

Prepared Comments to the Special Committee on State-Tribal Relations
February 25, 2005

Presented by John Vincent, Acting Administrator, Division of Trust Finance and
Employer Services, Department of Employment Relations

ELIGIBILITY OF TRIBAL LAW ENFORCEMENT OFFICERS TO PARTICIPATE IN
THE STATE RETIREMENT SYSTEM

State Representative Musser, Committee members, thank you for extending an invitation to the Department of Employee Trust Funds (ETF) to address the Special Committee on State-Tribal Relations. My name is John Vincent. My position with ETF is Acting Administrator – Division of Trust Finance and Employer Services. My Division, among other responsibilities, is responsible for determining eligibility for participation in the Wisconsin Retirement System, as well as other benefit programs administered by ETF.

Today, I am here to specifically provide remarks on the proposition to allow tribal police officers to participate in the Wisconsin Retirement System (WRS). My comments will center on the following:

- Technical concerns of ETF, such as the information in the January 9, 2001, letter from ETF Secretary Stanchfield to Representative Musser (I've brought along copies for Committee members),
- ETF's policy level concerns with the proposition, and
- Provide information regarding the cost to the employer, such as a tribal government, of participating in the WRS.

The January 9, 2001, letter provided technical responses to some critically fundamental questions that require serious consideration, as this proposition is discussed. However, for the benefit of the Committee, I would like to expand the focus of my remarks to provide the complete comprehensive list of requirements, questions, and issues that should be addressed. By doing so, the Committee will have the full perspective of the questions and challenges that are before it with this proposition.

When requests are received for inclusion under the WRS, ETF employs the same standards for inclusion that are used for all employers. No special status or exceptions are provided to any employer to permit participation. ETF must be consistent to avoid adverse selection, to not jeopardize the WRS's current qualified tax status, maintain system financial integrity, and to protect the members of the participating employers. As such, ETF must ensure that the employer requesting inclusion positively satisfies all of the following.

1. Does the Employer meet the definition of employer in §40.02(28), of the Wisconsin Statutes?
2. Will the Employer, with participation in the WRS, meet the criteria of covering all eligible employees, as provided in §40.22(1), of the Wisconsin Statutes?
3. Is the Employer a separate legal jurisdiction for OASDHI (Social Security) purposes and does the Employer resolve to provide Social Security coverage under the State of Wisconsin's Section 218 Agreement with the Social Security Administration (SSA)?
4. Is the Employer's participation acceptable to the SSA for purposes of amending the Section 218 Agreement?
5. Does the Employer meet Internal Revenue Service (IRS) guidelines for inclusion in a "qualified" public pension plan?

It is essential to ascertain the answer to the first question, before the balance of the questions can be addressed.

The question of whether Indian Tribal Bands qualify to come under the WRS has come up in the past. In each of these instances, ETF concluded that Indian Tribal Bands do not meet the definition of "governmental unit" for purposes of Chapter 40, Wis. Stats., and for purposes of Social Security coverage under the State of Wisconsin's Section 218 Agreement with the SSA. This conclusion was reached after careful review of the Statutes governing the WRS. Wisconsin Statutes §40.02(28) provides that an employer is:

"...the state, including each state agency, any county, city, village, town, school district, other governmental unit or instrumentality of 2 or more units of government now existing or hereafter created within the state..."

Even though tribal governments, such as the Lac du Flambeau Band, may perform some governmental functions, ETF has interpreted the term "other governmental unit" to mean a governmental unit of the same kind of class and nature as the other state-created government units listed in §40.02(28), Wis. States., (e.g., towns, villages, cities, school districts, etc.).

In addition, other provisions within Chapter 40 appear to support this conclusion. For example, §40.06, Wis. Stats., provides for the collection of reports and payments. If contributions are not paid timely, this statute allows ETF to collect contribution payments directly from local government state aids or from State agency appropriations. It appears that those drafting this statutory language believed that all participating employers would fall into one of two categories; either State agencies or political subdivisions of the State. There are no provisions made for collecting delinquent reports and/or payments from entities other than State agencies or political subdivisions of the State. Similarly, the Section 218 Agreement with the SSA focuses on the State and its political subdivisions.

If the first question were effectively resolved so tribal governments would meet the Wisconsin Statute definition of employer, then the balance of the questions must be satisfied. For if an employer does not meet the statutory definition of employer, the remaining questions would not need to be addressed.

The proposition being discussed, today, to allow tribal police officers to participate in the Wisconsin Retirement System (WRS), falls within the scope of the second question. Will the Employer meet the criteria of covering all eligible employees, as provided in §40.22(1), of the Wisconsin Statutes? All eligible employees of participating employers must be covered under the WRS, as provided in the Wisconsin Statutes:

“...each employe currently in the service of, and receiving earnings from, a...participating employer shall be included within the provisions of the Wisconsin retirement system...”

The problem for the WRS of covering only a subset of employees, such as covering only tribal police officers, is primarily one of adverse selection against the fund. Allowing employers to limit participation in the WRS to various subsets of employees creates greater risk to other employers when covering only higher risk employees in the WRS either in terms of age or type of employment. For example, an employer could cover a subset of employees that were older and closer to retirement resulting in a higher cost of coverage than their total workforce would result in. In the WRS, the average contribution rate charged to all employers is based on the experience of a large diversified pool of ages and occupations. Covering higher cost and higher risk employees in the WRS could result in shifting higher costs to all other employers and employees and potentially drive up the contribution cost of all employers.

A second problem occurs when employees internally transfer (voluntarily or involuntarily) from a covered position to an uncovered position while still employed by the same employer. Thus, an employee could have coverage in one subset, for example as a tribal police officer, and lose coverage by moving to a non-covered subset, for example as a dispatcher, correctional officer, or firefighter. This would certainly create individual hardships for employees and significant confusion. This would also affect an employee's coverage in any other benefit plan administered by ETF where WRS participation is required to obtain and maintain eligibility for coverage in that benefit plan, e.g., health and disability insurance.

Finally, research is needed to determine if allowing a subset of employees to be covered by the WRS conflicts with any federal laws governing qualified public pension systems. Specifically, there are minimum participation standards under federal law that would need to be reviewed for applicability to public pension plans.

The final three questions are equally important for an employer to be accepted for inclusion into the WRS, and to ensure that WRS tax status under federal tax law will not be jeopardized. These questions relate to the Social Security Administration (SSA) and the IRS.

An entity requesting inclusion in the WRS must also meet the definition of a separate legal entity for purposes of coming under the State's Section 218 Agreement with the SSA. This agreement requires that all WRS participants be covered for Social Security purposes under Wisconsin's Section 218 Agreement. In order to be covered under the Section 218 Agreement, individuals must be employees of the State and/or political subdivision of the State. The Section 218 Agreement defines political subdivisions as an "instrumentality of (a) the State, (b) one or more political subdivisions of the State, or (c) the State and one or more of its political subdivisions..." In the past, the SSA has indicated that Indian Tribal Bands did not meet this definition.

As it relates to the IRS, Wis. Stats. §40.015 requires that the WRS be administered as a governmental plan and as a qualified plan for federal income tax purposes. Therefore, ETF must also be satisfied that including any tribal governments in the WRS will not jeopardize its governmental status under federal tax law. If the WRS were to lose its status under federal tax law, the WRS would come under the provisions established by ERISA (Employee Retirement Income Security Act), which is under the Department of Labor. ERISA is a federal law that sets minimum standards for pension plans in private industry. Thus, it is key to note that if the federal tax status under federal law was lost, the State's WRS retirement plan for the 520,000 plus members, and 1,400 participating employers, would be under the control of the U. S. Department of Labor.

Having provided remarks on the critically important eligibility criteria, I'll now switch my focus to ETF's policy considerations, and reaction to this proposition.

Early in my remarks, I stated that ETF's policy is to employ the same standards for inclusion that are used for all employers. No special status or exceptions are provided to any employer to permit participation. Again, ETF must be consistent to avoid adverse selection, to not jeopardize the WRS's current qualified and governmental tax status, maintain system financial integrity, and to protect the members of the participating employers.

To start this section of my remarks, I thought I would pose a question that perhaps would be asked. That is, would ETF oppose participation if the five (5) critical eligibility questions/criteria were met? ETF would not oppose participation if the Trust Fund is protected and this proposition meets the public policy objective of providing benefits to public employees. That is different than supporting the legislation. The public policy issue is whether the state legislature considers tribal employees to be governmental employees, and therefore, eligible for the same benefits that other state and local government employees have. That is really a matter the legislature needs to resolve. If both the legislature and the federal government, via the IRS, conclude they are and all the protections I have described are in place, then the public policy objective can be met.

Note that in the prior sentence I mentioned the requirement that "all the protections are in place." There are two (2) assurances that need to solidly be in place, if steps are to be taken to permit tribal governments to participate in the WRS.

The first is that there are assurances that the employer meets the obligation to fund the benefits promised to its employees. These assurances are to provide protections for the WRS, but more importantly, for the employees of the defaulting employer, and for all the employees of all participating employers. The WRS needs to have required contributions paid timely and in the amounts specified to fund the benefits. If state and local governments do not pay their required contributions, they are subject to ETF levying their state aids in amounts sufficient to pay the obligation. With tribal governments, this would not be an option because such aids come from the federal government. It would appear that the state legislature could not direct levy of federal funds received by a tribal government for unpaid WRS contributions. There might be other mechanisms the tribe could establish such as a surety bond that would guarantee payment of contributions in the event of default by the tribal government. However, it would be difficult to estimate the value of such a bond given the long-term nature of the commitment and the ultimate unknown value of future contributions. A legal opinion from the Attorney General would be necessary to determine if a state agency, such as ETF, could seek judgement in a state court against a tribe for contributions owed.

The second assurance also is for the protection of the employees of participating employers. For example, it would be necessary to assure that orders of the tribal court dividing pension assets in the case of a divorce could apply. It is not clear if the current state statute on Qualified Domestic Relations Orders and the division of WRS benefits would apply to a tribal court order.

There are other WRS statutory provisions about restoration of participant accounts by court ordered settlements, or arbitration awards involving employees that are reinstated to employment after discharge, that may create some legal questions with respect to actions of a tribal court.

In addition, under §40.08 (12), Wis. Stats., appeals of decisions by the Employee Trust Funds (ETF), Wisconsin Retirement (WR) and Teacher Retirement (TR) Boards are certiorari proceedings and must go to the Dane County Circuit Court. If a tribal government appealed a decision of one of the boards of trustees, the tribal government would be subject to the jurisdiction of a state court.

These are a few examples of the legal issues that would need to be clarified or resolved with respect to the extent of autonomy of tribal governments participating in the WRS.

The final area I would like to provide information on is the potential cost implications to any tribal government, if they were to be able to participate in the WRS. If a tribal government were to be included in the WRS, it would be likely they would have employees in occupations that would be considered "general" participants, while others would be "protective." For purposes of illustration, I've assumed this to be the case. Because of how the retirement provisions differ between the two, the tribal government's contribution rate would differ for each of them. As mentioned earlier, the contribution

rate is an average for all participating employers. For example, the following are the contribution rates for calendar year 2005, as a percent of payroll.

General	10.2%
Protective With Social Security	14.8%

In addition to the WRS retirement benefit provisions, the WRS duty disability provisions would cover employees in the protective category. The rate for each participating employer is experience rated. Any new employer would come in at the minimum contribution cost of 1.9% of payroll, but would be rated based on claims experience in future years. Of course, if no claims were paid during the first year, the 1.9% contribution rate would remain unchanged.

The last comment on this subject is about prior service coverage. The fore mentioned WRS contribution rates were prospective. If the new participating employer chose to cover past service of all employees, there would be a prior service rate. The actual rate would be actuarially determined based on the age and service of the covered population. To put this into perspective, the statewide average rate is about 1.3% of payroll, but this can vary dramatically, particularly in a small group.

I've provided quite a bit of information in my remarks, and would like to end by emphasizing the following points:

1. It is imperative that all employers seeking to participate under the WRS meet the same eligibility criteria as all participating employers.
2. That participation by tribal governments does not impact the WRS's governmental and qualified tax status.
3. That tribal governments are subject to state court jurisdiction, jurisdiction of the ETF Board and other legal processes.
4. That all employees meeting WRS eligibility criteria participate.
5. That there are binding guarantees regarding payment of obligations that can be enforced by ETF.
6. That the participation in the WRS by any tribal government would be without end just like other employers.
7. That ETF would not oppose participation by tribal governments if the Trust Fund is protected and the legislature determines the public policy objective of providing benefits to public employees is met.

That concludes my remarks. Thank you again for the invitation to address the Committee. Are there any questions?