

**1999 DRAFTING REQUEST**

**Bill**

Received: 02/11/2000

Received By: kahlepj

Wanted: Soon

Identical to LRB:

For: Brian Rude (608) 266-5490

By/Representing: Mark Patronsky

This file may be shown to any legislator: NO

Drafter: kahlepj

May Contact:

Alt. Drafters:

Subject: Econ. Development - tourism

Extra Copies:

**Pre Topic:**

No specific pre topic given

**Topic:**

Federal indemnification for Kickapoo valley reserve

**Instructions:**

See Attached

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kahlepj 02/14/2000	jgeller 02/14/2000		_____			
/1			jfrantze 02/15/2000	_____	lrb_docadmin 02/15/2000	lrb_docadmin 02/16/2000	

FE Sent For:

<END>

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/?	kahlepj	1 2/14/00 JG	2/15/00 JG	2/15/00 JG			

FE Sent For:

<END>

Pam -

last night

Mark Patrosky faxed this over. It's  
for Rude and he's "in a big hurry" for it.

Mark isn't in today, but will be back Monday

Beddy

**WISCONSIN LEGISLATIVE COUNCIL STAFF**

One East Main Street, Suite 401

P.O. Box 2536

Madison, WI 53701-2536

**FAX # 608/266-3830**

**DATE:** 2/10/2000

**NUMBER OF PAGES SENT, INCLUDING COVER PAGE:** 2  
*[If pages are not all received or are illegible, please call 608/266-1304.]*

**PLEASE DELIVER TO:** BECKY TRADEWELL

**FAX NUMBER:**

**FROM:** MARK PATTONSIA

**MESSAGE:**

PLEASE DRAFT FOR  
SEN. RUDE.



6-9280

Mark:

DOA on tourism?

what is indemnification for?

indemnify feds for land? no

agree to indemnify fed gov? ✓

required by

S/b fed gov instead of fed law

TO: PAM KAHLER

INTEROFFICE MEMORANDUM

TO: SENATOR BRIAN RUDE  
 FROM: DENNIS FAY, TOURISM  
 SUBJECT: TRANSFER OF KICKAPOO PROPERTY & HOLD HARMLESS AGREEMENT  
 DATE: 11/23/99  
 CC: MARCY WEST

PL 104 - 303  
 SEC 361 (3220)

The Water Resources Development Act of 1996 authorizes the transfer of ownership of the Reserve property from the U.S. Corps of Engineers to the State. As a condition of the transfer, the Act requires "that the State of Wisconsin enters into a written agreement with the Secretary to hold the United States harmless from all claims arising from or through the operations of the lands and improvements subject to the transfer."

Ever since the memorandum of understanding was signed between the State and the Ho-Chunk Nation in October 1997, the Board, through its lawyer, and the Corps, primarily through the St. Paul office, have had sporadic discussions concerning the content of the Hold Harmless clause.

The most recent communication from the Corps is that the hold harmless agreement should read as follows. "The State shall hold and save the Government free from all damages arising from the construction, operation, maintenance, repair, replacement, and rehabilitation of the Project and any Project-related betterments, except for damages due to the fault or negligence of the Government or its contractors."

The Corps is willing to include the following language as a limitation on the agreement. "Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the Legislature of the State of Wisconsin." As part of the communication the Corps notes that the underlined language will have to be tailored to meet the requirements of the Act.

The difficulty is that the Attorney General has consistently stated that state agencies lack the authority to sign such a hold harmless agreement. Indemnification and hold harmless provisions are generally prohibited by the Wisconsin Constitution because, if enforced, they require the state to pay a claim for which there has been no legislative appropriation. To the extent the legislature has provided statutory authority for paying these types of claims, the Constitutional provisions have been satisfied. Section 895.46, Stats., is the only statutory authority that applies. Section 895.46, Stats., requires the state to indemnify its officers, employees and agents for claims arising out of the scope of their employment. Section 893.82, Stats., effectively supplements s. 895.46, Stats., by requiring timely notice of a claim as a condition precedent to bringing suit against an officer, employee or agent. It also limits the amount of damages recoverable in such actions to \$250,000.



The language the Corps wants is considerably broader than what is authorized by ss. 895.46 and 893.82, Stats. If called upon to decide the legal validity of such contract language, a court might void the contract in its entirety, although that seems unlikely. It might limit the State's liability to what is allowed under ss. 895.46 and 893.82, Stats. However, it might also enforce the provision as written. Further, enforcement might be ordered, in some measure, against the state representatives who sign the contract, if the court concludes, as it likely would, that there is no authority to sign a contract which includes such a broad indemnity provision. In that event, it is also possible that the state representatives who sign the contract might not be entitled to statutory indemnification, since they would likely be found to have been acting outside the scope of their employment.

Unfortunately, the limiting language, "Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the Legislature of the State of Wisconsin", suggested by the Corps does not help. The language appears to be an attempt to avoid the Constitutional proscription noted above, but according to the Attorney General, does not work. The Constitutional proscription is not against "future appropriations," but rather is against the payment of any claim without legislative appropriation.

From the beginning of our discussions with the Corps I have suggested language that provides indemnification subject to the limits of ss. 895.46 and 893.82, Stats. In fact, I have provided an example to the Corps of a lease it has with the Department of Natural Resources for the Fox Locks that includes the suggested limited indemnification clause. That language reads, "The State shall hold and save the Government free from all damages arising from the construction, operation, maintenance, repair, replacement, and rehabilitation of the Project, and any Project-related betterments, to the extent such damages are due to the negligence of a state officer, employee or agent acting within the scope of his or her employment, subject only to the limitations of s. 893.82, Wis. Stats." The St. Paul office of the Corps has stated that the suggested language does not conform to the requirements of the Act.

More recently, I have suggested the following language. "The State shall hold and save the Government free from all damages arising from the construction, operation, maintenance, repair, replacement, and rehabilitation of the Project, and any Project-related betterments, to the extent such damages are due to the negligence of a state officer, employee or agent acting within the scope of his or her employment. Any claim hereunder shall be subject to the limitations of s. 893.82, Wis. Stats., unless the Wisconsin Legislature specifically authorizes payment of the claim." I have also suggested that the State might consider the purchase of an insurance policy as a substitute for the broader indemnity clause. The Corps has not yet officially responded to the most recent suggestions. The informal indication from the St. Paul Office is negative.

The St. Paul Corps office understands that under current law we are not able to sign the indemnity clause it believes is necessary for the land transfer. It has suggested that the Legislature pass the necessary legislation. It is aware of s. 30.205, Stats., that authorizes the DNR to sign the necessary indemnity clause for certain water resources projects and suggests passage of similar legislation for the Board.

Over the 2 years since the signing of the MOU, little to no progress has been made on this issue through discussions with the St. Paul office of the Corps. To date, there has been limited to no direct contact with the Washington offices of the Corps in spite of requests from members of the Wisconsin delegation for that direct dialogue. It is difficult to say whether direct contact would make a difference in the negotiations over this issue, but it is probably worth pursuing.



State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-4532/1  
PJK.....

JLg

~~PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION~~

SOON  
(2-14)

gen cat

1 AN ACT ~~relating to~~; relating to: an agreement to indemnify the federal government in  
2 connection with the transfer of land for the Kickapoo valley reserve.

***Analysis by the Legislative Reference Bureau***

Under current law, the department of tourism may acquire from the federal government land adjacent to the Kickapoo River. This land, known as the Kickapoo valley reserve, is to be managed for recreational and vacation use and in such a way as to preserve its unique environmental, scenic and cultural features. This bill authorizes the department of administration, in connection with the land transfer, to enter into an agreement with the federal government containing indemnification provisions required by federal law.

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

3 SECTION 1. 41.40 of the statutes is renumbered 41.40 (1). ✓

4 SECTION 2. 41.40 (2) of the statutes is created to read: ✓



**SUBMITTAL  
FORM**

**LEGISLATIVE REFERENCE BUREAU  
Legal Section Telephone: 266-3561  
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 02/15/2000

To: Senator Rude

Relating to LRB drafting number: LRB-4532

**Topic**

Federal indemnification for Kickapoo valley reserve

**Subject(s)**

Econ. Development - tourism

1. **JACKET** the draft for introduction \_\_\_\_\_



in the **Senate** \_\_\_\_ or the **Assembly** \_\_\_\_ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached \_\_\_\_\_.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction \_\_\_\_\_.

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Pamela J. Kahler, Senior Legislative Attorney  
Telephone: (608) 266-2682