

Midway City Council
18 May 2021
Regular Meeting

Island Ditch Water Shares /
Shareholder Settlement
Agreement

**AGREEMENT FOR THE ISSUANCE OF CLASS I ISLAND DITCH
SHARES IN MIDWAY IRRIGATION COMPANY**

THIS AGREEMENT (the "Agreement") is entered into as of this _____ day of _____, 2021, by and between MIDWAY IRRIGATION COMPANY (hereinafter called "MIC"), and ISLAND DITCH IRRIGATION COMPANY (hereinafter called the "IDC"), and the individual shareholders of IDC as follows: Benevolence LLC, Midway City, Heber Valley Special Service District, Chip Wright, the Bureau of Reclamation, Probst North Field, LLC, Probst Raspberry, LLC, and the Probst Revocable Living Trust. MIC, IDC, and the individual shareholders are, from time to time, hereinafter referred to individually as a "Party" and collectively as the "Parties." Unless otherwise noted herein, this Agreement supersedes and replaces any previous agreements entered into by and between MIC and IDC and its shareholders and is the entire, complete Agreement between the Parties.

RECITALS

A. On page 64 of the Morse Decree (attached as Exhibit A) 26 water rights were granted to the area known as the Island Ditch in Midway Utah. These water rights were sufficient to irrigate 364.9 acres.

B. The largest of these water rights (55-11506 and 55-11507) were granted to Midway Irrigation Company ("MIC") and are sufficient for the irrigation of 186 acres of land ("Island Ditch Water").

C. The remaining 24 water rights in the Island Ditch area were granted to private individuals and some were delivered through the same diversions and ditches as the MIC water, but were not represented by shares in MIC and were not considered a part of MIC.

D. In 1989 a request was submitted to MIC to allow the holders of the shares of the Island Ditch Water to break off from MIC and to form the Island Ditch Irrigation Company ("IDC").

E. MIC issued Stock Certificate #2516 to the Island Ditch Irrigation Company for 254 shares, which exceeded the number of shares supported by Water Rights 55-11506 and 55-11507 by 68 shares.

F. At the time of the separation it was understood by both parties that MIC deeded Water Rights 55-11506 and 55-11507 to the Island Ditch Irrigation Company, which actually never happened. Further, none of the remaining private water rights in the area were ever deeded to MIC or IDC to support the issuance of the additional 68 shares.

G. Due to proposed land sales in the Island Ditch Area, it was discovered that the arrangement between MIC and IDC was not sufficient to pass marketable title to the shares that were supposedly held by IDC.

H. MIC and IDC agreed to work together to resolve the accounting issues and secure a

chain of title to the shares so that owners in the area could sell their land and water rights.

I. As part of this effort, MIC approved edits to its bylaws in 2019 to create a new class of stock entitled Class I (Island Ditch) shares, and the shareholders of IDC approved dissolving the company in 2019, leaving Water Rights 55-11506 and 55-11507 in MIC, and having Class I (Island Ditch) shares issued on the Island Ditch Water.

J. A request was submitted by IDC for the issuance of 333 Class I shares, highlighting accounting errors and issues that needed to be resolved through a reconciliation of the water rights held by both companies and assuring the shares issued were supported by these water rights.

K. Working together, the companies have reached an agreement on the accounting and number of Class I shares that need to be issued on Water Rights 55-11506 and 55-11507, and the transfer of private water rights to MIC to support the additional 68 shares issued in 1989.

L. As part of this agreement, IDC will dissolve its company and affirm ownership of the Island Ditch Water, and all right, title and interest it has or may have to its ditches and infrastructure to MIC in exchange for Class I shares in MIC in accordance with the terms set forth below.

M. Each Party acknowledges that it is entering into this Agreement voluntarily.

THEREFORE, for the good and valuable consideration set forth below, the sufficiency of which is accepted and acknowledged, the Parties agree as follows:

1. Basis for the Issuance of Class I Shares: MIC agrees to issue and IDC and its shareholders agree to accept 316 Class I shares based on the following water rights:
 - a. 55-11506 and 55-11507 (currently held by MIC as established in the Morse Decree attached as Exhibit A);
 - b. 55-11510 and 55-11511 and water rights 55-11526 and 55-11527 (currently held by MIC as established in a Deed from HVSSD attached as Exhibit B);
 - c. 55-11516 and 55-11517 and water rights 55-11528 and 55-11529 (currently held by MIC as established in a Deed from The Calvin J. Probst Family Revocable Trust and Probst North Fields, LLC attached as Exhibit C).
 - d. 55-11530 and 55-11531 (17.22 acres as established in a Deed from CJP Family 1, LC attached as Exhibit D).
 - e. 55-11518 and 55-11519 (35 acres as established in a Deed from Probst North Field, LLC and Probst Raspberry, LLC attached as Exhibit E).
 - f. 55-11520 and 55-11521 (9.57 acres as established in a Deed from The Calvin J. Probst Family Revocable Trust attached as Exhibit F).
 - g. 55-11522 and 55-11523 (10 acres as established in a Deed from Probst North Field, LLC and Probst Raspberry, LLC attached as Exhibit G).

- h. 55-11524 and 55-11525 (1.21 acres as established in a Deed from Probst North Field, LLC attached as Exhibit H).

2. Distribution of Class I Shares: The 316 Class I shares will be distributed as set forth below:

Shareholder	Class I Shares
Benevolence, LLC	1
HVSSD	80
Chip Wright	20
Bureau of Reclamation	8
Midway City	15
The Calvin J. Probst Family Revocable Trust	192
TOTAL	316

3. RECONCILIATION: The parties acknowledge that there has been long-standing confusion regarding the accounting of shares since Island Ditch organized itself in 1989, with particular questions regarding the 68 shares issued that were not supported by water rights in either company. The parties acknowledge that they have worked together to resolve these discrepancies, and that with the transfer of water rights to MIC from HVSSD, The Calvin J. Probst Family Revocable Trust, Probst North Field, LLC, and Probst Raspberry LLC as set forth above, there are now water rights sufficient to support all Class I shares issued under this agreement. Further, IDC and its shareholders acknowledge that the records of IDC were less than accurate, and all agree that the issuance of Class I shares as set forth above represents their interests, both individually and corporately, to their interests in all of water rights 55-11506/507, and to their interests in the following water rights in the amounts deeded to the Company in Exhibits B through H: 55-11510/511, 55-11526/527, 55-11516/517, 55-11518/19, 55-11520/21, 55-11522/23, 55-11524/25, and 55-11530/531. IDC and its shareholders agree that by accepting the Class I shares issued under this agreement the shareholder does hereby release MIC from any and all liability associated with the calculation and issuance of the Class I shares, with the express agreement that the only rights that remain to IDC and the shareholders after accepting the Class I shares issued on the water rights deeded to the Company in Exhibits A through H are those that exist as a Class I shareholder in MIC.
- a. Exhibit I contains the analysis on how the reconciliation and issuance of shares was calculated, and by signing below IDC and each shareholder does hereby warrant and represent that it has reviewed the analysis and accepts the same for purposes of the issuance of Class I shares, and waives all claims it/they have or may have regarding these calculations, including alternative calculations based on information presently known or discovered in the future.

4. IDC and its shareholders represent and warrant as follows:
 - a. MIC holds all right, title and interest to Water Rights 55-11506/507, 55-11510/511, 55-11526/527, 55-11516/517, 55-11518/519, 55-11520/521, 55-11522/523, 55-11524/525 55-11528/529, and 55-11530/531 and waives any and claims they have or may have in these water rights in exchange for Class I shares in MIC. The Parties agree that there is an additional 4 acres from Water Rights 55-11508/509, an additional 8.9 acres from Water Rights 55-11514/515, an additional 5 acres from Water Rights 55-11528/529, and an additional 4.79 acres from Water Rights 55-11524/525 that could be transferred to MIC from the Calvin J. Probst Family Revocable Trust or Probst Raspberry, LLC for an additional 22.69 Class I Shares.
 - b. MIC holds all right, title and interest to all easements, infrastructure, ditches, canals, water works, and diversions currently associated with, used by, or made necessary by the delivery of Water Rights 55-11506/507, 55-11510/511, 55-11526/527, 55-11516/517, 55-11518/519, 55-11520/521, 55-11522/523, 55-11524/525, 55-11528/529, and 55-11530/531.
5. As set forth in MIC's Bylaws, Class I Island Ditch shares shall be entitled to the following rights, and subject to the following restrictions:
 - a. MIC will issue Class I Island Ditch shares to the holders of stock in IDC, in accordance with the list set forth in paragraph 2 above.
 - b. Each Class I share shall have the diversion, quantity, type, use, flow, and period of use rights associated with the Island Ditch water rights, as these water rights are set forth in Exhibit A.
 - c. The holders of Class I Island Ditch stock shall have the rights set forth in the MIC bylaws.
 - d. MIC shall be responsible for on-going maintenance and operation of all ditches, easements, canals, infrastructure and waterworks associated with the water rights represented by the Class I shares, and MIC shall cooperate in good faith with any Class I shareholder's request for pressurized irrigation for the delivery of such water. MIC shall have the right to make special assessments to Class I stock for the purpose of on-going maintenance or for a request to pressurize the Island Ditch system in accordance with MIC Bylaws in effect at the time.
 - e. IDC and its shareholders do hereby agree to indemnify and hold

harmless MIC for any liability that arises from the operation of IDC prior to the date of this agreement.

- f. MIC does hereby agree to indemnify and hold harmless holders of Class I stock for any liability that arises from the operation of MIC and its associated water rights and infrastructure prior to the date of this agreement.
- g. IDC and its shareholders acknowledge that the Island Ditch Irrigation Company was created in 1989 and expired in 2001 for failure to file a renewal. With the intent to renew IDC as it was formed in 1989, a new corporation with the same name and charter for IDC was filed in 2014 and expired in 2021 for failure to file a renewal. IDC and its shareholders do hereby acknowledge Ken Probst's authority to wrap up the affairs of IDC and acknowledge the binding nature of his signature on this Agreement on behalf of IDC.
- h. By accepting Class I shares in MIC, IDC and its shareholders do hereby recognize that the IDC shares issued to its shareholders were a good faith attempt by IDC and its shareholders for such shares to be based on water shares transferred by MIC in 1989 (Stock Certificate #2516) or those water rights granted by the Morse Decree. By signing this agreement IDC and each shareholder hereby surrender to MIC all rights, title and interest it/they have or may have to pre-existing MIC shares or shares in the IDC company, and accept cancellation of the same.
- i. By signing below, each shareholder receiving Class I stock in MIC agrees to and acknowledges the following:
 - 1. After the execution of this Agreement, Class I shares may be assessed future operation and maintenance costs uniquely associated with the delivery of the water represented by a Class I shares, as well as assessed for the system generally if these assessments are approved in accordance with MIC Bylaws in effect at the time.
 - 2. By accepting the Class I shares the shareholder subjects himself/herself to the Bylaws and existing Policies and Procedures of MIC, acknowledges that they have read them, and agrees to abide by them.

3. IDC shareholders agree that none of the Class I Island Ditch shares will be allowed to be transferred into MIC's culinary sources (i.e. Mahogany Spring and Gerber Spring).
 4. MIC and IDC shareholders each agree not to protest any change application to move any of the Class I shares into the City owned and operated Mahogany Well or any other future developed City owned culinary sources.
 5. The parties do hereby mutually waive the requirement to file a Change Application on the Island Ditch Water Rights to add the River Ditch as a point of diversion.
 6. All of the above provisions will survive closing.
6. Amendment. Once Class I Island Ditch shares are issued by MIC and accepted by the parties hereto, no amendment of this Agreement shall be allowed unless agreed in writing signed by all parties.
7. Miscellaneous Terms.
- a. Incorporation of Recitals and Introductory Paragraph. The Recitals contained in this Agreement, and the introductory paragraph preceding the Recitals, are hereby incorporated into this Agreement as if fully set forth herein.
 - b. Other Necessary Acts. Each Party shall execute and deliver to the other Party any further instruments and documents as may be reasonably necessary to carry out the objectives and intent of this Agreement. MIC shall take all necessary actions to defend, perfect, and protect all water rights represented by the Class I shares for the benefit of the Class I shareholders, including any necessary filings or action in the pending adjudication (Case No. 365729849).
 - c. Other Miscellaneous Terms. The singular shall be made plural; the masculine gender shall include the feminine; "shall" is mandatory; "may" is permissive.
 - d. Waiver. No action taken by any Party shall be deemed to constitute a waiver of compliance by such Party with respect to any representation, warranty, or condition contained in this Agreement. Any waiver by any Party of a breach or default of any condition of this Agreement shall not operate or be construed as a waiver by such Party of any subsequent breach or default.
 - e. Utah Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Utah.

- f. Attorney's Fees. In the event of litigation or arbitration between the Parties regarding an alleged breach of this Agreement, the prevailing party shall be entitled to its reasonable costs and attorney's fees.
- g. Covenant of Good Faith and Fair Dealing. Each Party shall use its best efforts and take and employ all necessary actions in good faith consistent with this Agreement and Applicable Law to ensure that the rights secured to the other Party through this Agreement can be enjoyed.
- h. Representations. Each Party hereby represents and warrants to each other Party that the following statements are true, complete and not misleading as regards the representing and warranting Party:
 - 1. Such Party is duly organized, validly existing and in good standing under the laws of the state of its' organization.
 - 2. Such Party has full authority to enter into this Agreement and to perform all of its obligations hereunder. The individual(s) executing this Agreement on behalf of such Party do so with the full authority of the Party that those individuals represent.
 - 3. This Agreement constitutes the legal, valid and binding obligation of such Party, enforceable in accordance with its terms, subject to the rules of bankruptcy, moratorium, and equitable principles.
- 8. Entire Agreement, Counterparts and Exhibits. Unless otherwise noted herein, this Agreement, including its Exhibits, is the final and exclusive understanding and agreement of the Parties and supersedes all negotiations or previous agreements between the Parties with respect to all or any part of the subject matter hereof.
- 9. Enforcement. This Agreement may be specifically enforced.
- 10. Survival of Terms and Conditions. All provisions of this Agreement which, by their context or by the language hereof, continue or are meant to continue beyond the Closing, shall survive the Closing until such time as their existence is of no benefit to any Party.
- 11. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and assigns.
- 12. Execution. This Agreement may be executed in multiple counterparts, which taken together shall constitute one and the same document. This Agreement may be executed and delivered by facsimile, email or other electronic means.

PURPOSEFULLY LEFT BLANK
SIGNATURE PAGE FOLLOWS

IN WITNESS HEREOF, this Agreement has been entered into by and between the following:

MIDWAY IRRIGATION COMPANY

Steve Farrell
Its: President

ISLAND DITCH IRRIGATION COMPANY

Ken Probst
Its: President

INDIVIDUAL SHAREHOLDERS OF ISLAND DITCH IRRIGATION COMPANY

CITY OF MIDWAY Attest:

Celeste Johnson, Mayor

Brad Wilson, City Recorder

BENEVOLENCE, LLC

Brad Pelo
Its: Manager

HEBER VALLEY SPECIAL SERVICE DISTRICT

Celeste Johnson
Its: Chair

BUREAU OF RECLAMATION

By:
Its:

CHIP WRIGHT

THE CALVIN J. PROBST FAMILY REVOCABLE TRUST

Ken Probst

Its: Trustee

PROBST RASPBERRY, LLC

Ken Probst

Its: Manager

PROBST NORTH FIELDS, LLC

Ken Probst

Its: Manager

EXHIBIT A

I S L A N D D I T C H.

N-A-M-E.

Class, Acres, Second Feet.

(a)	Midway Irrigation Company,	1st	186	3.100	55-11506
		17th		1.550	55-11507
(b)	Alfred L. Alder,	1st	4	0.067	55-11508
		17th		0.033	55-11509
(c)	Jesse Nelson,	1st	32	0.533	55-11510
		17th		0.257	55-11511
(d)	William L. Van Wagoner, and John Van Wagoner Jr.,	1st	10	0.157	55-11512
		17th		0.083	55-11513
(e)	William Winterton,	1st	8.90	0.148	55-11514
		17th		0.074	55-11515
(f)	John Murri,	1st	15	0.250	55-11516
		17th		0.125	55-11517
(g)	Hyrum S. Winterton, T. Fred Winterton, and Moroni Winterton,	1st	35	0.583	55-11518
		17th		0.292	55-11519
(h)	E. R. Bronson,	1st	15	0.250	55-11520
		17th		0.125	55-11521
(i)	Joseph S. Wright,	1st	10	0.167	55-11522
		17th		0.083	55-11523
(j)	William Bonner,	1st	6	0.100	55-11524
		17th		0.050	55-11525
(k)	James Pyper,	1st	5	0.083	55-11526
		17th		0.042	55-11527
(l)	Henry Zenger,	1st	5	0.083	55-11528
		17th		0.042	55-11529
(m)	James A. Hamilton, William Hamilton, Ella Hamilton Snyder, Jennie Hamilton Summers, Lovica Hamilton Snyder, Mary Hamilton Chambers, Maggie Hamilton Campbell, Theodore Hamilton, and David Hamilton, duly substituted for James B. Hamilton, deceased; Jointly and undivided,	1st	33	0.550	55-11530
		17th		0.275	55-11531

EXHIBIT I

EXHIBIT I

IDC SHARES RECONCILIATION

The following is the process followed to reach the number of Class I shares issued by MIC to IDC shareholders under this Agreement:

1. The total decreed water rights issued in the Island Ditch area is for 364.9 acres. As set forth below, when done with the reconciliation, there cannot be more than 364.9 acres represented collectively by Class I shares and private water rights.
2. MIC holds water right 55-11506 and 55-11507 which is sufficient for 186 acres.
3. In 1989 MIC issued stock certificate 2516 to Island Ditch Company for 254 shares (i.e. acres), which was 68 shares more than it held water rights for.
4. The parties acknowledge that neither MIC nor IDC ever had private water rights transferred to them to support the additional 68 shares.
5. Based on the stock book of IDC, the current shareholders of the Company are as follows:

SHAREHOLDER	SHARES	
Larry Bonner (now Probst Rev. Trust)	13	
Sharon Jensen (now Benevolence, LLC)	1	
HVSSD	80	
Eldon Wright	10	
James Wright	10	
Bureau of Reclamation	8	
Midway City	15	
Probst Rev. Trust	93	
Probst Rev. Trust	11	
Howard L. Bodily Family Partnership (Now Probst Rev. Trust)	13	
TOTAL	254	

This still leaves 68 shares issued on water rights that were never transferred to either MIC or IDC. To highlight the problematic aspect of accounting, IDC submitted a request for 333 Class I shares to MIC in 2019 that was based on practically all of the private water rights in the area, even though none of them had been deeded to either MIC or IDC.

MIC agreed to issue Class I shares on only those water rights it held title to, which prior to this agreement was 186. The following analysis was done to reconcile the private water rights with the 254 shares issued in 1989 and has resulted in an agreement to have 68 acres of water deeded to MIC to support the number of 254 shares.

Of the remaining shareholders in IDC, there are only two (The Probst Entities and HVSSD) that hold a combination of private water rights and make claims to Class I shares that, if combined, far exceed their existing acreage, suggesting some portion of the claimed Class I shares are actually held in private water rights that need to be deeded to MIC to justify the shares. Both parties have stipulated to the following reconciliation.

HVSSD claims 80 shares in IDC, and an additional 37 acres in private water rights. A review of a map shows that HVSSD only holds 80 acres in the Island Ditch area that is under irrigation, meaning 37 of those 80 acres are actually supported by private water rights. HVSSD has deeded to MIC Water Rights 11510/511 (32 shares) and Water Rights 11526/527 (5 shares) in exchange for 80 Class I shares that matches the eighty acres it has outside of the sewer ponds. This means that 43 acres of the original 80 were covered by Water Rights 11506/507 and the remaining 37 acres are now supported by water rights transferred to MIC.

This leaves 31 acres that need to be covered by independent water rights to reach 254. Probst has 199 acres of property and claims water rights sufficient for 214.69 acres (130 Class I shares and 95.69 acres of private water). Combined this would be 225.69 acres, which exceeds his actual acreage.

To reconcile Probst has deeded Water Rights 11516/517 (15 shares) and Water Rights 11528/529 (5 shares) to cover the first 20 acres. Probst has also deeded Water Right 11530/531 (17.22 shares) to MIC to cover the remaining 11 acres of the issued 254 shares. The parties agree that 11530/11531 contains 6.22 acres more than is required to cover the remaining 11 acres, and as such, MIC will issue an additional 6.22 Class I shares on these extra water rights.

With these transactions the books are now balanced, with all Class I shares supported by decreed water rights.

The following table reconciles the Class I shares:

SHAREHOLDER	SHARES	Original Shares	Outside Water	Total
Larry Bonner to (The Calvin J. Probst Family Revocable Trust)	13	13 (from Lois Bonner to kids to Larry Bonner)		13
Sharon Jensen to Benevolence, LLC	1	1 (from Harvey Van Wagoner)		1
HVSSD	80	80 (received from Harvey Van Wagoner)	Deed 510 and 511 (32 shares)	80

			Deed 526-527 (5 shares)	
Eldon Wright to James (Chip) Wright	10	20		10
James Wright to James (Chip) Wright	10			10
Bureau of Reclamation	8	8 (received from Calvin Probst)		8
Midway City	15	15 (from HVSSD)		15
Probst Rev. Trust	93	93	Deed 516-517 (15 shares) 528-529 (5 shares) Deed 530/531 (11 shares)	93
The Calvin J. Probst Family Revocable Trust	11	11		11
Howard Bodily to The Calvin J. Probst Family Revocable Trust	13	13		13
TOTAL	254			254
Probst Rev. Trust	6.22		Deed 530/531 (remaining 6.22 shares)	6.22
	260.22			260.22

With these transfers all water rights in the Island Ditch area are accounted for and tied to the land held by the property owners:

Water Right	Owner	Recognized amount of Acreage
55-11506/507	MIC	186 (Class I Shares)
55-11508/509	The Calvin J. Probst Family Revocable Trust	4
55-11510/511	MIC	32 (Class I Shares)

55-11512/513	BJW Trust	10
55-11514/515	Probst Raspberry, LLC	8.9
55-11516/517	MIC	15 (Class I Shares)
55-11518/519	Probst North Field, LLC Probst Raspberry, LLC	35
55-11520/521	Benevolence LLC (2.72) The Calvin J. Probst Family Revocable Trust (9.57)	15
55-11522/523	Probst North Field, LLC Probst Raspberry, LLC	10
55-11524/525	Probst North Field, LLC	6
55-11526/527	MIC	5 (Class I Shares)
55-11528/529	The Calvin J. Probst Family Revocable Trust Probst North Fields, LLC	5
55-11530/531	Hamilton Et. Al (15.78)	33
55-11530/531	MIC (17.22)	17.22 (Class I Shares)
TOTAL		364.9

The Probst Entities have deeded sufficient private water rights to support an additional 62 Class I shares as follows:

Probst Entities	130		From original 254 issued	130
Probst Rev. Trust	6.22		Deed 530/531 (remaining 6.22 shares)	6.22
Probst North Field/Raspberry	35		Deed 518/519	35
Probst Rev. Trust	9.57		Deed 520/521	9.57
Probst North Field/Raspberry	10		Deed 522/523	10
Probst North Field	1.21	Leaves 4.79 in water right	Deed 524/525	1.21
	192			192