.