the Governor to the proper state agency for that purpose. In addition, the provisions of Chapter 279 of the Acts of 1947 relative to allotment would have to be complied with.

The proceeds of the federal share of the unemployment compensation tax are used to pay the administrative expenses of state employment security agencies. I understand that the federal authorities will consider the cost of a building (amortized over a ten-year period) as an administrative expense to be paid by the federal government, but that this payment will not impair the title of the state to the property. Such arrangements would not affect the authority to purchase the property from the appropriation in question.

OFFICIAL OPINION NO. 38

April 28, 1948.

Hon. John H. Nigh, Director,
Department of Conservation,
140 North Senate Avenue,
Indianapolis, Indiana.

Dear Sir:

I have your letter as follows:

> "I request an official opinion of your office on the question of whether the Department of Conservation has authority under Section 93, Chapter 21, Acts of 1937, to establish a spawning ground on a certain water channel located on private land at Lake Maxinkuckee.
>
> "Also, I request your opinion on whether the Department of Conservation has authority under Chapter 301, Acts of 1947, to prosecute or enjoin the owner of land from continuing to maintain and use for fishing a water channel located on his property which was created by cutting into the shore line of Lake Maxinkuckee prior to the enactment of this statute."

I am further informed that the water channel referred to by you consists of a circular channel of water in the neighborhood of forty feet wide and six to twelve feet deep, which

surrounds an island approximately sixty to seventy feet in diameter; that the circular channel of water is connected with Lake Maxinkuckee by a channel approximately twenty feet in width.

Section 93 of Chapter 21 of the Acts of 1937 is as follows:

> "(a) The director is hereby authorized to designate and set aside any lake or stream or part thereof, in this state, as spawning grounds for fish. The director shall designate the general extent, limits or periphery of such spawning grounds by appropriate signs.
>
> "(b) It shall be unlawful for any person or persons to take, catch, kill, or pursue for the purpose of taking, catching, or killing any fish whatsoever, from any such designated spawning ground or grounds during the time the same shall be set apart as provided in this act.
>
> "(c) It shall be unlawful for any person or persons to operate or cause to be operated any power-propelled boat on or over such designated spawning grounds during the time the same shall be set apart, as provided in this act.
>
> "(d) It shall be unlawful for any unauthorized person or persons to disturb or remove any sign or signs erected under the provisions of this act.
>
> "(e) It shall be unlawful for any person to take, catch, or capture any minnows of any variety within the limits of any spawning grounds designated and established by the state for the breeding and propagation of fish." (Section 11-1604, Burns' 1942 Replacement.)

Under these facts the water in question is private water but has a connection with the lake. It is my opinion that under such circumstances, even though the exclusive right to fish in said water may belong to the owner, it is subject to the State's right of regulation and the State may impose reasonable restrictions to preserve and propagate fish therein in the interests of the public, notwithstanding private ownership of the soil surrounding and under such water.

The imposition of such restrictions is not to be considered the taking of property without due process of law. This rule is well stated in Section 44, Volume 22, American Jurisprudence, at page 699:

> "Generally, where non-navigable streams, lakes, or ponds are so connected with other waters of the state as to permit of the migration of fish, the state may, to preserve fish and in the interest of the public, regulate the manner and prescribe the seasons for, and the manner of, their taking, notwithstanding private ownership of the soil under such waters. The imposition of such restrictions is not to be considered the taking of property without due process of law. A closed season may be established, and the catching of the fish by certain methods may be forbidden, by regulations which are applicable to private, as well as to public, waters. Likewise, a prohibition of the sale of fish during a closed season may apply to privately owned ponds and to fish privately propagated therein. * * *"

The right of the State to adopt and enforce reasonable regulations to preserve fishing in the interests of the public applies so long as there is any connection between such waters and private waters. This rule applies even though that connection be slight or even seasonal.

The case of State v. Lowder (1926), 198 Ind. 234, involved what was called "Latta's Creek Pond," which was an old channel of White River which at low water was cut off from the river, but during heavy rainfalls the river overflowed into the pond and fish could pass in and out of the pond. The defendant was arrested under the game laws for having unlawful possession of a seine and for taking fish therewith in said pond. The defense was that it was private water and he was immune from prosecution. Upon the question thus presented the Court said at page 237:

> "The court gave instructions, the correctness of which is not challenged, that if the pond was so connected with any public waters that in times of freshets or high water fish could go into it from such public waters and out again, it was not a private pond,

whether they might so come out again the same day, or the next season; that if at times of high water, the pond was so connected with public waters as to permit the migration of fish to and from it the owner of the land on which the pond was situated did not have such an exclusive interest in the fish therein as to be immune from prosecution for taking fish therefrom with a seine; that the mere fact that, after the freshets and high water had receded, there was no longer, at low water, any connection between the pond and the river and creek which sometimes overflowed it would not make it a private pond; and that if the pond was located on two or more tracts of land owned by different persons, it would not be a private pond. These instructions correctly declared the law. People v. Bridges (1892), 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684; People v. Lewis (1924), 227 Mich. 343, 198 N. W. 957; Peters v. State (1896), 26 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114; *Ex parte* Fritz (1905), 86 Miss. 210, 38 So. 722, 109 Am. St. 700; 11 R. C. L. pp. 1017, 1044. * * *"

You will note that the *Lowder* case, above quoted from, and authorities place the right of the State to regulate fish in private waters upon the basis of some connection between such private waters and other waters, which affords a method of egress and ingress of the fish to and from such private waters.

It is, therefore, my opinion that, acting under the provisions of Section 93, Chapter 21 of the Acts of 1937, the Director of the Division of Fish and Game may designate and set aside said waters or part thereof as spawning grounds for fish. However, I do not believe that this power and authority could be extended to operate as an arbitrary prohibition of fishing in such private waters, but it would have to bear a reasonable relationship to spawning; the season and length of spawning to depend upon the actual facts and circumstances.

In answer to your second question, it is my opinion that Chapter 301 of the Acts of 1947, referred to, is not retroactive and does not make unlawful the continuance of an excavation

previously made and which was lawful at the time it was made.

OFFICIAL OPINION NO. 39

April 28, 1948.

Hon. C. E. Ruston,
State Board of Accounts,
304 State House,
Indianapolis 4, Indiana.

Dear Sir:

I acknowledge receipt of your letter of April 12, 1948 requesting my official opinion upon the following questions:

> "1. May a person defined in Chapter 352, Acts of 1947 claim the exemption on property he or she owns in a county other than the county in which he or she resides?
>
> "2. If the answer to question one (1) is in the affirmative, must the person file his affidavit with the county auditor of such other county?
>
> "3. If your answer to question 2 is in the negative what procedure must the applicant for exemption follow to gain his exemption in a county other than in the county of residence?"

The statutes to which you refer are as follows:

> "That any person who shall have served in the military or naval forces of the United States during any of its wars, and who shall have been honorably discharged therefrom, and who is disabled with a service-connected disability of ten per cent or more, as evidenced by a letter or certificate from the Veterans' Administration, or its successor, and the widow of any such person who shall have served in the military or naval forces of the United States during any of its wars, shall have the amount of two thousand dollars deducted from his or her taxable property: Provided, That this said exemption shall not bar recipient thereof