IGWA SUMMARY OF POSITIONS ON DIRECTOR'S ORDERS RELATED TO THE BLUE LAKES DELIVERY CALLS EXHIBIT 400A

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A. AFFIRMATIVE DEFENSES

1. **Subordination:**
The Spring Users' water rights were subordinated as a matter of law to all junior ground water rights pursuant to the 1984 Swan Falls Agreement, i.e. – so long as the minimum stream flows at the Murphy Gauge exceed 3900 cfs. Therefore, their delivery call is invalid.

2. **Local Ground Water Board:**
Curtailment orders exceed the Director's authority and are invalid as a matter of law because IDWR failed to form and convene a local ground water board required by Idaho Code § 42-237(b) and § 42-237(d) before any curtailment order was issued.

3. **Unreasonable Means of Diversion:**
The Springs Users water rights rely upon pressurized ground water, therefore, they first must establish reasonable means of diversion to ensure adequate flow to their facilities and are not guaranteed a certain artesian flow or pressure. The Spring Users failed to establish legally protected means of diversion and therefore their delivery call and the curtailment order is invalid.

4. **No reasonable pumping levels have been established:**
The Springs Users' water rights rely upon pressurized ground water and have failed to comply with Idaho Code § 42-226 which requires that they first establish reasonable ground water pumping levels. No reasonable pumping level has been established. Therefore no finding of material injury is valid and any curtailment order is arbitrary, capricious and without basis in law or fact.

5. **Waste Water:**
The curtailment order is invalid because it is based on shortages of waste water, not natural flow. As a matter of law the Spring Users can only make a lawful delivery call for natural water supplies, which have not diminished. The Spring Users cannot force delivery of a supply of waste water which no longer exists due to the conversions to more efficient sprinkler irrigation and winter water storage.

6. **Futile Call:**
The delivery call results based upon the curtailment orders are speculative and uncertain in quantity and time. There is no evidence that the proposed curtailment of ground water users and ground water rights will provide any specific increase in the amount of water available to the Spring Users' water rights in quantities and in time that can be put to beneficial use. Therefore the delivery calls are futile as a matter of law. Furthermore, the ordered quantity of ground water curtailment is enormously disproportionate to the tiny amount of water that may result, if any, and thus result in an impermissible waste of the water resource, thereby violating Idaho law and the prior appropriation doctrine.

7. **Denial of Due Process:**
The ground water users' water rights constitute private property rights that cannot be taken or impaired without due process of law. The issuance of the curtailment orders without a hearing, in excess of statutory authority and in violation of Idaho Code § 42-237(b)(d) violates the ground water users' right to due process of law and constitutes a taking in violation of the Constitutions of the State of Idaho and the United States.

8. **Request for Declaratory Ruling (Rule 400):**
Ground water users requested a declaratory ruling under Idaho Code § 67-5232 and IDAPA 37.01.01.400 that no Idaho law precludes junior priority water users from utilizing replacement water from alternative sources to mitigate compensable shortages to the senior Spring Users water rights. i.e. -- water quality is not a decreed element of any water right as a matter of law.

B. FINDINGS OF FACT – SUPPORTED

MAY 19, 2005 ORDER

First Text	Support	Reasoning	Reference to Clear Springs Order
Findings of Fact #5: From the pre-irrigation conditions of the 1860s until the 1950s, the amount of water diverted from the Snake River and its tributaries for gravity flood/furrow irrigation increased substantially, from about 8 million acre-feet, or less, in the early 1900s to about 9.5 million acre-feet in the early 1950s. USGS Professional Paper 1408-F, p. F14. Significant quantities of the surface water diverted were in excess of crop consumptive uses and provided incidental recharge to the ESPA above the average incidental recharge of 3.4 million acre-feet described in Finding 3 for the May 1980 through April 2002 time period. Ground water levels across the ESPA responded by rising at many locations. For example, the average rise in ground water levels near Jerome, Idaho, and near Fort Hall, Idaho, was 20 to 40 feet over several tens of years. The average rise in ground water levels west of American Falls was 60 to 70 feet. USGS Professional Paper 1408-A, p. A40. As a result, spring discharges in the Thousand Springs area correspondingly increased based on USGS data as shown on Attachment A *(not included for the purposes of this exhibit, but Attachment A is a chart showing average annual spring discharge to Snake River in Thousand Springs Area 1902-2004)*	Support	The spring discharges were increased by the historical application of surface water from the Snake River to lands of the Eastern Snake River Plain. At their natural level, the springs in the Thousand Springs Reach were approximately 4100 cfs. They peaked in 1952 at 6,940 cfs. Approximately 2,600 cfs of this was the result of incidental losses from surface water irrigation. The springs are still at a level above their natural level. Brendecke Testimony pp. 18– 26.	#5

Fact Text	Support	Reasoning	Reference to Clear Springs Order
Findings of Fact #6: Beginning in about the 1960s to 1970s time period through the most recent years, the total combined diversions of natural flow and storage releases above Milner Dam for irrigation using surface water supplies have declined from an average of nearly 9 million acre feet annually to less than 8 million acre-feet annually, notwithstanding years of drought, because of conversions from gravity flood/furrow irrigation to sprinkler irrigation in surface water irrigation systems and other efficiencies implemented by surface water delivery entities. The measured decrease in cumulative surface water diversions above Milner Dam for irrigation reflects the fact that less water is generally needed in the present time to fully irrigate lands authorized for irrigation with a certain crop mix under certain climatic growing conditions than was needed in the 1960s to 1970s for the same lands, crop mix, and climatic growing conditions. With parallel appropriations of ground water, which dramatically increased beginning in about 1950, ground water levels across the ESPA have responded by declining at most locations where levels had previously risen, exacerbated by the worst consecutive period of drought years on record for the upper Snake River Basin. As a result, spring discharges in the Thousand Springs area have correspondingly declined based on USGS data as also shown on Attachment A.	Support	See response to Finding #5 above.	#6
Findings of Fact #10: Various factors determine the specific hydraulically-connected reach of the Snake River or spring complexes affected by the	Support in part	Many factors affect the spring complexes at issue in this case, however, the ESPA is	#10

Fact Text	Support	Reasoning	Reference to Clear Springs Order
pumping of ground water from a well in the ESPA; the magnitude of the depletionary effects to a hydraulically-connected reach or spring complex; the time required for those depletionary effects to first be expressed as reductions in river flow or spring discharge; the time required for those depletionary effects to reach maximum amounts; and the time required for those depletionary effects to either recede, if ground water pumping from the well ceases, or reach steady-state conditions, if ground water pumping continues. Those factors include the proximity of the well to the various hydraulically-connected reaches or springs, the transmissivity of the aquifer (hydraulic conductivity multiplied by saturated thickness) between the well and the hydraulically-connected reach of the Snake River or springs, the riverbed hydraulic conductivity, the specific yield of the aquifer (ratio of the volume of water yielded from a portion of the aquifer to the volume of that portion of the aquifer), the period of time over which ground water is pumped from the well, and the amount of ground water pumped that is consumptively used.		not uniform and the ESPA Ground Water Model relies on a porous media paradigm that does not accurately reflect the geological characteristics of the ESPA. Thus, the ESPA Ground Water Model is not sufficiently accurate to predict the increase discharge in a particular spring stemming from the curtailment of particular ground water wells. Brendecke Testimony p. 49-50.	
Findings of Fact #11: The time required for depletionary effects in a hydraulically-connected reach of the Snake River or tributary springs to first be expressed, the time required for those depletionary effects to reach maximum amounts, and the time required for those depletionary effects to either recede, if ground water pumping from the well ceases, or reach steady-state conditions, if ground water pumping continues, can range from days to years or even decades, depending on the factors described in Finding No. 10.	Support in part	See response to Finding # 10 above.	#11