the sentence and "good time" allowed upon the entire period of imprisonment thus computed, upon the basis of the table set out in the act. (See Sec. 1, chapter 164, Acts 1933.)

Prisoner William Brooks, under the table mentioned, would be entitled to one month off of his year's sentence for good time. The table provides for two months off of the second year, which would figure one-sixth of the second year of imprisonment. Since the act provides that the prisoner shall be entitled to diminution of time as set out in the table for the respective years, "and pro rata for any part of a year when the sentence is for more or less than a year," the prisoner in question would be entitled to additional "good time" figured on the rate of one-sixth of the additional period of imprisonment imposed by law on account of the $119 unpaid fine and costs. This would figure 19 days, or a total of one month and nineteen days from the entire term of imprisonment.

CONSERVATION DEPARTMENT: Whether public service company must construct fish ladders in connection with diversion dam across Whitewater river in Wayne county.

June 21, 1933.

Kenneth M. Kunkel, Director,
Fish and Game Division,
Conservation Department,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of June 15, 1933, in which you ask whether or not the Public Service Company of Indiana may be compelled to construct fish ladders in connection with its diversion dam across Whitewater river in Wayne County, Indiana. You attach correspondence from officers of such company purporting to state the facts concerning the erection and operation of such dam and of the canal created by the diversion.

Section 4757, Burns Revised Statutes, 1926, provides as follows:

"The owner or owners of any dam across any of the rivers, streams or watercourses in this state, when such dam is of the height of four feet or over, shall, within six months after the passage of this act, con-
struct and maintain fish ladders on such dam sufficient to allow the fish below such dam to pass over such dam into the waters above the same. Such fish ladders to be constructed in such manner and of such material as shall be directed by the commission of fisheries of Indiana."

Section 4758 provides that it shall be the duty of the township trustee to erect fish ladders upon the failure or refusal of the owner or owners to do so, and makes the cost of construction a lien on the dam property and waterpower rights. Section 4759 relates to construction of fish ladders in connection with dams built after the passage of the act, and provides for the same procedure and remedies on failure or refusal of the owner or owners of the dam to construct such fish ladders.

The letter from the general counsel for the Public Service Company of Indiana, which was attached to your inquiry, cites the fact that a wooden dam first was built at the site in question by the State of Indiana in 1830, and that later, in 1865, under authority of an act of the legislature, all of the right, title and interest of the state in the hydraulic rights and all dams and feeder dams were conveyed to the predecessor in interest of the Public Service Company of Indiana, the present owner. This fact is clearly immaterial, in view of the fact that the state had divested itself of all title to the property some twenty years before the passage of the act under consideration (Secs. 4757-4759, supra), and in view of the further fact, that the said act contains no exemptions or exceptions in favor of dams originally constructed by the state itself, nor does the grant by the state expressly give the right to maintain the dam without adequate fish ladders or fish ways.

Counsel also raises the point that to compel the present owner to construct proper fish ladders would be unconstitutional as depriving it of its property without due process of law. We cannot accede to this view, although it has been supported in a few jurisdictions, especially where there has been an adverse user of such dams by the owners without fish ways for a sufficient period to acquire the right or easement under the statute. (See Sibley, et al. v. State, 64 S. W. 703; Woollever v. Stewart, 36 Ohio St. 146, 38 Am. R. 569.)
But the better rule, and the one now generally accepted throughout the United States, is that the states have the right to require the construction of sluices or fish ways to allow the free passage of fish up and down the streams of the states for spawning purposes, and to require that such sluices or fish ways be constructed at the expense of the owner or owners, regardless of whether the dam was constructed before the passage of the statute prescribing the fish ways or not. The theory is adopted that in the absence of an express statutory or charter provision to the contrary, one who builds a dam on a stream frequented by fish, constructs and maintains it under an implied obligation to keep open sufficient sluices and fish ways for the passage of fish at the proper season; that therefore, there was never any property right acquired within the meaning of the constitutional provisions, nor could the adverse user operate to bar a public right such as the right to have the stream kept open for the free passage of fish in their migrations.


And this general rule applies, even though the construction of fish ladders causes a resultant loss of water power, in addition to the cost of such construction.

In re: Delaware River at Stilesville, 115 N. Y. Supp. 745.

Besides having the support of the prevailing weight of authority, the action of the conservation department in ordering the construction of fish ladders in the instant case has the additional support of the particular facts under consideration. From counsel’s letter, it appears that the original wooden dam was torn down and replaced by a new concrete dam in 1913, which was after the passage of the act in question. In other words, regardless of whether the owner could have been required to cut a sluice or fish way in the dam
already constructed under section 4757, supra, clearly it came within the operation of section 4759, supra, when it constructed a new dam in 1913. (See 33 Pa. Co. Reports, 79.)

It is well settled that the right to require fish ways, or fish ladders, where the right has been recognized, arises as a branch of the police powers of the state. It also is the accepted rule that constitutional guaranties, that no person shall be deprived of life, liberty, or property, without due process of law, do not limit, and were not intended to limit, the subjects on which the police power of a state may lawfully be exerted.

Chicago, etc., R. Co. v. Tranbarger, 238 U. S. 67; Knight and Jillison Co. v. Miller, 172 Ind. 27, 43; Bemis v. Guirll Drainage Co., 182 Ind. 36; Pittsburgh, etc., R. Co. v. State, 178 Ind. 498; Given v. State, 160 Ind. 552, 556.

If the regulations prescribed are reasonable, they are valid; but if they are unreasonable, they are void as a taking of private property without compensation and without due process of law. In applying this test, it must be remembered that the presumption is in favor of the reasonableness and validity of the law.


Although the precise question under consideration has never been passed upon by our courts, still they have recognized the general rule that statutes enacted under a reasonable exercise of the police power are constitutional, even though their administration necessitates considerable expenditures of money by the parties affected, in altering or adding to or even destroying their private property.


In conclusion, it is my opinion that the Public Service Company of Indiana legally may be required to construct an adequate fish way or fish ladder in connection with its diver-
sion dam unless, by reason of such dam, the old channel of Whitewater river below the dam has lost its character as a "river, stream, or watercourse." If this be true, as the attached letters would seem to indicate, then the fish ladders should be constructed in connection with the dams built across the stream as now diverted through the canal, rather than in connection with the diversion dam itself. This question is a question of fact, the answer to which depends upon information not in the writer's possession.

CONSERVATION DEPARTMENT: Whether people leasing camp on White river would be required to have license to fish.

June 22, 1933.

Hon. Kenneth M. Kunkel, Director, Fish and Game Division, Department of Conservation, Indianapolis, Indiana.

Dear Sir:

I have before me your communication of June 21, 1933, which reads in part as follows:

"We would like to have an opinion as to whether or not a number of people leasing a camp on White River would be required to have a license to fish. They claim their lease reaches to the middle of the stream and that, therefore, they would not be required to have a license to fish on White river."

The act relating to hunting and fishing licenses, as amended by the recent legislature, (Chapter 216, Acts 1933), provides:

"The following persons only may hunt, fish or trap without a license therefor, and upon these conditions only: The owners of farm lands who are residents of Indiana, and their children living with them, upon such lands only; bona fide tenants of farm lands, residing thereon, upon such lands only. All persons under eighteen years of age may fish without a license. Also all persons who by right of being an honorably discharged soldier, sailor, marine or army nurse are exempt from securing a license under this act." (Our italics.)