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DISTRICT COURT, WATER DIVISION 2, COLORADO		FILED IN THE OFFICE OF THE CLERK, DISTRICT COURT WATER DIV. NO. 2 STATE OF COLORADO <b>APR 11 2005</b> CLERK
Court Address: 320 West 10th Street, #203 Pueblo, CO 81003		
<b>CONCERNING THE WATER RIGHTS APPLICATION OF:</b>  <b>FOUR ELK PROPERTY OWNER'S ASSOCIATION, INC.</b>  <b>IN CHAFFEE COUNTY.</b>		COURT USE ONLY Case Number: <b>03CW41</b>
Attorney or Party Without Attorney (Name and Address):   Phone Number: _____ E-mail: _____ FAX Number: _____ Atty. Reg.#: _____		
<b>ORDER GRANTING MOTION TO APPROVE BRAMWELL STIPULATION AND FOR ENTRY OF DECREE</b>		

THE COURT, having reviewed the Stipulation between Applicant and Gerald J. Bramwell, and the Applicant's Motion to Approve Stipulation and for Entry of Decree, and finding the relief requested therein to be warranted,

**IT IS HEREBY ORDERED:**

1. The Motion to Approve Stipulation and for Entry of Decree is granted.
2. The Stipulation between Applicants and Gerald J. Bramwell regarding settlement is approved and made an order of this Court. The parties are ordered to perform in accordance with the terms of their Stipulation.
3. No other protests of the Ruling were filed by other objectors and the Applicant has stipulated with the only remaining objector, thus entry of the Judgment and Decree filed with the Motion is appropriate.

Dated this 11 day of April, 2005.

**BY THE COURT:**

  
 \_\_\_\_\_  
 Dennis Maes, Water Judge

DISTRICT COURT, WATER DIVISION 2,  
STATE OF COLORADO  
Pueblo County Judicial Building  
320 West 10th Street  
Pueblo, Colorado 81003

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STATE OF COLORADO

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CLERK

**CONCERNING THE WATER RIGHTS  
APPLICATION OF:**

**FOUR ELK PROPERTY OWNER'S  
ASSOCIATION, INC.**

**IN CHAFFEE COUNTY**

△ COURT USE ONLY △

Case Number: 03CW41

Div.: 2

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE OF  
THE WATER COURT**

THIS MATTER comes before the Court on the Application and the Amended Application for Water Storage Right and Surface Water Right filed by the Four Elk Property Owner's Association (the "Application") and, having reviewed said Application and other pleadings on file and the stipulations of the parties, and being fully advised on this matter, the following findings and orders have been made:

**FINDINGS OF FACT**

**General Findings**

1. Name, telephone number and address of Applicant:

Four Elk Property Owner's Association, Inc.  
c/o Bob Sherron, President  
34077 Surrey Lane  
Buena Vista, CO 81211

2. By Order of Referral from Water Division 2, dated May 14, 2003, Case No. 03CW41 was referred to the Water Referee.
3. By Order for Publication from Water Division 2, dated May 14, 2003, the Original Application was ordered published as required by statute.
4. Subsequent to publication of the original Application, but prior to the receipt of any statements of opposition, Applicant filed its First Amendment to Application (the "Amended Application") dated June 25, 2003. By Order from the Water Referee dated July 1, 2003, the Amended Application was ordered published.
5. The Water Court caused publication of the Original Application and Amended Application (hereinafter "Application") as provided by statute and publication costs have been paid. The time for filing statements of opposition expired on July 31, 2003. All notices required by law have been given. The Court has jurisdiction over the subject matter of this proceeding and over all parties affected hereby, whether or not they have appeared in this action. The land and water rights involved herein are not included within the boundaries of any designated groundwater basin.
6. Pursuant to C.R.S. §37-92-302(2)(a) and (4), the Division Engineer's Office for Division 2 filed with the Court a Consultation Report dated March 12, 2004. Applicant has mailed copies of the Consultation Report to all parties of record pursuant to C.R.S. §37-92-302(4). The Court considered the Consultation Report and has consulted with the Division Engineer.
7. One Statement of Opposition to the Application was timely filed by Bruce and Valerie Svihus on July 31, 2003. Two parties sought intervention in the case. By Order of the Referee dated July 22, 2004, Gerald J. Bramwell was granted authorization to intervene and his Statement of Opposition was filed. By Order of the Referee dated September 28, 2004, Michael and Linda Forman were granted authorization to intervene and their Statement of Opposition was filed.
8. On November 1, 2004, a Referee's hearing was conducted at which time, the Referee reviewed documentary evidence and heard testimony from the Applicants, from the Objectors Brus and Valerie Svihus, Michael and Linda Forman and Gerald Bramwell, and from Assistant Division Engineer Steve Kastner, and Assistant Water Commissioner, Dave Kelly.
9. Following the hearing, the Referee entered a Ruling dated November 18, 2004.
10. Objector Gerald J. Bramwell filed a Protest to the Referee's Ruling. No other protests to the Ruling were filed by any other party.

11. Applicant and Objector Bramwell reached a stipulation wherein they agreed to several modifications to the Referee's Ruling, including amendments to Paragraphs 12, 14 and 15 of that Ruling, and in exchange, Bramwell consented to the withdrawal of his Protest and entry of a decree consistent with the terms of the Stipulation.
12. This Judgment and Decree accepts and incorporates the factual findings made by the Referee in the November 18, 2004 Ruling and modifies the Referee's Ruling consistent with the terms of the Bramwell Stipulation.

### WATER STORAGE RIGHT

13. Name of Reservoir:

JBI Pond

14. Legal Description of location of dam:

The JBI Pond is located on Lot 20, Four Elk Camp Subdivision (Amended), Chaffee County, Colorado, which is located in the NE 1/4, NW 1/4, Section 22, Township 13 South, Range 79 W, 6th PM, Chaffee County, Colorado approximately 800 feet from the north section line and 2850 feet from the east section line.

15. Source: JBI Pond is an off-channel reservoir which impounds the waters of Four Elk Creek, a tributary to the Arkansas River.

16. Date of Appropriation:

A. August 1, 1969.

B. How appropriation was initiated: By construction of the dam and pond structure by the Soil Conservation Service and the subdivision developer and by impounding the waters of 4 Elk Creek for beneficial uses, including but not limited to storage for fish propagation, wildlife habitat and fire protection.

C. Date water applied to beneficial use: August 1, 1969.

17. Amount claimed in acre feet: 2.187 acre feet, absolute.

18. Use.

A. Fire protection, fish propagation, wildlife and recreation.

19. Surface area of high water line: approximately 0.55 acres
- A. Maximum height of dam: 10.5 feet
  - B. Length of dam in feet: 260 feet

20. Total capacity of reservoir: 2.187 acre feet.

Active capacity: 2.187 acre feet                      Dead Storage: 0

21. Evidence of Appropriation Date. Opposers asserted that the JBI Pond was developed in 2002 rather than 1969 as claimed in the Application. Based upon evidence submitted by Applicant, the Court finds that the JBI Pond was constructed during the summer of 1969 and the appropriation date of August 1, 1969 is appropriate. Evidence reviewed in support of the appropriation date includes the following:

- A. Affidavit of Lois Walton, one of the original developers of the 4 Elk Camp Subdivision.
- B. June 2, 1969 letter from James H. Walton, the developer of the 4 Elk Camp subdivision, which states that the pond is under construction.
- C. United States Department of Agriculture Agricultural Stabilization and Conservation Service "Approval and Application Payment" dated 3/6/67 for construction of the JBI Pond.
- D. May 6, 1968 letter from Ray Foote at Soil Conservation Service to James Walton regarding commencement of construction of the JBI Pond.
- E. September 10, 1969 Letter to Chaffee-Lake A.S.C. County Committee itemizing the construction costs for the JBI Pond.
- F. October, 1969 photograph of the JBI Pond from the Upper Arkansas Soil Conservation District.
- G. May 2, 1974 letter from Pete Wither to Robert Conover which states that the fishing pond has been constructed.
- H. July 2, 1977 Minutes of Annual Meeting of 4 Elk Camp Property Owners Association which states that the fish in the pond are doing poorly due to low flows in 4 Elk Creek.

- I. June 30, 1978 Financial Statement of 4 Elk Camp Property Owners Association which lists an expenditure of \$255.00 for pond insurance.
- J. July 1, 1978 Minutes of Annual Meeting of 4 Elk Camp Property Owners Association which states that the bentoniting of 4 Elk Creek and the pond have been carried out.

Ample additional evidence was provided to and considered by the Referee and the Court which supports the appropriation date awarded to the JBI Pond and refuting Opposers' claim that the pond was built in 2002, including additional business records of 4 Elk Camp Property Owners Association and the 1994 U.S.G.S. "Harvard Lakes" topographic quad map which shows the presence of the JBI Pond.

### **SURFACE WATER RIGHT**

22. Name of Structure:

JBI Pond Ditch

23. Legal Description of point of diversion:

Applicant claimed in its Amended Application a point of diversion for the JBI Pond Ditch located on Lot 13, Four Elk Camp Subdivision, Chaffee County Colorado at a point approximately 1300 feet south of the northwest corner of Section 22, Township 13 South, Range 79 West, 6th P.M., Chaffee County, Colorado. Lot 13 is located in the NW 1/4 NW 1/4, Section 22, Township 13 South, Range 79 West, 6th P.M., Chaffee County, Colorado. The claimed point of diversion is the point where 4 Elk Creek flowed onto said Lot 13 from the National Forest which is the adjoining Section 21 to the west, and is the point at which Applicants commenced their maintenance, construction and improvement of the stream channel and stream bed of 4 Elk Creek, and controlled the flow of waters within 4 Elk Creek by operation of said stream as their ditch.

Subsequent to filing the Amended Application, Applicant has developed evidence that at the time the JBI Pond was built in 1969, the developers of the subdivision created a diversion structure from 4 Elk Creek on Lot 15. Lot 15 is located in the NW 1/4 NW 1/4, Section 22, Township 13 South, Range 79 West, 6th P.M., Chaffee County, Colorado. From that diversion point on Lot 15, a ditch was constructed which proceeded in an easterly direction across Lots 15, 16, 17, and 19 as claimed. That ditch structure is known as the JBI Pond Ditch. The original pre-1969 stream channel of 4 Elk Creek flowed northwesterly at the JBI Pond Ditch point of diversion on Lot 15 to the northeast corner of Lot 16, flowed under Wagon Trail onto Lots 9, 8, 7, under Surrey Lane and onto Lot 6 before emptying into the pond constructed on Lot 5. Attached to this Decree as Exhibit 1 is a plat map of the

subdivision showing the location of the diversion point on Lot 15, as well as the original channel of 4 Elk Creek and the location of the JBI Pond Ditch.

From its diversion point on Lot 15, the JBI Pond Ditch flows across Lots 15, 16, 19 and 20, 4 Elk Camp Subdivision, Chaffee County, Colorado and then into the JBI Pond. A manmade channel downstream of the JBI Pond flows into the pond on Lot 5, and then the Lot 5 pond overflow is into the original stream channel of 4 Elk Creek.

24. Source: 4 Elk Creek, a tributary to the Arkansas River.
25. Date of Appropriation:
  - A. August 1, 1969.
  - B. How appropriation was initiated: Since August, 1969, Applicants have diverted the entire flow of 4 Elk Creek into the JBI Pond Ditch, regularly and continuously performed dredging, maintenance, cleaning, straightening, and bentoniting of the Ditch. The surface water so diverted and controlled was then stored in JBI Pond for the claimed beneficial uses.
  - C. Date water applied to beneficial use: August 1, 1969.
26. Amount claimed: 1.5 c.f.s, absolute.
27. Use:
  - A. Fire protection, fish propagation, wildlife, recreation and storage for beneficial uses in JBI Pond.
28. Partial Summary of Evidence of Applicant's historic operation of the JBI Pond Ditch. In finding that the Applicant has diverted and applied to beneficial use the waters of 4 Elk Creek through the JBI Pond Ditch, the following evidence was considered by the Referee and the Court:
  - A. Affidavit of Lois Walton, one of the developers of the 4 Elk Camp Subdivision which states at Paragraphs 7 and 8 that the flow of 4 Elk Creek was diverted from the original creek channel into the Ditch in 1969 when the JBI Pond was completed.
  - B. July 16, 1977 Minutes of Annual Meeting of Board of Directors of 4 Elk Camp Property Owners Association itemizing the expenditure of \$300.00 for clearing and bentoniting of the Ditch a/k/a 4 Elk Creek.

- C. September 21, 1991 Annual Report of Board of Directors of 4 Elk Creek Property Owners Association regarding channelizing and bentoniting of the Ditch a/k/a 4 Elk Creek.
- D. September 21, 1991 Minutes of annual meeting documenting \$1184.00 being spent on channelizing and improving the creek bed of 4 Elk Creek to control and improve the flow into the JBI Pond. The Minutes further state that "above the 4 Elk (JBI) pond, the Association is responsible for the flow of the creek... It is recommended that the creeks be checked frequently, year around, to keep the water flowing." The Association also authorized spending \$1,000.00 to bentonite the creek bed.
- E. 2/27/94 Letter From 4 Elk Property Owner's Association re: "Water Flow in 4 Elk Creek" in which the Applicant's work plan for the creek bed a/k/a the JBI Pond Ditch includes "deepening the streambed", "clearing growth and deepening the stream channel from the National Forest boundary through each lot to where the stream leaves the subdivision, and placing "bentonite in the streambed.

The Court expressly finds that Applicant has operated, maintained and controlled its JBI Pond Ditch a/k/a 4 Elk Creek from its point of diversion on Lot 15 down to the JBI Pond. The Court further expressly finds that said JBI Pond Ditch has been continuously operated and maintained by the Applicant over and across Lots 15, 16, 17 and 19 of the 4 Elk Subdivision, with the knowledge, cooperation and acquiescence of the owners of Lots 15, 16, 17 and 19, 4 Elk Camp Subdivision, since at least 1969 when the ditch was constructed and the JBI Pond was first filled.

Applicant has the right to continue to access these Lots in order to operate and maintain the JBI Pond Ditch and to put its water rights to beneficial use.

- 29. Applicants have fulfilled all legal requirements including C.R.S. § 37-92-302 and 37-92-305 for the requested Decree for the surface water rights and water storage rights and their related uses as described above.
- 30. There are no decreed water rights on 4 Elk Creek, thus no material injury will occur to other vested water rights and decreed conditional water rights on 4 Elk Creek.
- 31. Opposers Bruce and Valerie Svihus ("Opposers") raised several issues in their statement of opposition, and with respect to these issues, the Court finds that the objections either do not warrant denial of this decree or have been expressly and adequately addressed in this Decree. In addition to this general finding, the Court makes the following additional specific findings regarding the objections of these Opposers:
  - A. Opposers claim that the JBI Pond water right will affect groundwater levels and yield in the vicinity of the pond, injuring existing water well users and



future well development. There are no other decreed water rights on 4 Elk Creek, therefore, the water rights awarded herein cannot cause material injury to any other water rights or wells on 4 Elk Creek. Speculation as to injury to future wells that may be developed is not a proper issue for this Court.

- B. Opposers' claim that the Applicants' water rights should not be awarded without a court-approved plan for augmentation. The Assistant Division Engineer and the Assistant Water Commissioner testified that from the time that the JBI Pond was constructed in 1969, it has operated under a "futile call" determination made by the Water Commissioner and Division Engineer. Thus, absolute diversions to storage in the JBI Pond through the JBI Pond Ditch have been made in priority and without injury to decreed water rights on the Arkansas River mainstem. The futile call determination is an administrative decision and there is no guarantee that such a determination will be applied to the JBI Pond in the future. However, the fact that future administration of the JBI Pond may differ from past administration under the futile call, does not warrant denial of the water rights nor imposition of a requirement that Applicants' must adjudicate a plan for augmentation as a condition precedent to granting of this Decree.
- C. Opposers claim that their property values will be impacted by Applicants operation of the JBI Pond Ditch through their property and that they have a right to the enjoyment, benefit, aesthetic value and protection of the natural resources on their property." The Constitution of the State of Colorado declares that the waters of the state are available for appropriation and beneficial use by its citizens (Article XVI, Sections 5 and 6), and protection of stream flows through Opposers' property is not a beneficial use of water which is a proper issue in a Water Court proceeding.
- D. Opposers' dispute the height of the JBI Pond Dam claimed by Applicant and assert that the JBI Pond is a "jurisdictional" dam under state law. Whether or not the JBI Pond dam is or is not of jurisdictional height is not a proper issue for consideration by the Court because it is unrelated to the issue of whether water has been stored in priority in such structure and placed to beneficial use by the Applicant. The issue of whether the JBI Pond dam is of non-jurisdictional height is a determination of the State Engineer.

In the event that the JBI Pond Dam is determined by the State Engineer to be jurisdictional, then Applicant shall comply with the State Colorado Dam Safety Regulations as ordered by the State Engineer or lower the water level stored in the JBI Pond to a level which would render the JBI Pond dam to be non-jurisdictional. In the event that the water level of the JBI Pond is permanently lowered as provided herein, then Applicant shall amend this

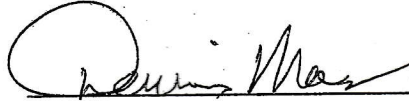
Decree to reflect the actual quantity of water being stored in the JBI Pond.  
Such amendment may be made by Motion to the Court by Applicant.

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:**

32. All the foregoing Findings of Fact and Conclusions of Law are incorporated by reference herein, and are to be considered a part of the decretal portion hereof as though set out in full.
33. The Application for Water Storage Right and Surface Water Right proposed by the Applicants is approved, subject to the terms of this decree.
34. The Applicant has furnished acceptable proof as to all claims and, therefore, the water rights requested in this matter as set forth above are hereby decreed.
35. The Applicant shall install and maintain such water measuring devices, diversion structures, flow meters, and keep proper records as the case may be as are deemed essential by the Office of the State Engineer and that the same shall be installed and operated in accordance with the instructions of said office and under the terms and conditions of this Decree.
36. The priorities awarded herein to the decree for the water rights are for a filing made to the Water Court in the year of 2003 and shall be administered by the State and Division Engineers of the Colorado Division of Water Resources as having been filed in that year, and shall be junior to all priorities awarded in previous years. As between other water rights filed in the same calendar year, priority shall be determined by historical dates of appropriation and not administered by the date of entry of this ruling and decree.
37. The JBI Pond is currently equipped with an overflow valve and standpipe mechanism that allows tributary inflows to be bypassed when the pond is full; however, the JBI Pond does not have an outlet structure which allows for the pond to be drained in order to bypass out of priority inflows when the pond level is below the top of the standpipe. After consultation with the Division Engineer, the Court concludes that the following term and condition adequately addresses this issue: In the event that the future administration of 4 Elk Creek changes and the JBI Pond and JBI Pond Ditch water rights are not being administered as futile, then Applicant shall either bypass tributary inflows or modify the outlet structure to allow tributary inflows to flow through the JBI Pond.

DATED THIS 11 day of April, 2005.

**BY THE COURT:**

A handwritten signature in black ink, appearing to read "Dennis Maes", is written over a solid horizontal line.

Dennis Maes  
Water Judge  
Water Division No. 2  
State of Colorado

