

August 11, 2008

Chief Clerk, ATTN: Agenda Docket Clerk
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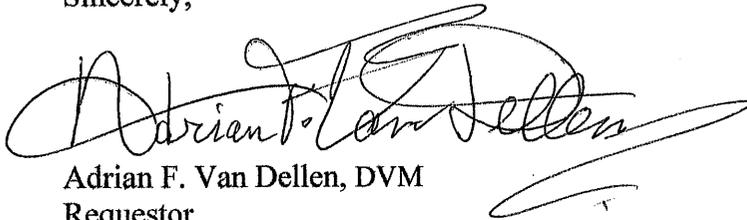
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: **HCR CHEROKEE TREE FARM, LP**
TCEQ DOCKET NO. 2008-0495-WR

Dear Ms. Castanuela:

Enclosed for filing is Adrian Van Dellen's Reply to Responses to Request for Hearing on the above-entitled matter.

Sincerely,



Adrian F. Van Dellen, DVM
Requestor

Cc: Mailing List

Encl: 1. Mailing List
2. Jul 16, '08 News article
3. Jul 18, '08 News article
4. Eight (8) photos (on 5 pgs)

CONCERNING ISSUES OF THE
APPLICATION OF HRC CHEROKEE
TREE FARM, L.P.'s TO CONSTRUCT
AND MAINTAIN TWO DAMS AND
RESERVOIRS ON FLAT CREEK;
WATER USE PERMIT NO. 12047

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 AUG 11 PM 2:50
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**ADRIAN VAN DELLEN's REPLY
TO RESPONSES TO HEARING REQUEST**

COMES NOW, Adrian Van Dellen ("VAN DELLEN"), Requestor files this Reply to Responses from the Applicant, the Executive Director, and the Office of Public Interest Counsel to Requests for a Hearing in the above-referenced matter, seeks standing as Affected Person, and would respectfully request that this matter then be referred to the State Office of Administrative Hearings ("SOAH").

I. SUMMARY OF RESPONSES

Office of Public Interest Counsel ("OPIC")

- Agrees that Van Dellen is an Affected Person [30 TAC_55.251 (b), (c); 30 TAC_55.256 (a), (c); 30 TAC_295.171], and timely filed his request for hearing;
- asserting that his claim is protected by law as detailed in cited Administrative Code;
- that he has personal justiciable interests, not common to the general public, that are recreational and economic in nature.
- Contends that a reasonable relationship exists between activity regulated and interest claimed;
- that the regulated activities -- constructing and maintaining dams and reservoirs -- affect habitat (flora/plants) and wildlife (fauna/amphibious and stream-side); and
- that consequently those proposed activities affect his business -- nature & wildlife photography and recreational guiding -- of and on the "Upper Neches River," including its confluent contributory stream, Flat Creek, on which the regulated activity is conducted.

TCEQ Executive Director ("ED")

- Contends that Van Dellen is not an Affected Person as he lives too far downstream of Flat Creek;
- and that he is not affected by the regulated activity any differently than the general public.

Applicant

- Asserts that Van Dellen is not an Affected Person and has no justiciable interests, and has not submitted a valid hearing request;
- Asserts that permit stipulations are adequate to prevent any potential adverse impacts on stream flow to the Neches River because the permit restricts impoundment of State water and Applicant must pass all flows downstream in Flat Creek;
- Asserts that permit stipulations include pumping ground water that will off-set any evaporative loss of State water consequent to the large surface area of the reservoirs;
- thus applicant alleges Van Dellen's interest in the flow of the Neches River is not affected.

II. SUMMARY OF VAN DELLEN'S REPLY

- Van Dellen completely agrees with OPIC's contention that he is an Affected Person, and accepts their analysis of the hearing request, confirming his standing under TAC.
- Van Dellen disputes the Executive Director's assertion that he lives too far downstream from Flat Creek for his business to be affected, that his water right and use is not different from the general public, and therefore that he is not an Affected Person.
- In contrast to the Applicant's assertion, Van Dellen believes the hearing request is valid and that it identifies justiciable interests, which qualifies him as an Affected Person.
- Van Dellen questions whether the permit stipulations will prevent adverse impacts on stream flow to the Neches River, especially in connection with pumping ground water to augment flow.

III. ARGUMENT

The very fact that the three respondents (OPIC, Executive Director, and Applicant) reach differing conclusions derived from the same facts provided in the hearing request justifies scheduling a Contested Case Hearing. OPIC's conclusion that Van Dellen is an Affected Person is compelling. His request for a hearing, which was filed in a timely manner, essentially complies with applicable Texas Administrative Code. His personal justiciable interests -- economic and recreational; not common to the general public -- of professional photography and guiding service will be adversely impacted by the proposed barriers (dams) in Flat Creek by restricting his access. The subjects of photography and objectives of his recreational guiding (that is, flora and fauna, wildlife and habitat) will arguably be negatively impacted, and thus also his business will be negatively impacted, by altered water flows over and beyond the dams. An admixture of surface water and ground water, which flows over dams rather than from the natural creek channel (that will effectively be obliterated on the bottom of the reservoirs), may cause impacts on water quality that impact the natural habitat. Admixed water certainly carries a different nutrient load to wildlife and habitat. In addition, the stream flow beyond the dams will be devoid of sand and silt that is indispensable for normal habitat, because the sand and silt will be trapped behind the dams. These changes could alter habitat in a way that alters Van Dellen's use of the river.

The Applicant seems to be arguing that permit conditions are adequate to prevent any potential impacts as a reason for not granting Van Dellen party status. However, the adequacy of those stipulations is an issue to be considered at a hearing. For example, size and design of the dams and outlets will determine the extent to which State water is temporarily impounded behind the dams. Furthermore, despite permit language, it is essentially impossible to avoid impounding State water, particularly when the reservoir is initially being filled, anytime that the wells are not operating or being properly operated, and likely during drought. And it will be very tricky to ensure that evaporation losses of State water are fully offset with pumped ground water. These are the kinds of issues and related ones that a hearing would address.

The Executive Director seems to argue that 100 miles is just too far downstream from the regulated activity for a person to be affected. Significantly, it is the very nature of Van Dellen's photography and guiding business that takes him on all segments of the Neches River, including those immediately below the confluence of Flat Creek and the Neches. Van Dellen has photographed and guided on the segments from the dam at Lake Palestine (River Mile 00.0) to the dam at B.A. Steinhagen reservoir ("Dam B," at RM 234.4), as well as on all the navigable tributary creeks of this stretch of the Neches. The attached five (5) pages with eight (8) photographs (**Att: 4; Pgs 1-5, fig. 1-8**) depict a few select river mile points on the Neches and Flat Creek, typical of Van Dellen's work.

III. ARGUMENT (continued)

Van Dellen's work is well within the various distances from the proposed regulated activity that the TCEQ would consider as affected distance. For example, Section 11.147 (b) of the Water Code requires the TCEQ to consider possible impacts on freshwater inflows for any permits issued within 200 miles of the coast. Based on that, it is clear the Water Code recognizes that diversions (regulated activity) affect flows at least for a distance of 200 miles downstream. Van Dellen understands that TCEQ routinely provides notice of new water rights permits to all holders of downstream water rights, regardless of the distance downstream, in recognition of the extent of potential impacts. Contrary to the Executive Director's assertion, Van Dellen earns a living, in part, from work and recreation activities on the river that is not true for the general public, including the section of the Neches immediate downstream of the proposed dam project.

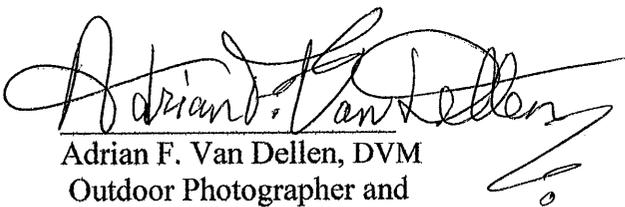
There are other issues to consider besides stream flow and water quality impact on wildlife and habitat, which would affect Van Dellen's use of the creek and river. For example, to obliterate a section of navigable stream, thus barring Van Dellen's (and other members of the public) access to it, is an issue that needs to be evaluated and would justify a hearing.

Another argument in the Applicant's response that addresses a substantive issue in the case rather than the status of Van Dellen as an Affected Person is whether permit stipulations are adequate to prevent any potential adverse impacts on stream flow to the Neches River because the permit restricts impoundment of State water and includes pumping ground water that will off-set evaporative losses of State water consequent to the large surface area of the reservoirs. Pumping ground water from four (4) wells into reservoirs to replace evaporated surface water intended for recreational use has been a contentious issue between the Applicant and the relevant ground water district authority, and required a compromise to be permitted (Att: 2, 3). Requestor Van Dellen had no input to the compromise settlement of the issue to use ground water for recreational use. An analysis and presentation of this settlement at a hearing to determine long-term feasibility of this settlement on stream flow and the ground water resource seems warranted.

IV. CONCLUSION

For the reasons delineated above, Requestor Van Dellen prays that the Commission determines him to be an Affected Person, and he respectfully implores the Commission to grant his request for a contested case hearing, and to refer this matter to the SOAH for a hearing to determine whether his existing water rights will be curtailed by the Applicant's proposed use.

Respectfully submitted,



Adrian F. Van Dellen, DVM
Outdoor Photographer and
Neches River Guide

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- Attachments: 1. Mailing list
2. Jul 16, '08 newspaper article
3. Jul 18, '08 newspaper article
4. Eight (8) photographs (on 5 pgs)

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TCEQ Docket No. 2008-0495-WR
Permit No. 12047

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Entities asking groundwater district for permission to use water for recreation

By Kelly Young kyoung@jacksonvilleprogress.com

Back in April, for the first time in their history, the board of directors of the Neches and Trinity Valleys Groundwater Conservation District allowed an applicant to use the district's groundwater to build a recreational surface lake. On the agenda for the July meeting, the board will have to determine whether or not to allow a second applicant to do the same.

"Like the situation in April with Elmwood Bradley Oaks, Cherokee Tree Farm is seeking to make a change to their operating permits to allow for a couple of ponds," said Roy Rodgers, general manager of NTVGCD. "They have operating permits for irrigation, and they want to add recreation to the permits as well. When you change the purpose of a well it requires a new permit."

When a permit was issued to Elmwood Bradley Oaks, which is located in Anderson County near Bradford, the district set a number of conditions on the agreement; including a requirement that meters be put on the wells and that the water can be paid for. **They also reserved the right to end the recreational use of the water if it is determined to be in the public interest to do so.**

According to Rodgers, Cherokee Tree Farm, in northwest Cherokee County, has objected to similar stipulations being placed on their operating permit.

"We would want to do an agreement with conditions to it, just like we did in the last situation, and they don't like that. We are saying they can do it, but we would want to have better control of the wells and we would want to make sure it's a non-exempt well so they have to pay for the water, and that's what they are objecting to," he said.

Cherokee Tree Farm has applied for permits with the state for the new lakes, but their applications have been held up until they receive approval from the district. They have indicated to Rodgers that their attorney will be present at Thursday's meeting.

Rodgers said East Texas is able to allow some of its groundwater to be used for recreational purposes because of the current abundance of water in our area, but he said **the district needs to be able to restrict the water's use in times of need.**

"In this area right now we have a lot of groundwater. In West Texas they don't have the water to allow it to be used in lakes, but in East Texas right now we do," Rodgers said. "So since we have the water now, **we are letting people use it as long as there are restrictions so we have the right to curtail it if we ever need the water.**"

The directors will also hear updates from their attorney, John Stover, regarding two pieces of legal action the district is undertaking. Rodgers claims the Pine Mountain and Caddo Creek subdivisions, in Anderson and Henderson counties respectively, and Lake Palestine Associates, located near Bullard, have failed to obtain the necessary operating permits and haven't been paying their fees.

Two public hearings will be held regarding drilling applications by Moore Station Water Systems Council and Aqua Texas Inc. for public water supply wells. The former is seeking water for the Moore Station community of Henderson County and the latter would place their well just east of Bullard.

"We are required to give public notice to surrounding property owners and all well owners within a quarter-mile of the proposed well, to give them an opportunity to express opposition to the well if they choose," Rodgers said.

Some citizens have already submitted written opposition to one of the wells, but they did not indicate whether they would attend the public hearings or not.

The NTVGCD board of directors regularly meets at 1:30 p.m. on the third Thursday of each month, at their offices at 212 S. Main St. in Jacksonville. All meetings of the NTVGCD are open to the public.

Published: July 18, 2008 10:47 am

In: **Jacksonville Daily Progress**

Water entitites agree to building lakes

By Kelly Young

kyoung@jacksonvilleprogress.com

It took two lawyers debating the finer points of Texas' water law, but the board of directors of the Neches and Trinity Valleys Groundwater Conservation District and representatives from HRC Cherokee Tree Farm LP eventually did reach a compromise which will allow the entity to use its wells to fill two lakes on their property.

The discord stemmed from the fact that HRC felt the operating permits received in January 2007 allowed them to use their wells to top off two lakes they intend to create on their property.

"We come before you today asking that the board acknowledge the operating permits we applied for and were granted back in 2007, those being for irrigation and for topping off the lakes," said Gina Norris of HRC. "We've typed up a transcript of that conversation in January, and they clearly show that both of those purposes were discussed here at that initial meeting."

Attorney Lynn Sherman, hydrogeologist Mike Thornhill and forester James Houser also spoke on behalf of HRC.

The district, on the other hand, contends the permits were specifically for irrigation purposes only, and that topping-off their lakes with well water would be a recreational use — and thus in violation of their permit.

"The well-drilling application document shows that the nature and purpose of all four wells is for irrigation purposes. During the conversation with Gina, recreational use might have been mentioned, but **the permit for these wells was for irrigation use only**," said Roy Rodgers, district general manager.

After much discussion and a few tense moments, a settlement was reached which will allow HRC officials to move forward with their plans to build the lakes. Their application for the lakes had been blocked by the Texas Commission on Environmental Quality, pending approval by the district.

"The board decided to approve a letter to TCEQ with a clarification that they can run water into their lakes, but we did not change the purposes for the lakes on their operating permits," Rodgers said. "We never wanted to keep them from getting a permit for the lakes, we just wanted to maintain an acceptable level of control over the water, and this agreement allows that."

According to Rodgers, **the district's drought contingency plan allows them to curtail irrigation [and recreation! avd] pumping if the public need requires it.**

He also said that while the proposed lakes would be quite large, the fact that HRC owns a 7,000-acre tract of land means the bodies of water will actually use less water per acre than the typical homeowner.



fig. 1

Flat Creek Put-in at Hwy 855 Bridge
Downstream of Proposed South Dam



fig. 2

Flat Creek Downstream of Proposed South Dam

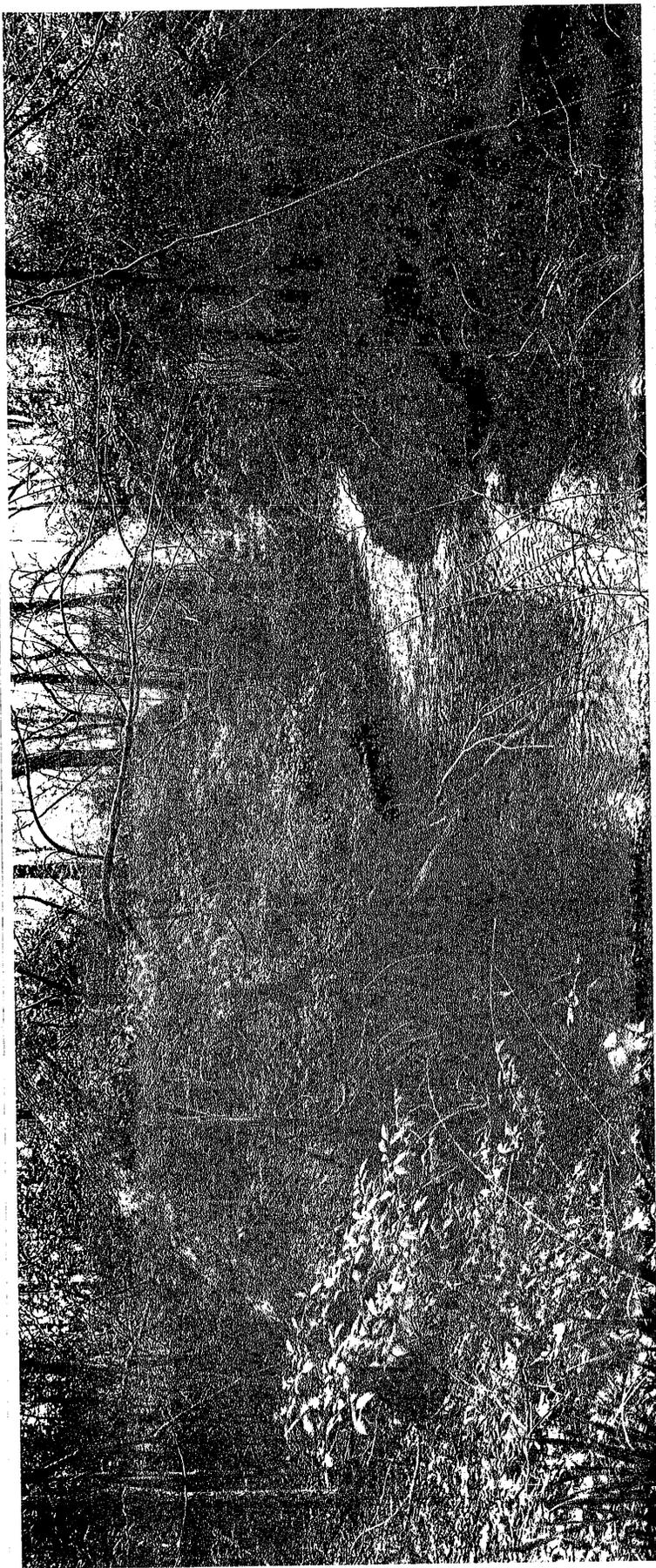


fig. 3

Flat Creek Downstream of Proposed North Dam

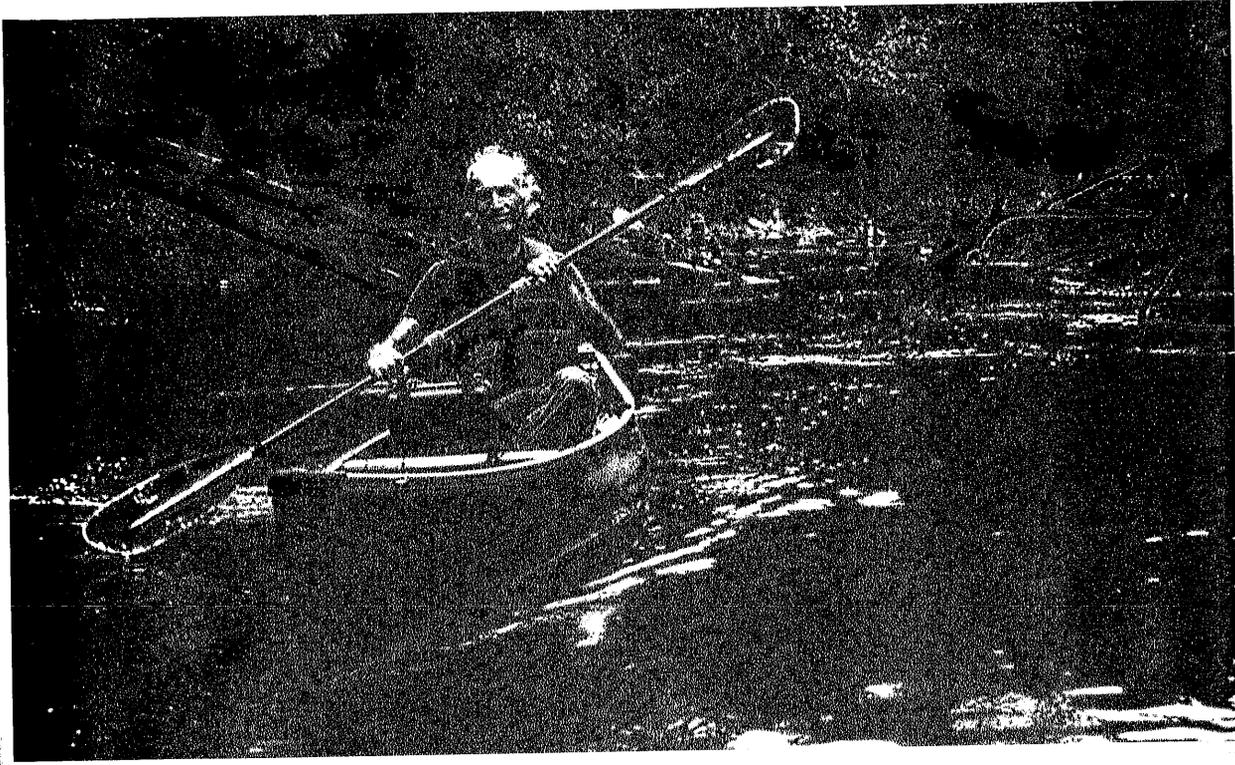


fig. 4

Van Dellen Guiding Sierra Group
Outing on the Neches at RM -21
[RM = River Mile]

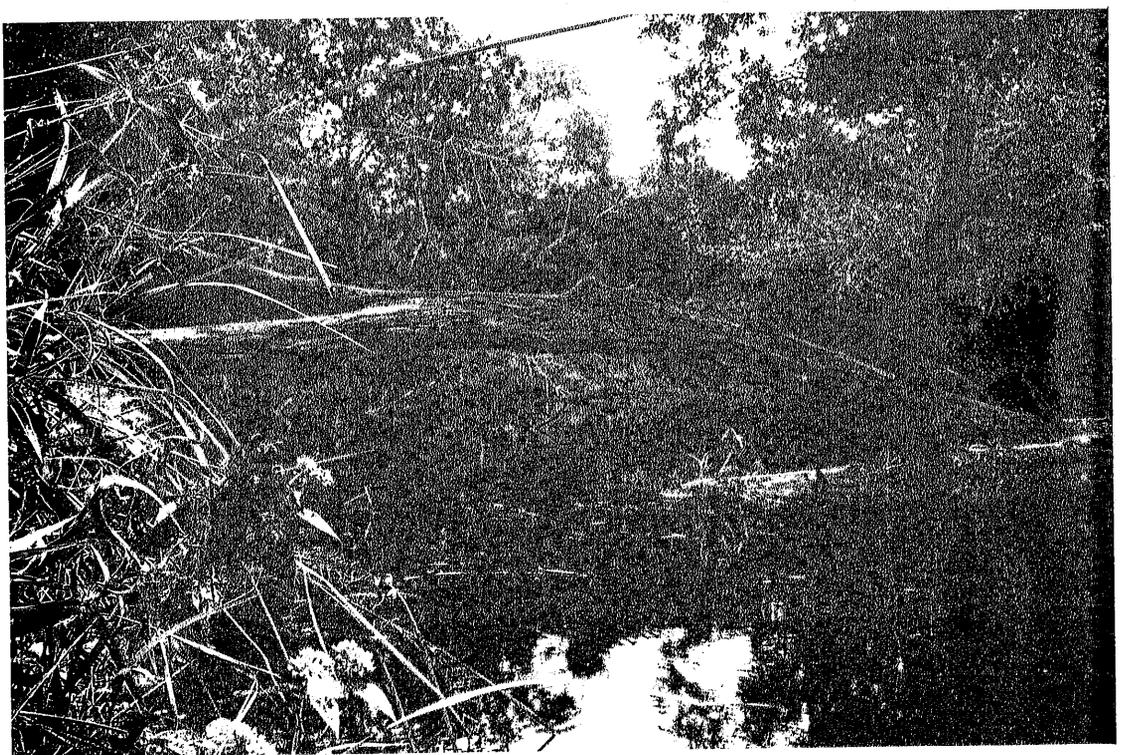


fig. 5

Rare Cardinal Flower & Arch at RM -25
Flower Prefers Riparian Habitat of Streams



fig. 6

First Light on the Neches at RM -143



fig. 7

Stream Flow Around Wide Base of Tupelo Tree

[Near RM -223]

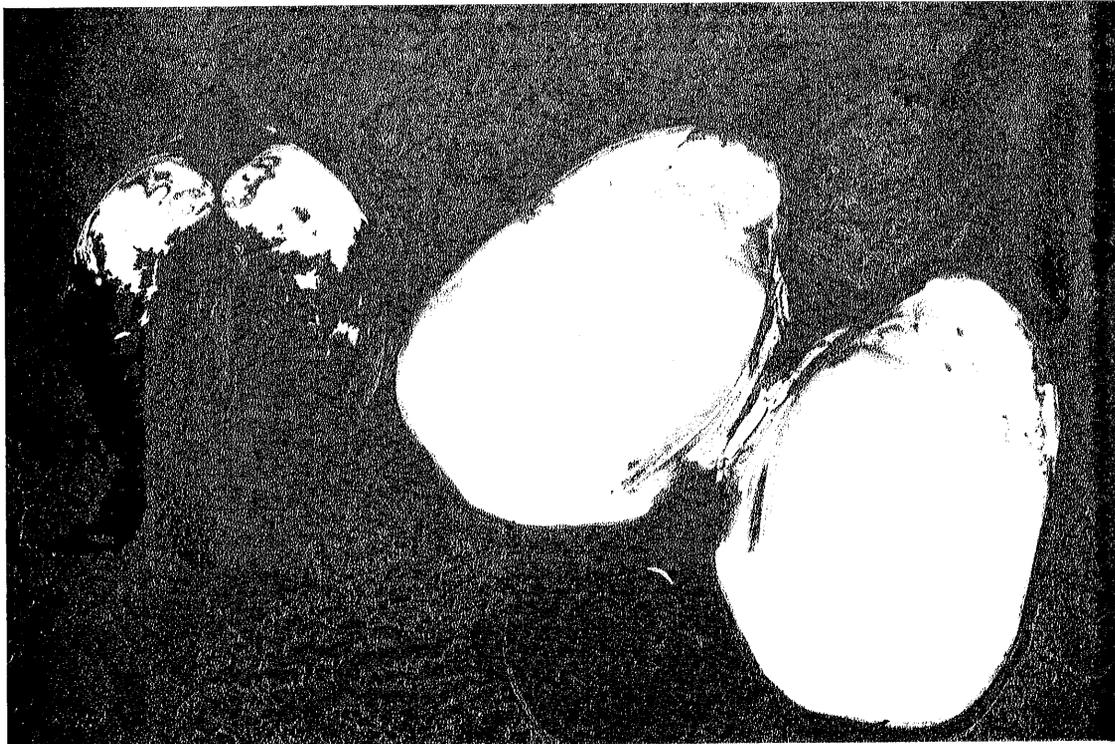


fig. 8

Fresh-water Mussels [three (3) species shown]

Found in Both Creek and River