a bank or trust company which is entitled to the $10.00 fee, then it must necessarily fall within the other classification of licensees who pay a license fee of $100.00 but upon examination of the foreign banking corporation it would be entitled to the credit given to all others who pay the $100.00 license fee.

OFFICIAL OPINION NO. 80

August 12, 1946.

Indiana Department of Conservation,
140 North Senate Avenue,
Indianapolis 9, Indiana.

Gentlemen:

I have your letter of August 6, in which you make the following statement of facts:

"A non-resident of the state owns a 200 acre farm upon which by building dams he has constructed an artificial lake or pond of about 5 acres. The source of water supply of the pond is the natural watershed of the farm and the lake or pond is not connected with any river, creek or natural watercourse lying outside the farm in such manner that fish can pass from the lake or pond to such watercourse. The owner has stocked the lake with fish at his own expense."

Based upon this statement of facts, you ask the following questions:

(1) Is the non-resident owner required to buy a non-resident fishing license under B. R. S. 1942 Repl. 11-4101, 1405?

(2) Are bona fide non paying guests of such owner required to buy resident or non-resident licenses as the case may be?

(3) Are paying guests invited by the owner required to buy such licenses?

(4) Are the penal statutes (B. R. S. 1942 Repl. 11-1601 and 1651) regulating closed seasons and bag
limits for game fish applicable to the owner of such a lake or pond?

(5) Are such penal statutes applicable to paying and non paying guests of such owner?

(6) If the answer to the above question is that licenses are not required and that penal regulations are not enforceable because the lake or pond in question is a private pond—then are the sections of the statute making it unlawful to use or possess any net, seine or trap enforceable against the owner of a private pond? Sec. B. R. S. 1942 Repl. 11-1429 and 11-1434."

Answers to the foregoing questions involve a consideration of certain general legal principles involving fish and game. Generally the law regards fish as ferae naturae, and insofar as any right of property in them exists, it is in the public or is common to all. No individual property in them exists until they are taken and reduced to actual possession. They are natives of the water, and no individual property in them can attach while they remain there free, but as they are valuable for food, the public has an interest in their propagation, protection and growth.

In the case of Gentile v. The State (1868), 29 Ind. 409, at page 417 the Court says:

"* * * But fish are ferae naturae, and as far as any right of property in them can exist, it is in the public, or is common to all. No individual property in them exists until they are taken and reduced to actual possession. 2 Black. Com. 392. They are natives of the water; it is there they generate and live and grow, and no individual property in them can attach whilst they remain there free. But, as they are valuable for food, the public has an interest in their protection and growth."

However, when fish are lawfully reduced to possession, their ownership passes to the possessor. The question is then presented as to whether, under the facts stated in your letter, the owner of the artificial pond has reduced the fish therein to possession so as to make them his property.
The law has always made a distinction between the right to fish in public waters and in private waters. In the case of Millspaugh, Admr. v. Indiana Public Service Co. (1937), 104 Ind. App. 540, the Court said, at page 548:

"* * * The right to fish in public waters is vested in the public until an exclusive right is acquired by an individual, whereas in private waters the exclusive rights of fishing belong to the owners of the soil beneath the waters. * * *"

In the case of Sanders v. De Rose (1934), 207 Ind. 90, at page 95, the Court says:

"Since the common law in relation to the ownership of land covered by the water of an inland non-navigable lake obtains in this state, it follows that where, as here, the portion of the several owners of the bed of such lake may be determined by congressional survey, each owner has the right to the free and unmolested use and control of his portion of the lake bed and water thereon for boating and fishing; or, as said by Farnham on Waters & Water Rights, p. 1376: 'When the soil over which the water runs, and the water itself, belong to the same person, the owner cannot be correctly said to have a right of fishery, because the land and its profits are so completely identified as his inheritance that they cannot be separated. Therefore, the fishery is included in land and water; and since, in the absence of express reservation, land includes water, a grant of land will include both water and fishery.' And, at page 1427, he said: 'Since the right to fish follows the title to the soil, there is no public right of fishery in a lake the title to the bed of which is in private ownership.'"

If one owns the land on both sides of a stream and has title to the bed of the stream at that time, he then has the sole privilege of fishing in that portion of the stream within his lands. Under such circumstances, however, the fish may come and go. They are not reduced to possession and are not his property until actually reduced to possession. Under such circumstances, even though the exclusive right of fish may
belong to the owner, it is subject to the State's right of regulation.

In 22 Am. Jur. at p. 682, Sec. 21, it is said:

"* * * In private waters, on the other hand, the exclusive rights of fishing belong to the owners of the soil beneath the waters, subject to the state's right of regulation. * * *"  

Under such circumstances, the State may impose reasonable restrictions and they are not considered the taking of property without due process of law. For example, 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. This rule is well-stated in Sec. 44, Vol. 22, Am. Jur., 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 private waters and other waters. That connection may be slight—it may even be 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), 96 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 such cases as the Lowder case and other authorities place the right of the State to regulate fishing 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.

Under your statement of facts, no such ability upon the part of the fish to come or go from the pond in question
exists. The pond is entirely land-locked. Where such a situation exists it has been held that the fish therein are reduced to possession and are the property of the owner of the land. In Vol. 22, Am. Jur., Sec. 3, p. 668, it is said:

"* * * It is true that if the boundaries of a single owner comprehend the entire surface of the inland pond, and if there are no means of passage by which fish can migrate to the waters of other owners, such single owner will be deemed the proprietor of the fish, as well as of the fishing rights in the pond. * * *"

In 22 Am. Jur., Sec. 44, at page 699, it is said:

"* * * The rule is different where there is no means by which fish can escape from the waters of a private owner; in such a case, he is thought to be the absolute owner of the fish while they are uncaught, although where the private water is connected with a stream in times of high water, but not at other times during the year, the taking of the fish therein may be the subject of governmental regulations. The fact that the fish therein are the result of propagation by the landowner does not affect the rule. * * *"

The case of State v. Roberts (1879), 59 N. H. 484, recognizes that where one owns the land surrounding a pond and the water is so enclosed as to be absolutely within his control, and the free passage of fish to and from it is entirely and rightfully obstructed, that such owner could take trout therefrom during the prohibited season, but not where there was a connection with other waters so that fish could pass to and from the pond.

Applying the foregoing principle to your specific questions, my opinion is as follows:

1. Sec. 11-1401 B. R. S. 1942 Repl., is as follows:

"It shall be unlawful for any person to fish in, or take, catch, or attempt to take or catch, any fish from the waters of this state, or to hunt, shoot, take, pursue, or trap any wild bird or wild animal in this state, without first procuring a license therefor, as in this
act provided, unless such person shall be by this act specifically exempt from so doing. (Acts 1937, ch. 21, § 10, p. 64.)"

Sec. 11-1405 B. R. S. 1942 Repl., provides certain exemptions from the requirement of licenses and is in part as follows:

“(a) Any owner of farmland who is a resident of this state, the spouse and children living with such owner may fish, hunt, and trap on any land belonging to such owner without a license.

“(b) A bona fide tenant of farmland, and the spouse and children living with such tenant may fish, hunt, and trap without a license on the farm only, upon which he resides. (Acts 1937, ch. 21, § 14, p. 64.)"

Under the facts stated in your letter, the non-resident owner is not required to have a fishing license under Sec. 11-1401 B. R. S. 1942 Repl., even though the exemption contained in Sec. 11-1405 by its terms applies only to an owner who is a resident of this state.

2. & 3. In my opinion, the fish in the pond mentioned in your letter are the property of the owner. See 22 Am. Jur., Sec. 2, p. 668, where it is said:

“If a person, after capturing fish, confines them in a private pond disconnected from public waters, he acquires an absolute property in them, subject to be divested only by their escape.”

One fishing in such pond without permission of the owner would be guilty of trespass. If one caught a fish in such pond without permission of the owner, it would not be his fish but would still be the property of the owner of the pond. Under the foregoing authorities, the exclusive right to fishing in such pond, and the fish therein, belongs to such owner. Such fish are not ferae naturae, there is no public ownership or right therein, and their capture is not subject to regulation under the fish and game laws.

I am, therefore, of the opinion that persons fishing in such pond as the guests of such owner are not required to buy
resident or non-resident license, and this applies whether they are paying or non-paying guests.

4. & 5. What we have already said requires that your questions numbers 4 and 5 be answered in the negative.

6. The statutes relating to seines, nets and traps are as follows:

Sec. 95, Ch. 21 of the Acts of 1937, as amended in 1943, provides, in part, as follows:

"It shall be unlawful for any person, firm or corporation to possess any seine, dip-net, gill-net, trammel-net, pound-net, or any other kind of fishing net whatsoever, or any spear, gig, or fish trap, or any part thereof, in this state, except as otherwise provided in this act."

(Sec. 11-1606, B. R. S. 1942 Repl., pamph. pt.)

Section 43, of said Act is as follows:

"(a) It shall be unlawful for any person to use, set or cause to be used or set any net, seine, or trap in any of the waters of this state other than those waters for which such net, seine, or trap is licensed under the provisions of this act.

(b) It shall be unlawful for any person to possess any net, seine, or trap (except gill-nets for taking cisco) licensed and tagged under the provisions of this act at a greater distance than one mile from the waters in which such net, seine, or trap may lawfully be used under the provisions of this act."

(Sec. 11-1434 B. R. S. 1942 Repl.)

Sec. 99 of said Act as last amended in 1941, provides that minnow seines, not more than twelve feet in length and four feet in depth, and having a mesh not greater than 1/4 inch, may be lawfully possessed and used to take minnows. Said section, by clause (e) also provides as follows:

"(e) Minnow seines and traps of greater dimensions than herein authorized may be lawfully possessed and used in Lake Michigan within the jurisdiction of this state and any lake or river of this state under special
permit issued by the director and under such rules and regulations as he may prescribe.”

(Sec. 11-1610 B. R. S. 1942 Repl.)

Sec. 38 of said Act provides as follows:

“The director is hereby authorized to issue to the owner of any private pond a free permit to possess, on his premises and to use in such private pond only a seine or trap (except any gill-net, trammel-net, dip-net), under such rules and regulations as the director shall deem necessary.”

(Sec. 11-1429 B. R. S. 1942 Repl.)

Provision is also made for taking fish by means of nets and otherwise from Lake Michigan and the Wabash River and for securing licenses as provided by the Act.

Under the above statutes the mere possession of a seine or net is made unlawful except where a permit or license therefor is obtained under the provisions of the Act, and express authority is given for the issuance of a free permit to possess a seine to the owner of a private pond. There is, therefore, express statutory authority for the owner of the pond in question to own and possess a seine upon obtaining a free permit for that purpose. If the owner complies with said sections and the director issues him such permit, then he may lawfully possess and use the same on his own property. The question then arises as to whether such owner would be subject to violation of the law if he possesses such a seine or net without having obtained a proper permit. This, in turn, presents the question as to the validity of the general statutory prohibition against possession of a net or seine. This question was presented to the U. S. Supreme Court in the case of Lawton v. Steele (1893), 152 U. S. 133, and the Court said, at page 142 of the opinion:

“It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and
other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose. (Ely v. Supervisors, 36 N. Y. 297,) but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question, (People v. West, 106 N. Y. 293,) and in such case the legislature may annex to the prohibited act all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.

In the case of State v. Lewis (1892), 134 Ind. 250, the question was presented that a seine was a legitimate article of property, harmless in itself, adaptable to other use, and that, therefore, the statute was invalid. The Court said, at page 253:

"This statute prohibits the use of gill nets and seines, except certain kinds or in certain waters. They are not a species of property adapted to any other use. The fact that they are made of material harmless in itself and valuable for other uses, does not change the right of the State to prohibit the use of or the possession of such material when woven into nets used solely for the purpose of catching fish at times and in waters prohibited by statute. The gill net and the seine are made and used exclusively for catching fish, trapping them, and catching them in large quantities. This method of catching fish the State has a right to prohibit, and if it has the right to so prohibit the catching, why has it not the right, also, to prohibit persons having an article of property in their possession used solely for such unlawful purposes?"
It is, therefore, my opinion, in answer to your question number 6, that the statute makes it unlawful to possess a net or seine other than those excepted; that the statute is valid and that the possession by the owner in question would be illegal unless he obtains a permit as provided for in the Act, or the seine or net in question is within those excepted by the Act.

OFFICIAL OPINION NO. 81

August 13, 1946.

Mr. John D. Pearson, Insurance Commissioner,
Department of Insurance,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of July 11, 1946 which reads as follows:

"Section 235, Article 2, of the Indiana Insurance Law which relates taxes to be imposed upon Foreign Insurance Companies, operating in the State of Indiana, provides for certain deductions from Cross Premium Income in arriving at a basis for computation of the taxes due. Under this specification, and taking into consideration the deductions permissible, must the company deduct from the gross premium only such losses as have been actually paid in the State without consideration for such part of the loss as has been reinsured?

"First, in other words, where Indiana risks are reinsured are the losses on direct writing deductible on a gross or net basis?

"Second, are losses paid by the reinsuring company deductible by the reinsuring company in computing taxes due the State of Indiana?"

The pertinent part of the premium tax upon foreign insurance companies is Section 235 of Chapter 162, page 588 of the Acts of 1935 (39-4802 Burns' 1933 R. S.):