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**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA	) Subcase Numbers: 77-10795, 77-10798,
	) 77-11537, 77-11569, 77-11657, 77-13915,
Case No. 39576	) 77-13918, 77-13919, 77-13920, 77-13922,
	) 77-13923, and 77-13925
	)
	) UNITED STATES' REPLY
	) MEMORANDUM IN SUPPORT OF
	) ITS FEDERAL RESERVED WATER
	) RIGHT CLAIMS AND REQUEST FOR
	) ORAL ARGUMENT

INTRODUCTION

The United States demonstrated in its *Memorandum in Support of Its Federal Reserved Water Right Claims* ("Opening Brief") that it is well settled that it is entitled to federal reserved rights for water used at administrative sites on National Forest System lands. *Opening Brief* at 6-

8. The United States further demonstrated that use of water at the administrative sites at issue in these subcases is necessary to accomplish the Organic Act's primary purposes. *Id.* at 8-11. The only issue before the Court is whether the State can show that the water uses in these subcases are not for administrative purposes recognized under the Organic Act.

In its *Brief in Opposition to United States Forest Service's Reserved Water Right Claims* ("*Opposition Brief*"), the State fails to rebut the United States' argument that the use of water at these sites is for the administration of Forest Service programs necessary to achieve the primary purposes of the Organic Act. Instead, the State inexplicably focuses most of its argument on land withdrawals made pursuant to the Pickett Act, a federal statute not at issue in these subcases. The State also presents the Court with an incorrect reading of *United States v. New Mexico*, failing to acknowledge that 1) water for Forest Service administrative sites was not at issue in *New Mexico*, and 2) the *New Mexico* Court explicitly recognized that Forest Service administration was necessary to fulfill primary Organic Act purposes.

A federal reserved water right exists when "water is necessary to fulfill the very purposes for which a federal reservation was created." *United States v. New Mexico*, 438 U.S. 696, 701 (1978). Because water at these sites is necessary to fulfill such purposes, the United States' claims for federal reserved water rights must be decreed.

ARGUMENT

A. The Purpose of the Organic Administration Act is Administration of the National Forests.

The United States' federal reserved water rights claims in these subcases ("Claims") were made pursuant to the Organic Administration Act of 1897, 30 Stat. 34-36 (1897), codified at 16

U.S.C.A. §§ 473-475, 477-482, 551 (West 2000) (“Organic Administration Act” or “Organic Act”). Administration of the National Forests is the underlying purpose of the Organic Administration Act; indeed, the title of the Act itself makes this clear. Numerous provisions of the Organic Act require that the Forests be administered. *See* 16 U.S.C. § 475 (National Forests to be controlled and administered in accordance with provision of Organic Act); 16 U.S.C. § 477 (Secretary of Agriculture may permit use of timber and stone in National Forests by regulation); 16 U.S.C. § 478 (access to National Forests subject to Secretary’s rules and regulations); 16 U.S.C. § 481 (water use within National Forests subject to federal rules and regulations); 16 U.S.C. § 551 (Secretary shall make rules and regulations to regulate occupancy and use of National Forests and to protect Forests from destruction). The United States Supreme Court in *United States v. New Mexico* described the Organic Administration Act as “a charter for forest management.” *United States v. New Mexico*, 438 U.S. 696, 706 (1978). The Court further noted that one of the shortcomings of the Creative Act of 1891, which led to enactment of the Organic Act, was the failure of the Creative Act to provide for adequate regulation of the Forests. *Id.*

The State, in its *Opposition Brief*, consistently relies on the *New Mexico* decision. The Court in *New Mexico* described the test for a federal reserved water right as follows:

Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress’ express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

New Mexico, 438 U.S. 696, 701 (1978).

Contrary to the State’s argument, the *New Mexico* decision provides no support for its

position. The only reserved right claims before the Supreme Court in *New Mexico* were instream flow claims for aesthetic, recreation, and fish-preservation purposes and consumptive claims for stockwatering. *New Mexico*, 438 U.S. at 705, 715-16. The issue presented in these subcases – whether by establishing Forest reservations, Congress implicitly reserved water for these Forest Service administrative sites – was not decided in *New Mexico*.

Nevertheless, the Court recognized that the very reason the Organic Act was passed was to provide for administration of the National Forests. As noted above, the Court described the Organic Act as “a charter for forest management” and recognized that the failure of the Organic Act to provide for adequate regulation of the Forests led to the Organic Act and its requirements of Forest administration. *New Mexico*, 438 U.S. at 706. Further, as described more fully below, the Court also recognized that failure to administer the Forests would imperil the accomplishment of the substantive purposes for which the Forests were established – providing a continuous supply of timber and assuring favorable conditions of water flow. *See infra* at 6-7.

The pertinent question, pursuant to *New Mexico*, is whether “water is necessary to fulfill the very purposes for which a federal reservation was created.” *New Mexico*, 438 U.S. at 701. Because the Supreme Court recognized in *New Mexico* that the Organic Act was enacted to provide for regulation and administration of the National Forests, there is simply no reasonable basis to conclude that Congress did not intend to reserve water for administration of the National Forests. Forest reservations made under the Organic Administration Act would be “practically valueless” without actual administration of the Forests. *See Winters v. United States*, 207 U.S. 564, 577 (1908) (“[I]t would be extreme to believe” that Congress did not implicitly intend to reserve water for the Fort Belknap Indian Reservation, because without water the Reservation

would be “practically valueless.”)¹

As explained in the United States’ *Opening Brief*, there has been a clear recognition by the courts which have ruled on the issue, including this Court, that federal reserved water rights for Forest administration were created with passage of the Organic Act. The Colorado Division No. 1 court provided a concise explanation of the common-sense reasoning underlying its decision:

[T]he national forests in Water Division No. 1 must be administered. Such administration requires administrative sites. It is reasonable to assume that Congress intended to reserve sufficient water to serve those sites.

In the Matter of Reserved Water Rights in the Platte River, Nos. W-8439-76, *Memorandum of Decision and Order* at 31 (Colo. Water Div. 1, Feb. 12, 1993) (attached as Exhibit A to United States’ *Opening Brief*).

Accordingly, there is no reasonable basis to contest the existence of federal reserved rights for Organic Act administrative purposes.

B. Administration of National Forests is Necessary to Fulfill Primary Purposes of the Reservations.

As explained in the United States *Opening Brief*, pp. 8-11, the administrative activity occurring at the administrative sites is directly related to Organic Act primary purposes.

Nevertheless, the State persists in an argument that, if water is used at an administrative site for a

¹ Forest administration cannot reasonably be described as a “secondary” purpose of the Forest reservations, as the Supreme Court described the purposes of the Multiple-Use Sustained Yield Act. *See New Mexico*, 438 U.S. at 713-15. Administration of the Forests is not the result of a later statute which broadened the purposes underlying the reservations, but the inherent reason for the initial statute itself. There is nothing “secondary” about Forest administration in the Organic Act. Instead, it is the underlying purpose of the entire statute and the means to achieve the primary purposes found by the Court in *New Mexico*.

trail crew, recreation or wilderness program, stock watering, or pasture irrigation, then federal reserved rights are not appropriate. *Opposition Brief* at 14-16.

Although the State contends that *New Mexico* supports this limited view of administrative activity, the Supreme Court in its decision recognized the fallacy of this argument. The Court, in fact, recognized that management of National Forests is necessary to achieve Organic Act primary purposes, not only through affirmative action such as fire suppression, but also through Forest Services regulation of activity on the Forests to prevent interference with such purposes. *New Mexico*, 438 U.S. at 717, n. 23. The Court used the specific example of Forest Service management of sheep and cattle grazing.

Under the [Organic Act], “any use of the [Forest] reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation at will, and without restraint, *might interfere seriously with the accomplishment of the purposes for which they were established*. But a limited *and regulated* use might not be inconsistent with the object sought to be attained by the statute.”

Id. (quoting *United States v. Grimaud*, 220 U.S. 506, 515-516 (1911)) (emphasis added); *see also* 16 U.S.C. § 551 (“Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests . . . *and may make such rules and regulations and establish such service as will insure the objects of such reservations*, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.”) (emphasis added)

This language is particularly striking in light of the Court’s rejection in *New Mexico* of a reserved water right for stockwatering purposes. In reaching that conclusion, the Court held: “If stockwatering could not take place in the Gila National Forest, Congress’ purposes in reserving

the land would not be defeated.” *New Mexico*, 438 U.S. at 716. Nevertheless, the Court recognized that when livestock grazing does occur on the National Forests, administration of such grazing does further primary purposes. In other words, although livestock grazing is not a primary purpose of National Forest reservations, administration of grazing authorizations by Forest Service personnel is necessary to fulfill primary purposes.

The same is true of other Forest Service management activities at issue in these subcases. Just as unregulated grazing is likely to impede achievement of Organic Act primary purposes, unrestricted recreation, for instance, would result in conditions -- forest fires and severe erosion -- at odds with primary purposes.

As explained in the *Kimball Affidavit*:

Administration of NFS programs and employee presence in the area serves to protect the forest from depredations and destruction. This ensures the continued viability of the resources on surrounding federally reserved NFS land and directly contributes to watershed protection, preservation of timber stands and to the maintenance of and improvement of watershed conditions, timber production and favorable conditions of water flow.

Affidavit of Stephen J. Kimball ¶ 7, subcase no. 77-10795.

The Supreme Court’s distinction between water used in a particular activity and water used to *administer* such activity is critical. *See New Mexico*, 438 U.S. at 717, n. 23. Without regulation and management of Forest uses, and without trails and horses² to access the Forest, the Forest Service cannot fulfill the mandates of the Organic Act – to protect the Forest, its timber

² The Monitor Valley court explicitly held that water for horses was needed to administer the Forest and that a reserved right for such stockwatering was appropriate. *In the Matter of the Determination of the Relative Rights in and to the Waters of the Monitor Valley Southern Part (140-B), Nye County, Nevada*, Case No. 14906, *Order* at 17-18 (Nevada Fifth Judicial Dist., April 28, 2000) (attached as Exhibit C to United States’ *Opening Brief*).

and its watersheds. The affidavits filed in support of the United States' Claims demonstrate that administration in these subcases does, in fact, support such purposes. On this basis, the United States' Claims should be decreed.

C. The Pickett Act Reservations Relied on by the State Have No Bearing on the Organic Act Reservations.

The State in its *Opening Brief* relies heavily on a series of reservations and withdrawals separate and distinct from the Organic Act reservations. While these reservations may provide an independent basis for reserved water rights, they have no bearing on the original Organic Act reservations or on the United States' Claims.

Exhibits 1 and 16 to the State's *Opening Brief* lists a series of land reservations and withdrawals made pursuant to a federal statute known as the Pickett Act. The State now argues that none of the United States' Claims can be decreed without such a reservation. *Opposition Brief* at 17-20. The State's argument displays a fundamental misunderstanding of land reservations and withdrawals made under the Organic Act and the Pickett Act and must be rejected.

The Pickett Act, also known as the General Withdrawal Act, was passed by Congress in 1910. It granted the Executive broad withdrawal powers:

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

36 Stat. 847 (1910) (repealed by Pub. L. 94-579, Title VII, § 704(a), 90 Stat. 2792 (1976)).

Pursuant to the Pickett Act, Executive Order No. 10355 was issued. Executive Order No.

10355 delegated to the Secretary of the Interior the authority vested in the President by the Pickett Act “to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes.” Executive Order No. 10355, 17 F.R. 4831 (attached as Exhibit A).

In regard to these subcases, the authority delegated to the Secretary of the Interior was exercised in Public Land Order Nos. 1564 and 2931. Public Land Order No. 1564 (attached as Exhibit 1 to the State’s *Opening Brief*) withdrew numerous parcels of federal land “from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws . . . and reserved for use of the Forest Service . . . as administrative sites and recreation areas.” Public Land Order No. 2931 (attached as Exhibit 16 to the State’s *Opening Brief*) withdrew the minerals in numerous parcels of federal land “from prospecting, location, entry, and purchase under the mineral laws of the United States in aid of programs of the Forest Service for utilization of the surface as administrative sites and campgrounds.” Because reserved National Forest System lands were closed to settlement upon reservation, *see Utah Power & Light Co. v. United States*, 243 U.S. 389, 402 (1917), but open to entry and location of mining claims under the Organic Act, *see* 16 U.S.C. § 482,³ the practical effect of both of the Public Land Orders was to withdraw the underlying lands from entry and location of mining claims. These withdrawals, therefore, protected the administrative use of these sites from interference by

³Most of these reservations were made under the Creative Act, which did withdraw the lands from all entry and appropriation under the Mining Laws. *See, e.g.*, Ex. 2 attached to Spencer Affidavit, subcase no. 77-10798 (reserving land from all “entry or settlement.”). Upon passage of the Organic Act, however, National Forest System lands were opened to entry and location of mining claims.

mining claims.

The State argues that the United States' Claims cannot be decreed unless the underlying land was withdrawn and reserved pursuant to one of the Public Land Orders. *Opposition Brief* at 17-18. Public Land Orders entered decades after the Forests were reserved are simply not relevant to the issue of whether water rights were created at the time of such reservations.⁴ While it is true that the Pickett Act withdrawals may provide a separate basis for assertion of a reserved water right, they have no bearing on the creation of the reserved rights at issue here.

In fact, the State has previously accepted the Organic Act as the basis for federal reserved rights for administrative sites. As noted in the United States *Opening Brief*, during the Organic Act litigation in this Court, the State conceded that water for federal administrative sites is a particularly well-grounded basis for a federal reserved right under the Organic Act. *See Organic Act Decision* at 6 n. 2 ("At oral argument the State only conceded that the United States might be entitled to a federal reserved water right 'in a few instances . . . particularly fire protection and for administrative purposes.'").

Further, in SRBA subcase number 81-10385, a federal reserved water claim for a Forest Service administrative site made under the Organic Act, the State filed a *Motion to Participate and/or Motion to File a Late Objection* (October 3, 2000), arguing that the United States could not obtain a federal reserved right for a stockwatering purpose of use. Subsequent to the State's

⁴ The State spends a full page citing and quoting FLPMA in support of its argument. *Opposition Brief* at 17. The withdrawals at issue, however, were not made pursuant to FLPMA, but under the terms of the Pickett Act. The Pickett Act, in fact, was repealed by FLPMA. *See* Pub. L. 94-579, Title VII, § 704(a), 90 Stat. 2792 (1976)).

Motion, the United States amended its claim changing the purpose of use from stockwater to administrative. At a hearing on December 7, 2000, the State orally withdrew its *Motion* “[i]n light of the United States’ amendments to its claim,” thus consenting to decree of the reserved right for administrative purposes under the Organic Act. *See Order Granting United States Motion to File Amended Notice of Claim*, subcase 81-10385 (December 8, 2000). This claim, as well as dozens of similar ones, has been decreed by the Court.

In its opposition to these Claims, the State attempts to “move the goalposts” in this litigation, having accepted the Organic Act as the basis for Forest Service administrative site claims at an earlier stage of the SRBA and now, with the SRBA nearing completion, presenting completely contrary legal arguments. The State earlier recognized, as any reasonable observer would, that in passing the Organic Act Congress intended that the National Forests would be administered and that, accordingly, reserved water rights for such sites should be decreed. The State’s reliance on the Pickett Act is nothing more than smoke and mirrors in an attempt to distract the Court from the obvious: Water at Forest Service administrative sites is necessary to fulfill the purposes for which the Forest reservations were created.

CONCLUSION

The United States has claimed water necessary to administer the National Forests and to fulfill primary purposes of the underlying reservations. For all of the reasons stated above, the United States’ Claims should be decreed.

REQUEST FOR ORAL ARGUMENT

Because the State has raised issues not before presented in this Court, the United States respectfully requests that the Court schedule oral argument.

DATED this 14th day of September, 2007.

Respectfully submitted,

A handwritten signature in cursive script, reading "David Negri". The signature is written in dark ink and is positioned above a horizontal line.

DAVID L. NEGRI

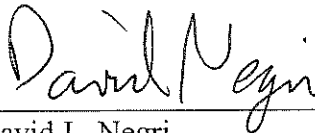
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CERTIFICATE OF MAILING

I certify that on September 14, 2007, I mailed a true and correct copy of the foregoing
**United States' Reply Memorandum in Support of its Federal Reserved Water Right Claims and Request For
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(Publication page references are not available for this document.)

EXECUTIVE ORDER 10355

DELEGATING TO THE SECRETARY OF THE INTERIOR THE AUTHORITY OF THE PRESIDENT TO
WITHDRAW OR RESERVE LANDS OF THE UNITED STATES FOR PUBLIC PURPOSES

May 26, 1952

By virtue of the authority vested in me by section 301 of title 3 of the United States Code (section 10 of Public Law 248, 82d Congress), and as President of the United States, it is ordered as follows:

SECTION 1. (a) Subject to the provisions of subsections (b), (c), and (d) of this section, I hereby delegate to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. 847 (43 U. S. C. 141), and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.

(b) All orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted to the Division of the Federal Register, General Services Administration, for filing and for publication in the FEDERAL REGISTER.

(c) No order affecting land under the administrative jurisdiction of any executive department or agency of the Government other than the Department of the Interior shall be issued by the Secretary of the Interior under the authority of this order without the prior approval or concurrence, so far as the order affects such land, of the head of the department or agency concerned, or of such officer of the department or agency concerned as the head thereof may designate for such purpose: Provided, that such officer is required to be appointed by the President by and with the advice and consent of the Senate.

(d) Any disagreement between two or more executive departments or agencies with respect to any proposed withdrawal or reservation shall be referred to the Director of the Bureau of the Budget for consideration and adjustment. The Director may, in his discretion, submit the matter to the President for his determination.

SEC. 2. The Secretary of the Interior is authorized to issue such rules and regulations, and to prescribe such procedures, as he may from time to time deem necessary or desirable for the exercise of the authority delegated to him by this order.

SEC. 3. The Secretary of the Interior is authorized to redelegate the authority delegated to him by this order to one or more of the following-designated

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officers: the Under Secretary of the Interior and the Assistant Secretaries of the Interior.

SEC. 4. This order supersedes Executive Order No. 9337 of April 24, 1943, [FN1] entitled 'Authorizing the Secretary of the Interior To Withdraw and Reserve Lands of the Public Domain and Other Lands Owned or Controlled by the United States'.

HARRY S. TRUMAN

THE WHITE HOUSE,

May 26, 1952.

FN1 3 CFR, 1943 Cum. Supp.

17 FR 4831, Exec. Order No. 10355, 1952 WL 48784 (Pres.)

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TITLE 3—THE PRESIDENT

EXECUTIVE ORDER 10354

AMENDMENT OF THE REGULATIONS RELATING TO COMMISSIONED OFFICERS AND EMPLOYEES OF THE PUBLIC HEALTH SERVICE

By virtue of the authority vested in me by section 200 (g) of the Public Health Service Act (58 Stat. 087; 42 U. S. C. 210 (g)), I hereby prescribe the following amendment of the regulations relating to commissioned officers and employees of the Public Health Service prescribed by Executive Order No. 8993 of August 31, 1948, as amended, as portions of Chapter I, Title 42, Code of Federal Regulations:

Section 22.1 of the said regulations is amended to read as follows:

"§ 22.1 *Duty requiring intimate contact with leprosy patients; additional pay for civil service officers or employees.* Except as provided in § 22.2, every civil service officer or employee of the Service assigned to full-time duty for a period of 30 days or more at a station of the Service devoted to the care of leprosy patients shall receive, while so assigned, in addition to the basic compensation provided by law for his position, a sum equal to 25 per centum of such compensation; *Provided*, that the rate of total basic and additional compensation received by any such civil service officer or employee on June 30, 1952, under laws and regulations then in effect shall not, so long as the officer or employee remains on continuous assignment to such duty, be reduced prior to July 1, 1957, by reason of the foregoing provisions of this section."

This order shall become effective on July 1, 1952.

HARRY S. TRUMAN

THE WHITE HOUSE,

May 26, 1952.

[F. R. Doc. 52-5834; Filed, May 26, 1952; 4:25 p. m.]

EXECUTIVE ORDER 10355

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purpose: *Provided*, that such officer is required to be appointed by the President by and with the advice and consent of the Senate.

(d) Any disagreement between two or more executive departments or agencies with respect to any proposed withdrawal or reservation shall be referred to the Director of the Bureau of the Budget for consideration and adjustment. The Director may, in his discretion, submit the matter to the President for his determination.

SEC. 2. The Secretary of the Interior is authorized to issue such rules and regulations, and to prescribe such procedures, as he may from time to time deem necessary or desirable for the exercise of the authority delegated to him by this order.

SEC. 3. The Secretary of the Interior is authorized to redelegate the authority delegated to him by this order to one or more of the following-designated officers: the Under Secretary of the Interior and the Assistant Secretaries of the Interior.

SEC. 4. This order supersedes Executive Order No. 9337 of April 24, 1943, entitled "Authorizing the Secretary of the Interior To Withdraw and Reserve Lands of the Public Domain and Other Lands Owned or Controlled by the United States".

HARRY S. TRUMAN

THE WHITE HOUSE,
May 26, 1952.

[F. R. Doc. 52-5935; Filed, May 26, 1952; 4:25 p. m.]

RULES AND REGULATIONS

TITLE 24—HOUSING AND HOUSING CREDIT

Chapter IV—Federal National Mortgage Association

PART 400—MORTGAGE PURCHASES, SERVICING AND SALES

MISCELLANEOUS AMENDMENTS

1. Section 400.102 is amended by striking all of said section and inserting a new section in lieu thereof to read as follows:

§ 400.102 *VA prior approval.* VA-guaranteed mortgages must have been processed through the VA prior approval procedure.

2. Section 400.103 is amended by striking all of said section and inserting a new section in lieu thereof to read as follows:

§ 400.103 *Extent of guaranty for single-family dwelling units.* If the improvements on the mortgaged premises comprise one single-family dwelling unit, the original principal amount of the mortgage will have been guaranteed: (a) In the case of a section 501 mortgage, to the extent of 60 percent; (b) in the case of a section 502 mortgage, to the extent of 50 percent or \$4,000, whichever is less.

3. Section 400.104 (a) is amended by striking all of said paragraph (a) and

inserting a new paragraph (a) in lieu thereof to read as follows:

§ 400.104 *Extent of guaranty for multiple-family dwelling units.* (a) If the improvements on the mortgaged premises comprise two or more single-family dwelling units, the original principal amount of the mortgage must not have exceeded the original amount of the guaranty, plus 50 percent of the purchase price or cost of the premises.

4. Section 400.109 is amended by striking all of said section and inserting a new section in lieu thereof to read as follows:

§ 400.109 *Closing costs.* The original principal amount of a guaranteed mortgage may not exceed the purchase price