

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 5, 2011

Ms. LaDonna Castañuela, Chief Clerk
Office of the Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC-105
Austin, Texas 78711-3087

Re: TCEQ Docket No. 2011-0128-UCR; Consideration of a request for a Commission order approving contracts between Ni America Texas Development, LLC (Ni America), Certificate of Convenience and Necessity (CCN) No. 13177, and Wellborn Special Utility District (Wellborn), (CCN) No. 11340, in Brazos County, Texas.

Dear Ms. Castañuela:

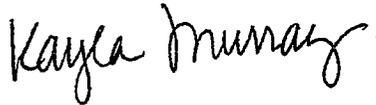
Transmitted herewith for filing with the Texas Commission on Environmental Quality (Commission or TCEQ) are the following items to be filed as backup materials for the April 20, 2011 agenda on a request for an order approving contracts designating water service areas between Ni America Texas Development, LLC (Ni America) and Wellborn Special Utility District (Wellborn):

1. Proposed Order;
2. Agenda Executive Summary;
3. Caption
4. Staff memo detailing financial, managerial, and technical capabilities of Wellborn to provide continuous and adequate service to the affected area;
5. Request for Commission order approving a Texas Water Code Section 13.248 agreement filed by Ni America on July 21, 2009, and declared administratively complete on March 10, 2010;
6. Texas Water Code, Section 13.248 contract between Ni America and Wellborn executed on June 23, 2009;
7. Map of the service area subject to the section 13.248 agreement for demonstrative purposes only; and
8. Notices Mailed to Parties.

Ms. LaDonna Castañuela, Chief Clerk
April 5, 2011
Page 2

Please do not hesitate to contact me at (512) 239-4761 if you have any questions regarding this material. Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink that reads "Kayla Murray". The signature is written in a cursive, flowing style.

Kayla Murray, Staff Attorney
Environmental Law Division

Enclosures

cc: Mailing list

**TCEQ DOCKET NO. 2011-0128-UCR
APPLICATION NO. 36467-C**

IN THE MATTER OF THE	§	BEFORE THE TEXAS
REQUEST FOR AN ORDER	§	
APPROVING THE CONTRACT	§	
DESIGNATING SERVICE AREAS	§	COMMISSION ON
BETWEEN NI AMERICA TEXAS	§	
DEVELOPMENT, LLC AND	§	
WELLBORN SPECIAL UTILITY	§	
DISTRICT IN BRAZOS COUNTY,	§	ENVIRONMENTAL QUALITY
TEXAS		

ORDER

A request for a Commission order approving a contract designating service areas between Ni America Texas Development, LLC (Ni America), Certificate of Convenience and Necessity (CCN) No. 13177, and Wellborn Special Utility District (Wellborn), Certificate of Convenience and Necessity (CCN) No. 11340, in Brazos County, Texas, was presented to the Texas Commission on Environmental Quality (TCEQ or Commission) for approval pursuant to Section 13.248 of the Texas Water Code and Title 30 of the Texas Administrative Code, Section 291.117.

On June 23, 2009, Ni America and Wellborn entered into an agreement (Agreement) regarding their respective water service areas pursuant to Section 13.248 of the Texas Water Code. Under the Agreement, Ni America will transfer a portion of its CCN area (Myers Reserve Tract) to Wellborn in five years from December 17, 2010, the date that Ni America was granted CCN No. 13177 for that area, and Wellborn will be the sole retail water service provider for the Myers Reserve Tract. The Myers Reserve Tract, which contains approximately 660 acres, is within Ni America's CCN; this Tract will be transferred to Wellborn. The Agreement provides for all customers and facilities to be

transferred to Wellborn via a Sale, Transfer, or Merger (STM) during the last twelve months of the five-year period in which Ni America is providing service. The Agreement is attached to this Order.

Contracts between retail public utilities that designate areas to be served and customers to be served by those retail public utilities, when approved by the Commission after public notice and hearing, are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity. TEXAS WATER CODE, §13.248.

The Commission held a hearing on the request at the April 20, 2011 agenda and found the request had merit.

Based on its current financial status, Wellborn is capable of rendering continuous and adequate water service to all customers in the Myers Reserve Tract, as described by the Agreement. The CCN transfer, which results in Wellborn being the sole retail water service provider in the Myers Reserve Tract, is necessary for the service, accommodation, convenience, or safety of the public.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

The Agreement transferring the Myers Reserve Tract of Ni America's CCN No. 13177, to Wellborn, CCN No. 11340, and designating that Wellborn is the sole retail water service provider in the Myers Reserve Tract, is hereby approved.

CCN No. 13177, in Brazos County, held by Ni America Texas Development, LLC, will be amended at the appropriate time in accordance with the Agreement with respect to the Myers Reserve Tract.

CCN No. 11340 in Brazos County, held by Wellborn Special Utility District, will be amended at the appropriate time in accordance with the Agreement with respect to the Myers Reserve Tract.

The Executive Director is directed to redraw the maps of the respective CCNs at the appropriate time as provided in the Agreement, and to amend the Commission's official water service area map for Brazos County, Texas, at the appropriate time. A map for demonstrative purposes is attached to this Order

The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to the parties.

If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

Issue Date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

For the Commission

Texas Commission on Environmental Quality
INTEROFFICE MEMORANDUM

TO: Texas Commission on Environmental Quality **DATE:** April 5, 2011

THRU: LaDonna Castañuela, Chief Clerk

FROM: Kayla Murray, Staff Attorney, Environmental Law Division

SUBJECT: TCEQ Docket No. 2011-0128-UCR. Consideration of a request for a Commission order approving the contract designating water service areas between Ni America Texas Development, LLC (Ni America), Certificate of Convenience and Necessity (CCN) No. 13177, and Wellborn Special Utility District (Wellborn), CCN No. 11340.

DESCRIPTION OF APPLICATION

Applicant: Ni America Texas Development, LLC

Regulated Activity: Retail water utility service

Type of Application: Request for a Commission Order approving a contract

Commission Action: Hearing regarding approval of the contract

Authority: Texas Water Code § 13.248 and 30 Texas Administrative Code § 291.117

FACTUAL BACKGROUND

Ni America Texas Development, LLC (Ni America), water certificate of convenience and necessity (CCN) No. 13177, has the right to provide retail water service to the approximate 660 acres in Brazos County that comprises its CCN; this area is also known as the Myers Reserve Tract. Ni America and Wellborn Special Utility District (Wellborn), CCN No. 11340, entered into a contract on June 23, 2009 regarding their respective water service areas pursuant to section 13.248 of the Texas Water Code. As stated in the agreement, Ni America will provide retail water utility service to the Myers Reserve Tract for five years beginning on December 17, 2010, the date that it was granted CCN No. 13177 for that area. At some time during the final twelve months of Ni America's five-year service period, it will prepare a Sale, Transfer, or Merger (STM) application to transfer the Myers Reserve Tract to Wellborn.

There are no customers in this area and there will be no transfer of facilities under the Agreement.

It should be noted that this request to transfer the service area is different from other 13.248 agreements in that the service area at issue is not being transferred at this time. When Ni America applied for a water CCN in Brazos County, Wellborn filed a protest with respect to that CCN application. In an effort to avoid a contested case hearing on Ni America's water CCN application, Ni America and Wellborn entered into the settlement agreement that the parties now ask the Commission to approve.

LEGAL AUTHORITY

The Texas Water Code prohibits a utility, a utility operated by an affected county, or a water supply corporation from rendering retail water or sewer utility service directly or indirectly to the public without first obtaining a CCN.¹ Conversely, a municipality is not required to obtain a CCN to provide retail water service.² However, a municipality may not provide service to areas that are outside of its corporate boundaries but within the CCN of another retail public utility without first obtaining written consent from that retail public utility.³

The Texas Water Code and TCEQ rules allow retail public utilities to enter into service area agreements and have the Commission affirm the agreements by amending the entities' respective CCNs.⁴ A transfer of a water or sewer system that also includes the transfer of customers and/or facilities may, in some cases, also require separate Commission approval for the transfer of customers and/or facilities.⁵

¹ TEX. WATER CODE ANN. § 13.242(a) (Vernon 2006).

² A municipality is a "retail public utility" under section 13.002(19) of the Texas Water Code but is not a "utility" under section 13.002(23). Therefore, the section 13.242(a) requirement that a "utility" must obtain a CCN before providing retail water utility service does not apply to a municipality.

³ *Id.* § 13.242(a).

⁴ *Id.* § 13.248; 30 TEX. ADMIN. CODE § 291.117 (West 2005) (Tex. Comm'n on Envtl. Quality, Contracts Valid and Enforceable). Section 13.248 states "contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the commission after public notice and hearing, are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity." Section 13.255(a) states that "[i]n the event that an area is incorporated or annexed by a municipality, ... the municipality and a retail public utility that provides water or sewer service to all or part of the area pursuant to a certificate of convenience and necessity may agree in writing that all or part of the area may be served by a municipally owned utility, by a franchised utility, or by the retail public utility. ... The executed agreement shall be filed with the commission, and the commission on receipt of the agreement, shall incorporate the terms of the agreement into the respective certificates of convenience and necessity of the parties to the agreement."

⁵ TEX. WATER CODE § 13.301. The section requires that some applicants also demonstrate "adequate financial, managerial, and technical capability for providing continuous and adequate service to the service area being acquired and to any areas currently certificated to the person" for the separate transaction relating to the transfer of facilities and/or customers.

The requests to approve the 13.248 agreements are not subject to the notice provisions of section 291.106, Title 30 of the Texas Administrative Code, which apply to applications for new and amended CCNs. The Commission may approve the service area agreement pursuant to section 13.248 of the Texas Water Code with the appropriate notice under the Open Meetings Act. The Executive Director will mail notice of the hearing upon the setting of an Agenda date.

BASIS FOR STAFF RECOMMENDATION

The following items were considered in developing the staff's recommendation:

1. Request for a Commission order approving the 13.248 contract emailed to the TCEQ from Wellborn Special Utility District on July 21, 2009 (Application No. 36467-C);
2. Settlement and Water Code 13.248 Agreement between Ni America Texas Development, LLC and Wellborn Special Utility District, executed on June 23, 2009;
3. Map (for demonstrative purposes) of the water service areas subject to the aforementioned agreement;
4. Financial, Managerial, and Technical analysis of Wellborn Special Utility District to operate in the affected area; and
5. Proposed Order.

STAFF RECOMMENDATION

Based on the facts stated in the application and the supporting documentation submitted by Ni America Texas Development, LLC and Wellborn Special Utility District, staff supports the request for a Commission order approving the contract designating service areas between Ni America Texas Development, LLC and Wellborn Special Utility District. Staff has confirmed that both parties are retail public utilities with active water CCNs and that the area the parties are seeking to transfer is certificated to Ni America Texas Development, LLC. Further, staff is satisfied that the Wellborn Special Utility District possesses the adequate financial, managerial, and technical capability to provide continuous and adequate service to the area to be transferred in five years from December 17, 2010.

Staff acknowledges that this 13.248 request is different from other 13.248 requests since no territory is being transferred at this time. While staff supports the request and has determined that Wellborn is capable of providing service to the Myers Reserve Tract, staff defers to the Commission on the policy question regarding the approval of a 13.248 request that does not contemplate a transfer of CCN territory until approximately five years from now.

STAFF CONTACTS

Kayla Murray, Environmental Law Division (239-4761)

Heidi Graham, Water Supply Division (239-0844)

CAPTION
Ni America Texas Development LLC
Application No. 36467-C

TCEQ Docket No. 2011-0128-UCR. Consideration of a request for a Commission Order approving a contract designating service areas between the Ni America Texas Development, LLC (Ni America), Certificate of Convenience and Necessity (CCN) No. 13177, and Wellborn Special Utility District (Wellborn), (CCN) No. 11340, in Brazos County, Texas, pursuant to section 13.248 of the Texas Water Code. Currently, Ni America holds a CCN for the area in question. Under the contract, Ni America will transfer the approximate 660-acre known as the Myers Reserve Tract to Wellborn in five years from December 17, 2010, the date that Ni America was issued the CCN for this area. Wellborn will be the sole retail water service provider in this area. There are no customers in this area and there will be no transfer of facilities under the Agreement. (Kayla Murray, Heidi Graham)

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Environmental Law Division **Date:** March 11, 2010
Thru: Heidi Graham/Vera Poe/Tammy Benter
From: Dan Smith
Subject: Contract Service Agreement Pursuant to Texas Water Code (TWC), Section 13.248, from Ni America Texas Development, LLC, (Ni America) Certificate of Convenience and Necessity (CCN) No. 13177, to Transfer a Portion of CCN No. 13177 to Wellborn Special Utility District (SUD), CCN No. 11340, in Brazos County; Application No. 36467-C

CN: 603329970; RN: 105477749 (Ni America Texas Development, LLC)
CN: 600647481; RN: 101458792 (Wellborn SUD)

In my opinion, Wellborn SUD has demonstrated adequate financial, managerial and technical capability to provide service to the area contracted for transfer.

Signed: Dan Smith Date: March 11, 2010

Ni America and Wellborn SUD entered an agreement dated June 23, 2009, to transfer approximately 600 acres with no current customers or system facilities, from Ni America's area to Wellborn's.

Ni America has not begun to provide service. Wellborn provides service to approximately 3,100 connections.

I have reviewed an unqualified opinion audit for Wellborn as the acquirer of the acreage under contract, dated December 31, 2008. The statement of net assets (balance sheet) shows total assets of \$17,137,020, of which \$2,517,379 is cash and of that amount, \$649,989 is restricted. Long-term debt is \$8,392,492 and net assets (equity) is \$7,881,095, for a ratio of debt to equity of 1.06:1.

The statement of revenues and expenses for water and wastewater operations showed a change in net assets (net profit) of \$906,483. These figures were net of

(continued)

Ni America Texas Development, LLC and Wellborn Special Utility District
Financial and Managerial Capability Analysis of Contract Service Agreement
Page 2

depreciation expense of \$331,969 and interest expense of \$243,821. So, cash available for debt service is \$1,482,273 and the next year's required principal and interest payments are \$605,504, for a ratio of debt service coverage of 2.45:1.

Since Ni America does not have operations or facility yet, it is assumed that transferring the area in question will not have a material adverse effect on their financial position.

This information supports a finding of adequate financial and managerial capability to provide service to the area contracted for transfer.



816 Congress Avenue, Suite 1900
Austin, Texas 78701
Telephone: (512) 322-5800
Facsimile: (512) 472-0532
www.lglawfirm.com

Mr. Embrey's Direct Line
(512) 322-5829
Email: tembre@lglawfirm.com

July 21, 2009

VIA HAND DELIVERY

Ms. Tammy Holquin-Benter
Utilities and Districts Section
Water Supply Division
Texas Commission on Environmental Quality
Building F
12100 Park 35 Circle
Austin, Texas 78753

RECEIVED
TCEQ
WATER SUPPLY DIV.
2009 JUL 21 PM 4 49

Re: Request for Approval of Agreement between Ni America Texas Development, LLC and Wellborn Special Utility District.

Dear Ms. Holquin-Benter:

In accordance with Section 13.248 of the Texas Water Code and 30 Texas Administrative Code 291.117, I submit this request on behalf of Ni America Texas Development, LLC for the approval of the Texas Commission on Environmental Quality ("TCEQ") of the attached agreement between Ni America Texas Development, LLC and Wellborn Special Utility District ("Wellborn SUD"). Under the terms of the agreement, Ni America Texas Development, LLC will have the exclusive authority to provide retail water service to the approximately 660 acres known as the Myers Reserve pending the granting of the retail water certificate of convenience and necessity ("CCN") application filed by Ni America Texas Development, LLC with the TCEQ (Application No. 36003-C).

To assist in the TCEQ's review of this request, attached are the following documents:

- Attachment A - Copy of Agreement between Ni America Texas Development, LLC and Wellborn SUD.
- Attachment B - Mapping Information for approximately 660 acres to be served by Ni America Texas Development, LLC.
- Attachment C - Financial, Managerial, and Technical Information for Ni America Texas Development, LLC.

RECEIVED
JUL 21 2009
TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY

Ms. Tammy Holguin-Benter
Texas Commission on Environmental Quality
July 21, 2009
Page 2

Attachment D - List of affected entities and individuals

Filing fee in the amount of \$100.00.

Thank you for your consideration of this request and I appreciate your time and effort. Please do not hesitate to call me at the above number if you have any questions or require additional information.

Sincerely,



Ty H. Embrey
Attorney for Ni America Texas Development, LLC

Attachments
2649/05/corr/ltr090721

cc: Mike Ashfield, Ni America (w/enclosure)

**SETTLEMENT AND WATER CODE 13.248 AGREEMENT
BY AND BETWEEN
NI AMERICA TEXAS DEVELOPMENT LLC AND
WELLBORN SPECIAL UTILITY DISTRICT**

This Settlement and Water Code 13.248 Agreement (“Agreement”) is entered into as of June 23, 2009 (the “Effective Date”) by and between Ni America Texas Development LLC (“Ni America”), a Texas limited liability company, and Wellborn Special Utility District (“Wellborn”), a political subdivision of the State of Texas. Ni America and Wellborn are sometimes individually referred to as a “Party” and collectively referred to as the “Parties”.

RECITALS

WHEREAS, Ni America filed applications for water (“Application No. 36003-C”) and sewer (“Application No. 36004-C”) Certificates of Convenience and Necessity (“CCN”) (the “Ni America Applications”) with the Texas Commission on Environmental Quality (“TCEQ”) for an approximately 660 acre tract located within Brazos County known as the Myers Reserve Tract, and provided notice of such applications as required by law; and

WHEREAS, Wellborn is the holder of water CCN No. 11340 (the “Wellborn CCN”) and provides retail water service to property located within Brazos County; and

WHEREAS, Wellborn received notice of the Ni America Applications and by letter dated May 22, 2008, Wellborn filed a protest and a request for public hearing on the Ni America Applications; and

WHEREAS, as a result of Wellborn’s protest and request for a contested case hearing, TCEQ transferred the Ni America Applications to the State Office of Administrative Hearings (“SOAH”) and, following the severance and remand to the TCEQ of Wellborn’s unrelated water CCN amendment Application No. 36062-C, the matter is referred to as SOAH Docket No. 582-09-0237 and TCEQ Docket No. 2008-1096-UCR;

WHEREAS, in order to avoid a long and expensive contested case hearing, the Parties desire to resolve the issues in dispute between them in this matter; and

WHEREAS, the Parties desire for TCEQ to approve this Agreement under the provisions of Texas Water Code § 13.248.

AGREEMENTS

NOW, THEREFORE, in consideration of the mutual promises, covenants, obligations and benefits set forth in this Agreement, the Parties agree as follows:

1. **Recitals.** The definitions contained in the Recitals above are incorporated herein for all purposes.

2. **Withdrawal of Protest and Removal of Land from CCN Application.** Within fifteen (15) days after the Effective Date, Wellborn shall file the withdrawal letter attached as Exhibit "A" with TCEQ to withdraw its protest and request for a contested case hearing related to SOAH Docket No. 582-09-0237 and TCEQ Docket No. 2008-1096-UCR. Wellborn further agrees to not oppose the efforts of Ni America to obtain TCEQ approval of Application No. 36003-C and Application No. 36004-C, so long as such applications are not amended in a manner which seeks to expand the proposed service area of Ni America.

3. **CCN and Provision of Retail Water Service.** Upon the issuance of the Water CCN and Sewer CCN by TCEQ as requested in Application No. 36003-C and Application No. 36004-C, Ni America shall have the right to provide retail water service to the Myers Reserve Tract but such retail water service shall only be for a term not to exceed five (5) years (the "Service Term"), beginning on the date of issuance of the TCEQ order granting Ni America the Water CCN on the Myers Reserve Tract. Ni America agrees that it will not provide retail or wholesale water service to any tract of land located outside of the Myers Reserve Tract and within the Wellborn CCN service area.

4. **Development of the Myers Reserve Tract and Construction of Water Facilities.** To the extent the Myers Reserve Tract is developed for residential, commercial or industrial purposes during the Service Term by Ni America or its agents or contractors, the design and construction of all sources of water supply, water lines, distribution lines, storage tanks, pumping equipment and any other facilities to be used to produce, store, treat or distribute water to the Myers Reserve Tract (the "Water Facilities") must comply with standards and requirements specified by Wellborn and/or Wellborn's consulting engineer. All plans and specifications for the Water Facilities, and associated easements or rights-of-way, must be reviewed and approved by Wellborn's consulting engineer prior to the issuance of any request for bids or the construction of the Water Facilities.

5. **Transfer of Myers Reserve Tract Water CCN to Wellborn.** Not later than the date on which there are twelve (12) months remaining in the Service Term, Ni America shall prepare and submit to Wellborn for its review and approval a Sale, Transfer or Merger application ("STM Application") sufficient to transfer the Ni America Water CCN service area for the Myers Reserve Tract to Wellborn's water CCN. Wellborn SUD will not unreasonably withhold its approval of a STM Application submitted by Ni America in accordance with this section.

A. After promptly making such changes to the STM Application as requested by Wellborn, Ni America shall file the STM application with the TCEQ, along with all required filing costs, not later than 10 days after Wellborn's approval of the STM Application.

B. Ni America agrees that it will support and diligently pursue the STM Application and will not oppose in any manner, directly or indirectly, the transfer of the Ni America Water CCN for the Myers Reserve Tract to Wellborn. All costs associated with the preparation and prosecution of the STM Application shall be solely the responsibility of, and paid for by, Ni America.

6. **Transfer of Water Facilities.** At the end of the Service Term, Ni America shall grant to Wellborn full ownership and title to the Water Facilities and all associated easements and real property, if any are in existence at that time, all at no cost to Wellborn and free of any and all construction liens or other liens related thereto. Real property shall be conveyed by a General Warranty Deed, easements by an assignment and facilities and equipment by a bill of sale. All such conveyance documents shall be in a form approved by Wellborn's attorney and shall include a representation by Ni America that the Water Facilities have all been constructed within legal easements, and Ni America shall bind itself and its successors and assigns to warrant and defend the title to the Water Facilities, including against any claims that such lines have been constructed illegally or not within proper easements or rights-of-way. Additionally, Wellborn shall have the right, but not the obligation, to assume all contracts, permits and warranties related to the Water Facilities, all at no cost to Wellborn.

7. **Approval of Agreement by TCEQ.** Within thirty (30) days after the Effective Date, Ni America will file a copy of this Agreement with TCEQ pursuant to section 13.248 of the Texas Water Code seeking approval of the Agreement by the Commissioners, or Executive Director if allowed by law, and incorporation into the appropriate areas of public convenience and necessity. Ni America and Wellborn agree to fully cooperate with the Commission in obtaining approval of this Agreement by the Commissioners (or Executive Director) under section 13.248 of the Texas Water Code.

8. **Term.** The term of this Agreement will commence on the Effective Date and continue until the later of: a) the date the TCEQ order transferring the Myers Reserve Tract from the Ni America Water CCN to the Wellborn Water CCN is final and non-appealable; and b) the date Ni America fulfills all of its obligations to Transfer the Water Facilities as set forth in Paragraph 7.

9. **Remedies.** If a Party defaults or breaches any obligation in this Agreement, the non-defaulting party shall have the following rights and remedies:

- a) to seek specific performance, or injunctive relief, without the necessity of having to prove the inadequacy of legal remedies or irreparable harm;
- b) to terminate its obligations under this Agreement, and/or
- c) to pursue all rights and remedies available at law or equity.

All such rights and remedies are cumulative and not exclusive, and to the greatest extent practicable may be exercised concurrently and successively.

10. **Notice.** Any notice given under this Agreement must be in writing and may be given: (i) by depositing it in the United States mail, certified, with return receipt requested, addressed to the Party to be notified and with all charges prepaid; or (ii) by depositing it with Federal Express or another service guaranteeing "next day delivery", addressed to the Party to be notified and with all charges prepaid; (iii) by personally delivering it to the Party, or any agent of the Party listed in this Agreement, or (iv) by facsimile with confirming copy sent by one of the other described methods of notice set forth. Notice by United States mail will be effective on the earlier of the date of receipt or three days after the date of mailing. Notice given in any other

manner will be effective only when received. For purposes of notice, the addresses of the Parties will, until changed as provided below, be as follows:

NI AMERICA: If by Hand delivery, "next day delivery" or mail:
Ni America Texas Development, LLC
Attn: Mike Ashfield
10913 Metronome
Houston, Texas 77043
Facsimile:

With Copy to: Mr. Ty H. Embrey
Lloyd Gosselink Rochelle & Townsend LLC
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Facsimile: (512) 472-0532

WELLBORN: If by Hand delivery or "next day delivery":
Wellborn Special Utility District
4118 Greens Prairie Road
Wellborn, Texas 77881
Facsimile: (979) 690-1260

If by deposition in the United States mail:
Wellborn Special Utility District
P.O. Box 250
Wellborn, Texas 77881
Attn: General Manager

With Copy to: Mr. Leonard H. Dougal
Jackson Walker L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
Facsimile: (512) 391-21121

The Parties may change their respective addresses by giving at least five days' written notice to the other Party.

11. **Severability; Waiver.** If any provision of this Agreement is illegal, invalid, or unenforceable, under present or future laws, it is the intention of the Parties that the remainder of this Agreement not be affected, and, in lieu of each illegal, invalid, or unenforceable provision, that a provision be added to this Agreement which is legal, valid, and enforceable and is as similar in terms to the illegal, invalid or enforceable provision as is possible. Any failure by a Party to insist upon strict performance by the other Party of any material provision of this Agreement will not be deemed a waiver of that or of any other provision, and a Party may at any time thereafter insist upon strict performance of any and all of the provisions of this Agreement.

12. **Application of Law and Venue.** The interpretation, performance, enforcement and validity of this Agreement is governed by the laws of the State of Texas. Venue will be in a court of appropriate jurisdiction in Brazos County, Texas.

13. **Entire Agreement.** This Agreement contains the entire agreement of the Parties. There are no other agreements or promises, oral or written, between the Parties regarding the subject matter of this Agreement. This Agreement can be amended only by written agreement signed by the Parties. This Agreement supersedes all other agreements between the Parties concerning the subject matter.

14. **Time.** Time is of the essence of this Agreement. In computing the number of days for purposes of this Agreement, all days will be counted, including Saturdays, Sundays and legal holidays; however, if the final day of any time period falls on a Saturday, Sunday or legal holiday, then the final day will be deemed to be the next day that is not a Saturday, Sunday or legal holiday. The term "business day" as used herein is defined as Monday through Friday excluding any legal holidays adopted by the State of Texas.

15. **Relationship of Parties.** The Parties shall not be deemed in a relationship of partners or joint venturers by virtue of this Agreement, nor shall either Party be an agent, representative, trustee or fiduciary of the other.

16. **Third Party Beneficiaries.** Nothing in this Agreement, express or implied, is intended to confer upon any person, other than the Parties, any rights, benefits, or remedies under or by reason of this Agreement.

17. **Assignment.** This Agreement may not be assigned by either Party, except by the prior written consent of the other Party.

IN WITNESS WHEREOF, the undersigned Parties have executed this Agreement in four original counterparts on the date indicated by each party's signature, but effective this 23rd day of June, 2009.

WELLBORN SPECIAL UTILITY DISTRICT

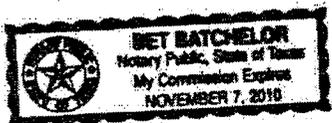
By: Jenny L. Ransom
Name: Jenny L. Ransom
Title: President, Board of Directors

Date: 6/23/09

ACKNOWLEDGMENT

STATE OF TEXAS §
 §
COUNTY OF BRAZOS §

This instrument was acknowledged before me on this 23rd day of June, 2009 by JERRY L. RANSOM, PRESIDENT for Wellborn Special Utility District, a political subdivision of the state of Texas, on behalf of said District.



Bet Batchelor
Notary Public, State of Texas

EXHIBIT "A"

FORM OF WITHDRAWAL OF PROTEST

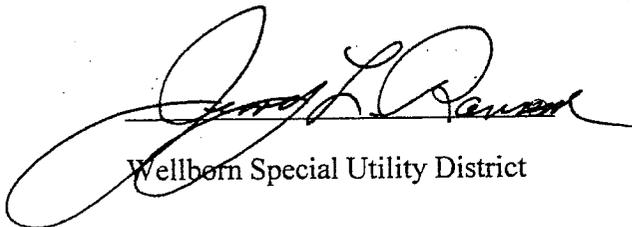
LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk MC – 105
P. O. Box 13087
Austin, Texas 78711-3087

RE: Ni America Texas Development LLC ("Ni America") CCN Applications No. 36003-C and No. 36004-C; SOAH Docket No. 582-09-0237 and TCEQ Docket No. 2008-1096-UCR

Dear Ms. Castañuela:

Ni America and Wellborn Special Utility District ("Wellborn SUD") have entered into the attached Settlement and Water Code 13.248 Agreement ("Agreement"). In light of the Agreement, Wellborn SUD hereby withdraws its request for hearing and protest in the above-referenced proceeding.

Sincerely,



Wellborn Special Utility District

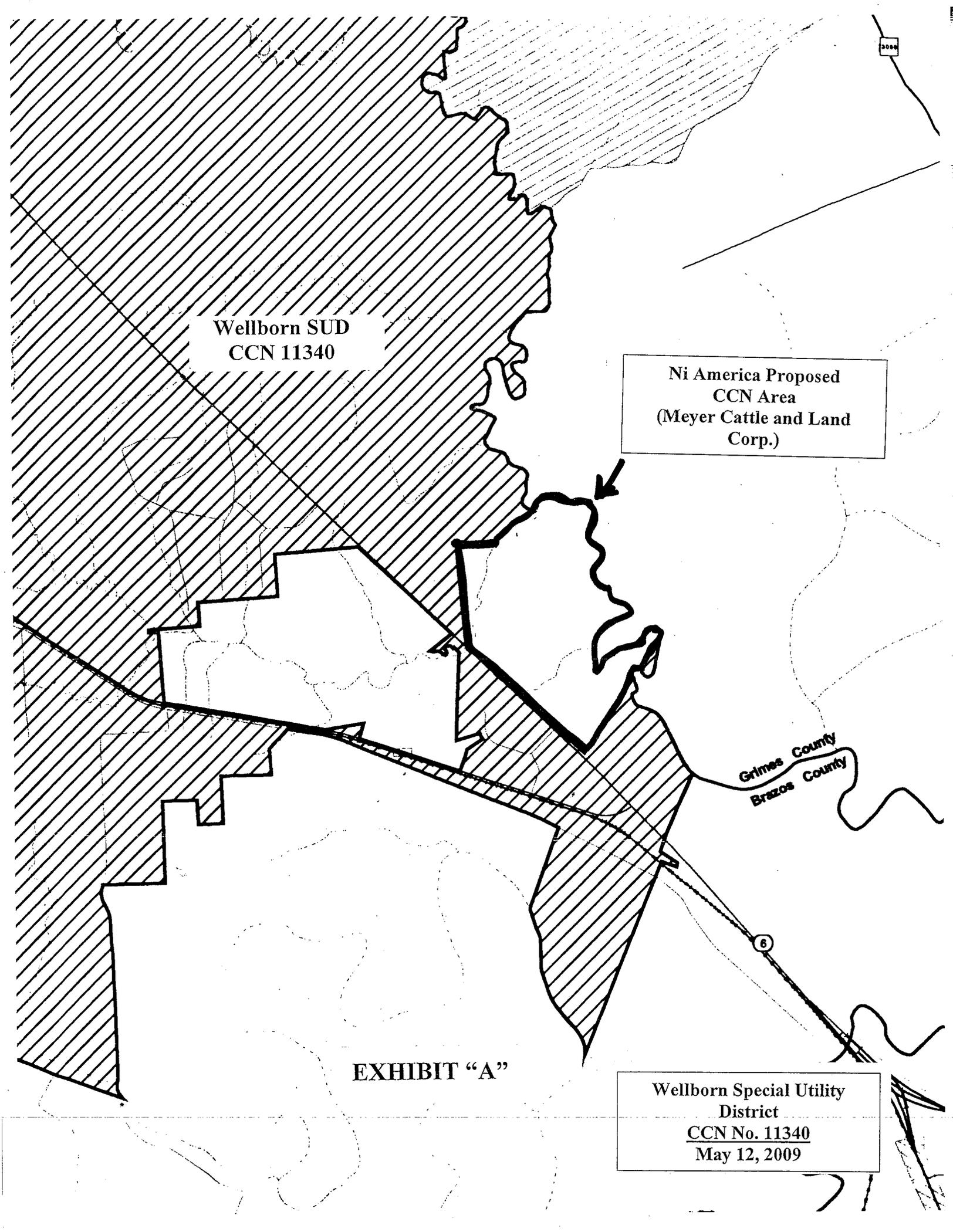
**Wellborn SUD
CCN 11340**

**Ni America Proposed
CCN Area
(Meyer Cattle and Land
Corp.)**

**Grimes County
Brazos County**

EXHIBIT "A"

**Wellborn Special Utility
District
CCN No. 11340
May 12, 2009**



Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 5, 2011

Ty H. Embrey
Lloyd Gosselink Rochelle & Townsend, LLC
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Fax: (512) 472-0532

Leonard H. Dougal
Jackson Walker, LLP
100 Congress Avenue, Suite 1100
Austin, Texas 78704
Fax: (512) 391-2112

Re: TCEQ Docket No. 2011-0128-UCR; Consideration of a request for a Commission order approving contracts between Ni America Texas Development, LLC (Ni America), Certificate of Convenience and Necessity (CCN) No. 13177, and Wellborn Special Utility District (Wellborn), (CCN) No. 11340, in Brazos County, Texas.

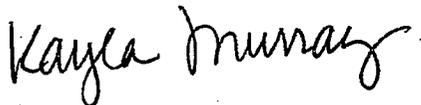
Dear Mr. Embrey and Mr. Dougal:

This letter is to inform you that the above-referenced application has been set on the Agenda for consideration by the Texas Commission on Environmental Quality (TCEQ). This Agenda will occur on April 20, 2011, beginning at 9:30 a.m. in Building E, Room 201S, 12100 Park 35 Circle, Austin, Texas. Included with this letter are the Agenda backup materials to be considered by the Commission. At least one of you will need to attend the Agenda to explain the agreement and to answer any questions the Commissioners may have.

Mr. Embrey and Mr. Dougal
April 5, 2011
Page 2

Persons with disabilities who plan to attend this hearing and who need special accommodations at the Agenda should call the TCEQ Office of Public Assistance at 1-800-687-4040 or 1-800-RELAY-TX (TDD) at least one week prior to the hearing. If you have any questions about this matter, you may contact Heidi Graham from the Water Supply Division at 1-512-239-0844 or me at 1-512-239-4761.

Sincerely,

A handwritten signature in black ink that reads "Kayla Murray". The signature is written in a cursive, flowing style.

Kayla Murray
Staff Attorney
Environmental Law Division

Enclosure