Approved: March 9, 2005
Date

MINUTES OF THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman Pete Brungardt at 10:38 a.m. on Tuesday, February 22, 2005, in Room 231-N of the Capitol.

All members were present.

Committee staff present:
Athena Andaya, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Senator Donald Betts
Jim Borthwick, Attorney with Blackwell Sanders Peper Martin, LLP, Kansas City
Ron Hein, Prairie Band Potawatomi Nation
Whitney Damron, Kickapoo Tribe and Sac & Fox Nation

Others attending:
See attached list.

Chairman Brungardt referred the Committee members to additional handouts distributed covering one set of written testimony submitted on **SB 170**, Fiscal Note covering **SB 168**, and copy of additional information furnished by Robert Stephan involving case citations relating to his testimony on **SB 168** and requested by Senator Vratil. (Attachment 1)

Chairman Brungardt called for bill introductions. Brad Smoot requested a bill be introduced on behalf of Explore Information Services, L.L.C., a subsidiary of The Schwan Food Company of Salina, Ks., relating to allowing affordable access to certain public information contained on Kansas motor vehicle records. He stated that this was a technical amendment which would give access to information that would help insurers identify undisclosed youthful drivers and generate some additional revenues for the State of Kansas from the sale of these records.

Senator Gilstrap made a motion to introduce the requested bill, seconded by Senator Vratil, and the motion carried.

Tiffany Mueller, Kansans for Justice and Equality Project, requested a bill be introduced that would amend the current Kansas Acts Against Discrimination to include prohibiting discrimination in the areas of housing, public accommodations, and employment based on sexual orientation.

Senator Gilstrap made a motion to introduce the requested bill, seconded by Senator Reitz, and the motion carried.

In consideration to Senator Betts' schedule, Chairman Brungardt called for discussion and final action on **SB 77**. He called upon Senator Betts to present his recommendation to the Committee regarding the proposed bill.

2/

Senator Betts explained that through negotiations and discussion with the Kansas Sheriff's Association and several agencies across the state, a compromise was reached regarding the removal of the misdemeanor in order to allow the fifteen member task force and agencies to go back and work some issues out gradually from year to year. He said that the task force does not want to right out punish law enforcement officers for whatever acts, and wants to see the agencies come up with a workable plan to combat the acts of racial profiling. The Chairman stated that the recommendation mirrors the original agreement that Senator Betts originally brought to the Committee containing the compromise worked out between all parties.

MINUTES OF THE Senate Federal and State Affairs Committee at 10:38 a.m. on February 22, 2005 in Room 231-N of the Capitol.

Senator Hensley made a motion to amend the proposed substitute bill with Senator Betts' recommended language and removing the misdemeanor penalty. The motion was seconded by Senator Reitz, and the motion carried.

The Revisor asked Senator Betts relative to a request to amend the date of the final report to November 1, 2005, located at the top of page 2, third line, on the draft of the substitute bill. Senator Betts responded that they would like to have the date changed for the final report from February 1, 2006, to be November 1, 2005, in order to allow the task force to have time to draft any new legislation deemed necessary to present to the 2006 Legislative Session.

Senator Hensley moved to make the requested date change, seconded by Senator Barnett, and the motion carried.

Chairman Brungardt requested the Revisor to clarify what the proposed substitute bill before the Committee contained. The Revisor explained that the drafted substitute bill is the bill taken from the proposed amendments to the bill when the Committee worked the bill on February 9. She stated that the way the bill was amended it would not have a criminal penalty, and provides for advisory committees to look at the question of procedures to be established for racial profiling, education, etc. for cities of the first class. It provides for the procedures to be studied by a task force that will then submit a report. (Attachment 2)

Senator Vratil asked what the substitute bill did in regard to grants or funding in the event the law enforcement agency or member of the agency violated the racial profiling statute. The Revisor responded that the substitute bill does incorporate Senator Barnett's amendment, bottom of page three and top of page 4, that if a law enforcement agency has been found to engage in racial profiling or has failed to discipline an officer in accordance with the recommendations of the Attorney General then that law enforcement agency would not be eligible to receive grants or other moneys from the state for the fiscal year following a finding by the Attorney General.

Senator Hensley moved to report **Substitute SB 77** favorably for passage, seconded by Senator Reitz, and the motion carried.

Chairman Brungardt called upon Whitney Damron and Jim Borthwick, Attorney with Blackwell Sanders Peper Martin, LLP, Kansas City, to give a presentation on the constitutional issues related to **SB 168** and **SB 170**. Mr. Damron, representing the Kickapoo Tribe and Sac & Fox Nation, introduced Chairman Steve Cadue of the Kickapoo Tribe and his Vice Chair, Emily Conklin, and Vice Chair of the Sac & Fox Nation, Fredia Perkins and other Tribal Counsel members and representatives who were in the attendance. Mr. Damron gave the history and background information on the tribes' efforts on expansion of gambling with a destination casino in Wyandotte County and work on tribal compacts for the past several years. Mr. Damron said his clients retained the services of Jim Borthwick of the Kansas City, Missouri-based law firm, Blackwell Sanders Peper Martin, LLP, in order to ascertain the constitutionality of several gaming bills that were scheduled to come before the 2004 Kansas Legislature as well as review gaming legislation that had been considered during earlier legislative sessions. He stated Mr. Borthwick's presentation would include three opinions that called into question the constitutionality of virtually all gaming proposals considered by the Kansas Legislature in recent years. (Attachment 3)

Jim Borthwick, Blackwell Sanders Peper Martin, LLP, presented to the Committee detailed information relating to his research and work over the past several years on casino gambling for the Kickapoo Tribe in Kansas and Sac & Fox Nation of Missouri in Kansas and Nebraska. He gave his opinion that SB 168 and **SB 170** which would authorize certain gaming activities in the state, would, if enacted, violate the Kansas Constitution. (Attachment 4)

Mr. Borthwick attached a copy of his firm's January 2004 requested opinion to his written testimony concerning the requirements of the Kansas Constitution relating to gambling activities. He referred to the letter and noted that the Kansas Constitution authorizes the Legislature to "provide for a state-owned and operated lottery." The Kansas Supreme Court has defined "lottery" to include any form of gambling

containing the elements of consideration, prize and chance. Also, the supreme Court has said that the words "state-owned and operated" must be construed to mean what the words imply to the common understanding of the average person, and particular attention should be paid to the intent and understanding of the people at the time the constitutional language was adopted.

Mr. Borthwick reviewed the provisions of both **SB 168** and **SB 170** , and the comparison of both proposed bills as to the constitutionality of each. He stated that the video lottery terminal provisions of **SB 168** raise some constitutional issues, but may well pass the constitutional test. He said because private entities, not the State, would own and operate the business enterprises constituting Lottery Gaming facilities, **SB 170** violates the Kansas Constitution. Copies of previous opinions and letters covering this subject were also attached to Mr. Borthwick's written testimony dated February 21, 2005.

Senator Vratil questioned Mr. Borthwick's interpretation of Section 8, page 11 of the bill, regarding his statement that 12.5% guaranteed profit was to be paid the lottery gaming facility manager before expenses. Senator Vratil said that statement was not true, and referred him to the bill and restated the percentages as laid out in the bill language. He agreed to visit with Mr. Borthwick after the meeting to clarify this matter further.

Senator Vratil questioned Mr. Borthwick's statement and written opinion regarding the manager purchases or leases the lottery facility games, and referred him to page 8, lines 32 and 33, which specifies that "A lottery gaming facility manager, on behalf of the state, shall purchase or lease for the Kansas lottery all lottery facility games." Senator Vratil asked if that language clearly indicated that the state would be the owner. Mr. Borthwick responded that it could be interpreted that way, but that it could also be interpreted the other way also. Senator Vratil disagreed, stating that there was nothing in the quoted language of the bill that indicates the facility manager will purchase, own or lease any lottery facility games for itself. Mr. Borthwick said that was correct.

Chairman Brungardt expressed the Committee's appreciation to Mr. Borthwick for his presentation.

Final Actions:

SB 121 - Charitable organizations and solicitations act; registration statement; audited financial statement

Chairman Brungardt called for discussion and final action on **SB 121**. The Revisor reviewed the bill which was requested by the Secretary of State's Office. She said it provides that the Federal income tax return of a charitable organization is sufficient in lieu of a financial statement, whereas currently it is discretionary with the Secretary of State's Office whether to accept the Federal income tax return. The bill also increases from $100,000 to $500,000 the amount of contributions a charitable organization may receive before the organization is required to file an audited financial statement.

Senator Barnett made a motion to pass the bill out favorably, seconded by Senator Reitz, and the motion carried.

SB 109 - Gaming compacts; relating to the procedure for the approval thereof

SB 153 - State-tribal gaming compacts; procedure for approval when legislature not in session

Chairman Brungardt called for discussion and possible final action on **SB 109** and **SB 153**, since both bills concern the event when the Legislature is not in session, of the Governor signing any gaming compact. He explained that currently the Legislative Coordinating Council (LCC) can meet on behalf of the Legislature and make a decision for the approval of the signing, and these two bills address that eventuality. Senator Vratil's bill, **SB 109**, states that those matters have to be considered by the Legislature, so a special session would have to be called or the matter would be held for the Legislature's return at the regular session time. Senator Brownlee's bill, **SB 153**, states that it has to be an extraordinary circumstance before an emergency is declared. This is defined as something that is "true now," but won't necessarily be true when the Legislature gets around to meeting. The Chairman clarified that one bill is more permissive, and the other bill restricts it strictly to legislative action.

MINUTES OF THE Senate Federal and State Affairs Committee at 10:38 a.m. on February 22, 2005 in Room 231-N of the Capitol.

Chairman Brungardt called for Committee discussion on the two bills, and instructed that a decision should be made as to which bill the Committee wants to progress for reporting out of committee.

Senator Vratil expressed his concern with **SB 153** about having to call a special session to approve an Indian gaming compact, and obligating the Legislature by statute to call that special session. He said that may have some constitutional implications because there are provisions in the Kansas Constitution that speaks to the calling of a special legislative session, and provide the means by which a special session may be called. He stated that he was not sure the Legislature could circumvent those constitution provisions by statute.

The Revisor explained that under the Constitution, a special session could be called regardless whether or not it was in statute as long as the Constitution was complied with. She stated that she did not know if there was any wording in this provision that contradicts the constitutional provision. Senator Vratil said this bill obligates the Legislature to call a special session, and says nothing about complying with the constitutional provisions to call a special session.

Senator Brownlee referred to **SB 153**, page 2, line 24, which states, "A special session of the legislature may be called in the manner provided by section 5 of article 1 of the Constitution of the state of Kansas....". She pointed out the word "may" in line 24, which she did not feel the word "may" was obligating.

Senator Vratil inquired if that was the interpretation of **SB 153**, then what does the bill add to the body of law beyond what is already contained in the state's Constitution.

Senator Brownlee replied that it changes the statutory requirement for a route now that goes through the LCC, and that is the purpose in this requested change. A policy question of open casino gambling for the entire state is of such significant issue that it should be voted upon by the entire Legislature.

Chairman Brungardt clarified it accepts the powers that LCC has when the Legislature is not in session. Senator Brownlee said that the Committee received testimony which indicated that the LCC is generally involved more as an administrative body than as a policy setting body.

Senator Vratil stated that the difference between the two bills was that one of them eliminates the authority for the LCC or any other body to act on an Indian gaming compact in the event of an emergency, and the second bill would allow the LCC to act in the event of an emergency declared by both the Joint Committee and the LCC.

Chairman Brungardt asked the members for a show of hands that favored **SB 153** which says the Legislature must decide if a special session be declared to carry business forward. There were five members voting in favor of **SB 153**. The Chair called for a vote of those members in favor of **SB 109**, which was the bill that was more permissive in the declaration of an emergency. Chairman Brungardt announced that the Committee favored **SB 153**, and called for a motion to advance the bill.

Senator Reitz made a motion to report **SB 153** favorably for passage, seconded by Senator Brownlee, and the motion carried.

Hearing continued on:
SB 168 - Kansas expanded lottery act; authorizing destination casinos, electronic and video gaming and other games at certain locations
Chairman Brungardt reopened the hearing on **SB 168** and called upon the final two opponents signed up to testify on the proposed bill.

Ron Hein, Prairie Band Potawatomi Nation (PBPN), testified in opposition to **SB 168**. He stated that the PBPN has consistently opposed legislation providing for the expansion of Class 3 gaming by the State of Kansas. He referred to page 4 of his written testimony relating to **SB 168**, and said that this bill does not meet the findings or the recommendations of the Governor's Gaming Committee. He explained that the

bill is dangerous because of the economic and ethical risks that are created, as noted by the Governor's Gaming Committee, with one state owned casino, along with the plethora of casinos and video lottery terminals provided for in the bill. He took exception to calling the multiple casinos contemplated by this legislation "destination casinos" when they are in reality "convenience casinos," which even the Governor's Gaming Committee recommended the state avoid. The Governor's Gaming Committee also recommended placing a limited number of video lottery terminals at the parimutuel tracks.

Mr. Hein questioned the concept of the "manager," and said the bill looked like it was written to protect and further the interest of the casino managers, and not the State of Kansas. He said there should not be a provision for a certain percent going to a manager, and the revenue should all go to the State. He concluded that if gaming is to be expanded in Kansas, it should involve Tribal gaming, it should be restricted, and it should be structured to solve the issue for the foreseeable future, most preferably through a constitutional amendment. (Attachment 5)

Whitney Damron, Kickapoo Tribe in Kansas and Sac&Fox Nation of Missouri in Kansas and Nebraska, spoke in opposition to **SB 168** that proposes to expand gaming in Kansas through state-owned and operated casinos and video lottery machines. He stated that both **SB 168** and **SB 170** do not necessarily preclude legislative consideration of Governor Sebelius' fall of 2004 gaming compact, but the bills obviously have ramifications for the Tribes' Kansas City project and their existing casinos. He outlined the Tribes' objections to the two proposed gaming bills in his detailed written testimony. He expressed concerns about the sections dealing with disclosure of ownership interests and those subject to criminal background review. He also question the percentage of revenues from destination casinos the state would receive. Mr. Damron stated that the provision for temporary facilities in the new Section 2 would be a short-sighted attempt by a developer to maximize their revenues, shore up a shaky financial plan, and do untold harm to the market area that would take many years to recover. In contract, the Tribal agreement with the Unified Government of Kansas City specifically prohibits a temporary facility, and this commitment was made at the request of the Tribes. (Attachment 6)

Mr. Damron pointed out that in reviewing **SB 170**, it was noted that the executive director of the Kansas Lottery is given immense power and discretion to award a certificate of authorization to a casino developer with no stated oversight or approval required from the Kansas Lottery Commission, the governor, the Kansas Legislature or other regulatory oversight authority. He expressed concerns about the length of an initial license term for a gaming facility manager. He spoke briefly about the single item that insures a broad expansion of gaming in Kansas which is the availability of state financing through the Kansas Development Finance Authority (KDFA). He concluded by saying if the state wants additional gaming, there are two avenues that could be pursued: (1) State-owned and operated gaming, or (2) expansion of tribal gaming as proposed by Mr. Damron's clients for Wyandotte County.

Chairman Brungardt closed the hearing on **SB 168**.

Minutes for the February 10, 2005, meeting were presented for approval. Senator O'Connor made a motion to approve the minutes as written, seconded by Senator Gilstrap, and the motion carried.

Chairman Brungardt reminded Committee members that there would be a confirmation hearing on Thursday, February 22, upon first recess.

The meeting was adjourned at 11:45 a.m. The next meeting scheduled is Thursday, February 22, 2005, upon first recess of the Senate.

SENATE FEDERAL & STATE AFFAIRS COMMITTEE GUEST LIST
DATE Tues., Feb. 22, 2005

Glenn Thompson	Stand Up for Kansas.
Ed Green	Sac & Fox Nation
Lance BURR	Kickapoo Nation
Jarrod Simon	Golden Eagle Casino
Michael Rutledge	Golden Eagle Casino
David Jones	Golden Eagle Casino
Jeff Bo Herbert	Kansas Sheriffs Association
Kayla Anderson	Norton KS
George Wingerd	Ruffin Corp.
Robert Stanoman Jr.	Golden Eagle Casino
Dustin	Golden Eagle Casino
Dana Burkhardt	Golden Eagle Casino
Kathy Bradley	Golden Eagle Casino
L Bontrager	Golden Eagle CASINO
Ron Underwood	Golden Eagle Casino
Matthew Cisneros	Golden Eagle Casino
Steve Barkley	Golden Eagle Casino
Rebecca Rice	KS Clubs & Assoc.
Angie Miller	Damron & Assoc.
Wes J. Hall	Corp. Comm. Firm, Inc.
Keith Kocher	KS Lottery
Tom Burgess	River Falls Granny
Doug Wallace	River Falls
Steve Cadue	KICKAPOO
Jim Barthwick	Blackwell Sanders Peper Martin

SENATE FEDERAL & STATE AFFAIRS COMMITTEE GUEST LIST

DATE Tues., Feb. 22, 2005

Dan Watkins	Kickapoo Tribe/Sac & Fox Nation
Lisa Stanley	Kickapoo Tribe in Kansas
Jami Rutherford	Little Gov't Rel.
Susan Parson	KS Greyhound Assn.
Sandy Jacquot	CKM
Judy Moler	KAC
Melissa Wangemann	Sec of State
Doug Smith	Butler National
Whitney Damron	Kickapoo Tribe/Sac & Fox Nation

TREE CITY USA

City of Bonner Springs

STATEMENT BY MAYOR CLAUSIE W. SMITH, CITY OF BONNER SPRINGS
February 17, 2005

To: Senate Federal and State Affairs Committee:

On behalf of the City of Bonner Springs, we urge passage of Senate Bill 170 that would allow development of destination hotels and casinos in Kansas. It seems to me that this legislation is far overdue. There is overwhelming support in our community and in Wyandotte County for the establishment of casinos.

In Wyandotte County, more than 80 percent favored casinos in a non-binding election a few years back. Right now, Kansans are voting in favor of casinos with their billfolds by going to Missouri and the riverboats. It is time that we keep that money in Kansas.

This is a win-win situation for everyone. When passed, I believe it will certainly be a major economic development boost and will also provide much needed revenue for cities, counties, school districts and the state.

I strongly urge approval of Senate Bill 170.

Respectfully,

Clausie W. Smith

Clausie W. Smith, Mayor
City of Bonner Springs, Kansas

Senate Federal & State Affairs
Committee
2-22-05
Attachment 1

205 E. 2nd STREET, P.O. BOX 38, BONNER SPRINGS, KS 66012
913-422-1020— FAX 913-441-1366
www.bonnerspings.org

KANSAS

DIVISION OF THE BUDGET
DUANE A. GOOSSEN, DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

February 17, 2005

The Honorable Pete Brungardt, Chairperson
Senate Committee on Federal and State Affairs
Statehouse, Room 143-N
Topeka, Kansas 66612

Dear Senator Brungardt:

SUBJECT: Fiscal Note for SB 168 by Senate Committee on Federal and State Affairs

In accordance with KSA 75-3715a, the following fiscal note concerning SB 168 is respectfully submitted to your committee.

SB 168 would create the Kansas Expanded Lottery Act. The act would authorize the operation of destination casinos in Kansas and the use of video lottery terminals at parimutuel licensee locations and veteran organizations. Destination casinos could be located in the following Kansas counties: Wyandotte, Crawford, Cherokee, and Sedgwick.

Destination Casinos

The bill defines a destination casino as a gaming operation with electronic gaming machines owned and operated by the state. The Executive Director of the Kansas Lottery would issue a certificate of authority to applicants seeking to develop a destination casino in Kansas and be a destination casino manager. The certificate would authorize the applicant to submit a qualified application to the destination casino commission. However, before issuance of the certificate of authority, local voters where the destination casino would be located would have to approve operation of the casino in that county. The commission would review the qualified application, which sets forth various requirements, including the location of the casino, the disposition of casino revenues, and that ownership and control of the gaming operation of the casino rests with the Kansas Lottery. If the commission approved the application, the commission would authorize the Executive Director to enter into a management agreement with

the destination casino manager for a term of at least 15 years. The management agreement would implement the application and allow the destination casino manager to manage the casino; however, the Executive Director would have complete ownership and control of gaming operations at the destination casino.

Revenue would be distributed as follows: 2.0 percent to the Gaming Act Oversight Fund, up to 4.0 percent jointly for the city and county where the casino is located, at least 22.0 percent to the state, and 0.5 percent to the Problem Gambling Grant Fund. The balance of the revenues would go to the Destination Casino Operating Expenses Fund and to the destination casino manager according to percentages that would be in the contract. The application would also provide for an advance payment of the state's future share of the casino net revenues. The payment could be up to $15,000 for each gaming machine operated at the casino.

Video Lottery Terminals

The Kansas Lottery would be authorized to implement a Video Lottery Program. In accordance with the rules and regulations of the destination casino commission, up to 4,000 video lottery terminals could be placed at parimutuel licensee locations and no more than a total of 500 at licensed premises of veteran organizations. Voters in the county where the terminals would be operated would have to approve operation of the terminals in that county. The Kansas Lottery would implement and administer the program. The Executive Director would enter into a contract with the parimutuel licensee and veteran organization for the operation of video lottery terminals. The licensee and organization would be considered video lottery sales agents. The contract would provide for the placement and operation of the terminals as well as an advance payment of the state's future share of the terminal net revenue, if the sales agent is a parimutuel licensee.

Video lottery sales agents at each location would manage the video lottery terminals. Net income from the terminals would be deposited into the Gaming Act Revenues Fund and then distributed as follows: as a commission and for operating expenses that would be paid to the video lottery sales agents, 7.0 percent of income from parimutuel licensee locations to the Live Horse Racing Purse Supplement Fund, 7.0 percent of income from parimutuel licensee locations to the Live Greyhound Racing Purse Supplement Fund, 1.5 percent to the county and 1.5 percent to the city where the parimutuel licensee is located, 14.0 percent of income from veterans organizations to the Veterans Benefit Fund, 0.5 percent to the Problem Gambling Grant Fund, and an appropriated amount to the Gaming Act Oversight Fund.

Other Provisions

SB 168 would create several funds, including the Gaming Act Revenues Fund, the Gaming Act Oversight Fund, the Live Horse Racing Purse Supplement Fund, the Live Greyhound Racing Purse Supplement Fund, the Veterans Benefit Fund, the Destination Casino

Operating Expenses Fund, and the Greyhound Promotion and Development Fund. The Gaming Act Revenues Fund would maintain separate accounts out of which each destination casino manager and video lottery sales agent would be paid. The Gaming Act Oversight Fund would pay the expenses of the Kansas Lottery associated with the administration and enforcement of the Kansas Expanded Lottery Act, as well as the operations of destination casinos and video lottery terminals.

The Live Horse Racing Purse Supplement Fund and the Live Greyhound Racing Purse Supplement Fund would be used for the distribution of purse supplements in accordance with the application approved by the destination casino commission. The Destination Casino Operating Expenses Fund would pay expenses of the operation of each destination casino. The Greyhound Promotion and Development Fund would be used for the development, promotion, and representation of the greyhound industry in Kansas. This fund would receive revenue through a voluntary greyhound purse checkoff program, which would deduct 2.0 percent from purses paid to kennels and greyhound owners that participate in the program.

Under current law, the Kansas Lottery would be abolished on July 1, 2008. SB 168 would change the date to July 1, 2012.

According to the Kansas Lottery, SB 168 could generate approximately $340.0 million in destination casino net revenue each year. Under the bill, a total of 4,500 lottery machines could be operated under the Video Lottery Program. Assuming each machine generated $48,000 in revenue, annual net revenues could reach $216.5 million. The bill could generate approximately $556.5 million in net revenues for the two major provisions combined. The agency could not estimate costs associated with administering its new responsibilities; however, the bill indicates that these costs would be financed by the gaming revenues generated under SB 168.

The Racing and Gaming Commission assumes passage of SB 168 could lead to increased wagering at current racetracks as well as the reopening of the Camptown Greyhound Park, since gaming machines at racetracks could increase the amount of activity in that industry. The parimutuel wagering taxes collected by the Commission from Camptown would cover operating costs related to the reopening of the facility. The Commission estimates that SB 168 could increase its costs by $2,056,779 in FY 2006. These costs include salaries of $1,608,729 for 20.00 FTE positions and $448,050 for other operating expenditures. Any parimutuel wagering taxes collected would be in addition to revenue generated from the operation of electronic gaming machines. The bill also would require the Woodland Racetrack to run a 65-day horse meet. Currently, the facility runs a 30-day horse meet. The extension of the horse meet would increase the agency's operating expenditures and increase the parimutuel wagering taxes collected from the facility. It is assumed that the additional revenue would cover the agency's increased costs.

SB 168 would also have a fiscal effect on the Department of Social and Rehabilitation Services (SRS). According to the bill, the Problem Gambling Grant Fund would receive .5 percent, up to $4.0 million, of net revenues generated by both casino revenues and video lottery

revenues. The additional revenue would allow SRS to enhance the problem gambling program with continued treatment of pathological gamblers.

SB 168 would have a fiscal effect on the Commission on Veterans Affairs. The bill does not indicate a specific percentage of revenue that the agency would receive; however, monies would be appropriated to the agency from gaming revenues for the benefit of veterans of the United States Armed Forces.

Under SB 168, the cities and counties would receive an aggregate of 4.0 percent of the net revenue generated at destination casinos and an aggregate of 3.0 percent of revenues generated from video lottery terminals. The Kansas Association of Counties indicates that there may be costs to the counties associated with operating ballots for voters to vote on whether to allow the operation of electronic gaming machines in their county. Any fiscal effect as a result of this bill would not be accounted for in *The FY 2006 Governor's Budget Report.*

In addition, SB 168 indicates that the balance of revenues remaining in the Gaming Act Revenues Fund after various transfers are made out of the fund would supplement funding for elementary and secondary public education.

Sincerely,

Duane A. Goossen

Duane A. Goossen
Director of the Budget

cc: Ed VanPetten, Lottery
John McElroy, Racing & Gaming
Cheryl Dolejsi, Racing & Gaming

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February 20, 2005

Honorable John Vratil
Kansas Senate
State Capitol
Topeka, Kansas 66612

RE: SB 168

Dear Senator Vratil:

During the hearing in regard to the above entitled bill you asked how I arrived at the list of elements of a state owned and operated casino. In particular, you inquired about my statement that the state is not required to own the real estate upon which a casino operates or the casino buildings or gaming equipment as long as it owns and operates the casino itself. At the time I was unable to state whether or not that conclusion had been derived from case law or a statute or legal treatise. I advised you that I would refresh my recollection upon returning to my office and thus this letter.

My working notes reminded me that the ownership issue was addressed in Attorney General Opinions 92-1 and 94-26. I attach those opinions to this letter.

You will note that the opinions refer to the fact that Article 15, Section 3c only provides for the right of the legislature to provide for a state owned and operated lottery. There is nothing in Article 15, Section 3 that requires that the state own the real estate or building upon which a lottery is located but only that it be state owned and operated.

As the Kansas Supreme Court has stated, Article 15 is self-executing, it is not self-defining. This simply means that as long as the "lottery" (casino) is state owned and operated the legislature may prescribe the manner in which it is executed.

The state lottery has been so operated since its inception. Namely, it owns and operates the lottery through private vendors and does not own the land or building from which the lottery is operated. To suggest that this is impermissible would be reading something into the constitution that is not there.

Sincerely,

Robert T. Stephan

Robert T. Stephan, LLC

RTS:mjs
Cc: Senate Federal and State Affairs Committee

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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January 2, 1992

ATTORNEY GENERAL OPINION NO. 92- 1

The Honorable Edward F. Reilly, Jr.
State Senator, Third District
430 Delaware
Leavenworth, Kansas 66048-2733

Re: Constitution of the State of Kansas--Miscellaneous--Lotteries; Indian Gaming Regulatory Act

Synopsis: If the legislature and the electorate choose to remove the constitutional authority for a state-owned and operated lottery, the types of class III games Indian tribes could conduct in this state pursuant to a compact would be limited to on-track parimutuel wagering on horse and dog races, as this would be the only permissible class III gaming anywhere in the state. A tribe may not conduct simulcasting/wagering operations pursuant to a compact or otherwise since such conduct is currently prohibited by state law. Statutorily prohibiting certain specific class III games, if across the board (i.e. no one, including the state, may conduct or participate in it), would foreclose the ability to include those specific games in a compact. 25 U.S.C. § 2719(d) specifically makes provisions of the Internal Revenue Code concerning the reporting and withholding of taxes on winnings applicable to Indian gaming operations.

As long as the state owns the business and has ultimate and complete control of the operation, article 15, section 3c of the constitution does not require that the state actually own the building or equipment used in a lottery operation. Cited

herein: Kan. Const., Art. 15, §§ 3b, 3c; 25 U.S.C. § 2719(d).

* * *

Dear Senator Reilly:

You request our opinion regarding gambling in the state of Kansas. We address your questions about Indian gaming first.

> "Does the constitutional provision allowing parimutuel wagering, like that allowing for a state lottery, result in the possibility that type III gambling (which includes a wide variety of gaming activities) can be conducted on reservations in Kansas? Would the Legislature be forced to propose amending the Constitution to remove or alter existing permissive language regarding both kinds of gambling in order to prohibit casino gambling in the state?"

The Kansas Supreme Court has held that parimutuel wagering on horse and dog races, if it includes the three elements of consideration, chance and prize, constitutes a lottery. State, ex rel., v. Bissing, 178 Kan. 111, 119 (1955). This is due to the broad definition attributed to the term "lottery" by our courts, see State, ex rel., v. Merchantile Assn., 45 Kan. 351, 353 (1891); State, ex rel, v. Fox Kansas Theater Co., 144 Kan. 687, 692 (1936), and the fact that the term has not been otherwise defined by the constitution. While parimutuel wagering has been held to be a form of lottery, we do not believe the courts would find in the reverse. Article 15, section 3b of the constitution is specific in terms of what it allows: "the operation or conduct . . . of horse and dog racing and parimutuel wagering thereon . . . [excluding off track betting]." Further, we do not interpret the Indian gaming regulatory act (IGRA) to open the door to all class III games solely because one particular class III game is permitted. See Mashantucket Pequot Tribe v. State of Conn., 737 F.Supp. 169, 176 (D.Conn. 1990) ("The type of gaming permitted is identified by the type of play permitted, not by bet, frequency, and prize limits."); U.S. v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 365 (8th

Cir. 1990) ("we believe that the legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity."); Lac Du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, ____ F.Supp. ____, Op. No. 90-C-408-C, 18 (W.D. Wisc. 1991). Thus, if the legislature and the electorate choose to remove the constitutional authority for a state-owned and operated lottery, we believe the types of class III games Indian tribes could conduct in this state pursuant to a compact would be limited to on-track parimutuel wagering on horse and dog races, as this would be the only permissible class III gaming anywhere in the state.

> "Since simulcasting of horse or dog races has not been authorized by statute, can parimutuel wagering on dog or horse races simulcast to American Indian gambling establishments be included among the array of gambling permitted by compacts with American Indian tribes? If so, would that constitute off-track betting which is banned by the Kansas constitution?"

The fact that simulcasting is not specifically authorized by statute or currently conducted in Kansas (see Attorney General Opinion No. 88-116) is of no consequence; what is important is whether the conduct is permitted, as opposed to prohibited. See Attorney General Opinion No. 91-119. Article 15, sections 3b and 3c together permit the state to conduct or provide for simulcasting. However, we have previously opined that Kansas statutes prohibit simulcasting. Attorney General Opinion No. 88-116. Thus, a tribe may not conduct simulcasting/wagering operations pursuant to a compact. Even if simulcasting was permissible, since off-track betting is constitutionally prohibited, Indian tribes could not simulcast horse and dog races for the purpose of betting thereon unless the wagers were placed at a racing facility (track).

> "In the absence of a law permitting simulcasting in Kansas, could American Indian gambling establishments receive simulcast race signals from tracks

> outside the state, whether or not betting is allowed on those simulcast races?"

See answer given above.

> "Could specific kinds of gambling, e.g., casino gambling, sports book, betting on simulcast races, etc., be prohibited for all persons by statute as a means of limiting types of gambling allowed by a compact between the state and a tribe, notwithstanding existing constitutional provisions? That is, would such a prohibition need to be constitutional, or is a statutory prohibition sufficient?"

The IGRA does not specify how the state may prohibit or permit certain class III games. In other words, the federal law does not require the prohibition or permission of games be by constitutional provisions. Thus, in our opinion, statutorily prohibiting certain specific class III games, if across the board (i.e. no one, including the state, may conduct or participate in it), would foreclose the ability to include those specific games in a compact. Lac Du Flambeau Band of Lake Superior Chippewa Indians, supra at 20. ("[T]he state is required to negotiate with [tribes] over the inclusion in a tribal-state compact of any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin constitution or state law). (Emphasis added).

> "Finally, in regard to enforcement of existing, nongambling related laws on American Indian reservations: Would such gambling establishments have a responsibility to the state or to the federal Internal Revenue Service to report individuals' winnings in order to ensure those winnings are taxed? If not, how could the state ensure that winners pay applicable income tax on their winnings?"

25 U.S.C. § 2719(d) specifically makes provisions of the Internal Revenue Code concerning the reporting and withholding of taxes on winnings applicable to Indian gaming operations.

"What types of arrangements with regard to video lottery machines satisfy the constitutional requirement that the Kansas lottery be state-owned and operated?

"Presumably the requirement would be met if the Kansas Lottery owned or leased the machines and either placed and maintained the machines, or contracted with a private entity to place and maintain them. However, can the Kansas Lottery:

"-- contract with private entities to place and maintain privately-owned video lottery machines;

"-- issue licenses or certificates authorizing private entities to place and maintain privately-owned video lottery machines; and

"-- receive a set percentage of the income from privately owned, placed, and maintained video lottery machines, with the remainder of the income going to the private entity or entities owning, placing, and maintaining those machines?"

Article 15, § 3c of the Kansas constitution authorizes the legislature to "provide for a state-owned and operated lottery. . . ." This office has previously stated that this provision "does not necessarily require that the state own the actual structure in which the lottery is conducted, or the equipment which is used in the operation. [A]s long as the state owns the business and has ultimate and complete control of the operation, it is not necessary that the state actually own the building or the equipment used in the operation." Letter to Senator Edward Reilly, dated February 15, 1991. It is our understanding that under the scenario you present, the state will, through legislation, rule and regulation and contract terms, determine and actively control the types of games to be allowed, the odds of winning, the stakes to be won, the amount of consideration required to play and the percentage of take for the state and others. The state will also determine where the machines will be placed as well as certifying such locations. These factors evidence state control.

Clearly, the more control the state retains, the easier it will be to determine that the operation is state-owned and operated. On the other hand, the fewer hands-on roles the state takes, the closer it comes to being state-regulated rather than state-owned and operated. In the example you present, if our understanding is correct, the state retains sufficient control and ownership to be constitutionally sound.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Julene L. Miller

Julene L. Miller
Deputy Attorney General

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STATE OF KANSAS

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February 23, 1994

ATTORNEY GENERAL OPINION NO. 94- 26

The Honorable Clyde D. Graeber
State Representative, Forty-First District
State Capitol, Room 115-S
Topeka, Kansas 66612

Re: Constitution of the State of Kansas--
Miscellaneous--State-Owned and Operated Lottery

Synopsis: The phrase "state-owned and operated," as used in article 15, section 3c of the Kansas constitution, is not synonymous with the phrase "state-regulated, licensed and taxed," the latter describing the state's involvement in bingo and parimutuel wagering on horse and dog races. A state-owned and operated lottery is one that is owned as well as directly controlled or managed by the state. Cited herein: Kan. Const., art. 15, §§ 3a, 3b, 3c.

* * *

Dear Representative Graeber:

You request our opinion regarding the lottery amendment, article 15, section 3c of the Kansas constitution. You state that as a result of the Kansas Supreme Court's recent decision in State, ex rel. Stephan v. Finney, Docket No. 69,616 (Jan. 27 1994), the legislative committee you chair will begin considering a number of casino gaming proposals. Essentially you seek guidance in defining the phrase "state-owned and operated," as it is used in the constitutional provision. Specifically your questions are:

"1. Must the state of Kansas own the real estate upon which a casino operates?

"2. Must the state of Kansas own the casino building or the gaming equipment?

"3. May the state of Kansas contract with private entities to construct a casino and operate games of chance within the casino?

"4. May the state of Kansas lease the casino premises to a private entity to operate games of chance therein?

"5. Must the personnel employed at a casino be state employees?

"6. May the state of Kansas issue licenses authorizing private entities to place and maintain privately-owned casino gaming equipment?

"7. May the state of Kansas receive a set percentage of the income derived from casino gaming operations conducted by a private entity which has entered into a contract with the state to operate a casino, with the remainder of the income going to the private entity?

"8. May the state of Kansas create by legislation a quasi-public corporation, rather than a commission or agency, which would regulate casino gaming in the state?"

In reviewing whether various arrangements for operation of video lottery machines would satisfy the constitutional requirement that the lottery be state-owned and operated, this office concluded that "[a]s long as the state owns the business and has ultimate and complete control of the operation, article 15, section 3c of the constitution does not require that the state actually own the building or equipment used in a lottery operation." Attorney General Opinion No. 92-1. We continue to hold this opinion and see no reason to distinguish between video lottery and other types of casino games in terms of the ownership issue. Therefore, we answer your first two questions negatively; the constitution does not require that the state own the real estate upon which a casino operates or the casino building or gaming equipment. It is the ownership of the lottery business itself which is important.

The remainder of your questions deal with degree of state control over the operation of a casino. As stated in Attorney General Opinion No. 92-1:

> "Clearly, the more control the state retains, the easier it will be to determine that the operation is state-owned and operated. On the other hand, the fewer hands-on roles the state takes, the closer it comes to being state-regulated rather than state-owned and operated."

You ask that we help draw the line between regulation and operation by answering your series of questions.

The Kansas constitution does not define the phrase "state-owned and operated." Neither has it been defined by the judiciary. We must therefor apply rules of constitutional construction to arrive at what we believe will be the court's interpretation of that phrase. The paramount rule of constitutional construction is that effect must be given to the intent of the framers and adopters of the provision in question. State, ex rel. v. Finney, supra at 45. There are several tools available to determine the intent of the framers of the constitution, including comparison of the language in question to language used in related provisions, and legislative history of the concurrent resolution that became the adopted provision.

> "The importance of understanding the intentions of the legislature in proposing the amendment cannot be understated. . . . Where the purpose of the framers of constitutional provisions is clearly expressed, it will be followed by the courts." Id. at 46.

We begin with a comparison of section 3c of article 15 to section 3b of that same article. Section 3b, authorizing parimutuel wagering on horse and dog racing, was considered and passed by the legislature at the same time as the lottery amendment. While the lottery amendment, section 3c, authorizes the legislature to "provide for a state-owned and operated lottery," the parimutuel provision states:

> "[T]he legislature may permit, regulate, license and tax . . . the operation or

> conduct, by bona fide non-profit organizations, of horse and dog racing and parimutuel wagering thereon. . . ." Kan. Const., art. 15, § 3b.

Clearly two different concepts were envisioned: The state would own and operate the lottery but would regulate, license and tax the private operation of parimutuel wagering. See also Kan. Const., art. 15, § 3a. Thus, it would appear that "state-owned and operated" means something different than "state-regulated, licensed and taxed."

1985 senate concurrent resolution no. 1609 (SCR 1609) is the proposal that became article 15, section 3c of the constitution. While there is no recorded discussion of the phrase "state-owned and operated" in the minutes of the committees that worked SCR 1609, the house committee was provided extensive information regarding the mechanics of a state lottery organization, including the functions a state agency would perform. Minutes, House Committee on Federal and State Affairs, January 16, 1986. Included in that information were statements such as:

> "Unlike a state lottery, bingo and raffle games are privately conducted by charitable and fraternal organizations under state license. Any profits inure to the benefit of the sponsoring organization. It was never intended that the games produce significant revenue for the state." Minutes, supra, attachment A (emphasis in original);
>
> "The states have adopted a variety of administrative arrangements for running their lotteries. In Delaware, Michigan, and New York, lotteries are managed by single heads; in the other lottery states, boards or commissions are used. The usual arguments apply. Use of a single accountable person is argued to promote responsiveness and accountability and to make it possible for the relevant department head and governor to be held unambiguously accountable. Use of a board or commission is said to insulate the activity from politics and promote public confidence in lottery operation.

> "The question of whether to use a board or commission is partly isolated from the question of where to place the lottery agency administratively. Lottery agencies are in the tax-collecting agency in [some states], but independent agencies elsewhere." Id.;
>
> "Most state lotteries are operated in generally the same way with day-to-day administration resting with a Lottery Director. Major units within the organization include Security, Administration, and Marketing. . . . Lottery staffs can range in size from Iowa at 125 to California's with over 500." Minutes, supra, attachment B.

In discussing the need for enabling legislation should SCR 1609 be adopted, the department of revenue presented the following:

> "A lottery is a unique entity in state government, in that it is the only state agency with a mission identical to a private business-selling a product in a fashion which maximizes revenue.
>
> . . . .
>
> "Specific issues and potential problem areas that will need to be examined are:
>
> "1. Location of the lottery operation. Although most states have a lottery commission to advise and govern lottery activities, they differ as to the lottery being a part of a state Department of Revenue or a separate state agency. Regardless of where it is located, it must have its own identity and be clearly responsible for its decisions, both from an efficiency and public relations standpoint.
>
> "2. The lottery must be provided with the authority to enter into contracts . . .

with vendors. . . ." Id. (Emphasis added).

Overall, the information presented to the committee illustrates an understanding that a "state-owned and operated lottery" would be one run by a state agency, board or commission with authority to contract for specific services including the ability to contract with private businesses to promote and retail state established lottery games a commission on basis.

As originally adopted by the senate, SCR 1609 contained these provisions:

> "(b) The legislature shall provide for a state lottery commission and for its control and supervision of any state-owned and operated lottery established hereunder. The state lottery commission shall have three members, appointed by the governor subject to confirmation by the senate, for overlapping terms as the legislature may prescribe. Not more than two members shall be members of the same political party. The state lottery commission shall report to the governor and the legislature at such times and upon such matters as may be prescribed by the legislature.
>
> "(c) All moneys received by the state from the operation of the state-owned and operated lottery which are not required for the financing of the operation of such lottery shall be allocated among the taxing subdivisions of the state in the manner prescribed by the legislature and shall be used only for the reduction of general ad valorem property tax levies upon tangible property." Journal of the Senate, 664-665, April 12, 1985.

After receiving testimony and information regarding the importance of flexibility in locating the lottery operation (Minutes, House Committee on Federal and State Affairs, January 16, 1986, attachment B), and in dedicating the proceeds of the lottery operation (Minutes, House Committee on Federal and State Affairs, January 21, 1986), the house

committee voted to amend the resolution by deleting the above-quoted provisions, and adopted the resolution as amended. Minutes, House Committee on Federal and State Affairs, January 23, 1986; Journal of the House, Report of Standing Committee 1356, January 24, 1986. SCR 1609 was eventually adopted by both houses and the electorate without subsections (b) and (c), thus alleviating a constitutional requirement that the state lottery be under the "control and supervision" of a specific state commission. There was never any recorded discussion, however, that the amendment was intended to allow a non-state entity to operate the lottery. Having retained the "state-owned and operated" language, in contrast to the "regulate, license and tax" language in the parimutuel provision, it is our opinion that the framers of the constitutional amendment intended that operation of the lottery be the responsibility of a state entity.

In determining the intent of the adopters of a constitutional provision, "its language should be held to mean what the words imply to the common understanding of men" at the time of adoption. State, ex rel. v. Highwood Services, Inc., 205 Kan. 821, 825 (1970). "When interpreting the constitution, each word must be given due force and appropriate meaning." Finney, supra, at 46. First, the use of the conjunctive "and" is significant; the lottery must be both state-owned and state-operated. Thus, just owning the lottery would not appear to satisfy the constitutional requirement. The word "operate," when used as a transitive verb, was generally defined in 1986 as follows:

> "1. To run or control the functioning of: operate a machine. 2. To conduct the affairs of; manage: operate a business. 3. To perform surgery upon. 4. To bring about or effect." The American Heritage Dictionary 871 (2d College Ed. 1985) (emphasis in original).

This definition is consistent with our conclusion in 1987 that "[t]he intent and understanding of both the legislature and the people seems to have been to have a government controlled lottery as a revenue raising measure." Attorney General Opinion No. 87-16. From this it appears that the intent of the adopters, as well as the framers, was for the state to own the lottery as well as to control or manage it directly.

Applying the foregoing discussion to your specific questions, our responses are as follows:

3. The state of Kansas may contract with private entities to construct a casino, as can be done with any state-owned and operated facility. The state may also contract with private entities to operate specific games of chance within the casino if ownership and sufficient control and responsibility over the business as a whole remains with the state.

4. The state may not lease the casino premises to a private entity to operate games of chance therein. Mere ownership of the premises is not enough; the state must own and operate the business.

5. Not all personnel employed at a casino must be state employees. The state may contract with private entities to provide services. Private entities providing contracted services may use their own employees. We caution, however, that as a matter of public policy sensitive positions should be held by state employees subject to termination by the state and ethics provisions and/or background checks.

6. The state of Kansas may license private entities to place and maintain privately-owned casino gaming equipment as long as the state retains ownership and control of, and responsibility for, the gaming operation. For example, the state would determine the types of games and gaming equipment to be made available for public use, the betting limits, the stakes, the odds, and essentially how the equipment will be used and patrolled.

7. An arrangement whereby the state agrees to permit a private entity to operate a casino in exchange for a set percentage of the take comes very close to regulation with a tax. However, if the arrangement is contractual and involves the state's retention of ownership and control, the issue of compensation would appear to be best left to sound business discretion exercised in the best interests of the state.

8. The state of Kansas may not hand over the operation of a casino to a "quasi-public" corporation, and must play a more intimate and active role than that of a regulator.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Julene L. Miller

Julene L. Miller
Deputy Attorney General

RTS:JLM:jm

DRAFT 02/11/05

Proposed Substitute for SENATE BILL No. 77

By Committee on Federal and State Affairs

AN ACT concerning racial profiling.

Be it enacted by the Legislature of the State of Kansas:

Section 1. As used in this act:

(a) "Governmental unit" means the state, or any county, city or other political subdivision thereof, or any department, division, board or other agency of any of the foregoing.

(b) "Law enforcement agency" means the governmental unit employing the law enforcement officer.

(c) "Law enforcement officer" has the meaning ascribed thereto in K.S.A. 74-5602, and amendments thereto.

(d) "Racial profiling" means the practice of a law enforcement officer or agency relying, as the sole factor, on race, ethnicity, national origin, gender or religious dress in selecting which individuals to subject to routine investigatory activities, or in deciding upon the scope and substance of law enforcement activity following the initial routine investigatory activity. Racial profiling does not include reliance on such criteria in combination with other identifying factors when the law enforcement officer or agency is seeking to apprehend a specific suspect whose race, ethnicity, national origin, gender or religious dress is part of the description of the suspect.

(e) "Routine investigatory activities" includes, but is not limited to, the following activities conducted by law enforcement officers and agencies in conjunction with traffic stops: (1) Frisks and other types of body searches, and (2) consensual or nonconsensual searches of persons or possessions, including vehicles, dormitory rooms, school lockers, homes and apartments.

(f) "Collection of data" means that information collected by Kansas law enforcement officers after each traffic or pedestrian stop.

Sec. 2. A 15-member task force shall be appointed by the governor to design a method for the uniform collection of data. The task force shall include representatives of the Kansas attorney general's office, the Kansas highway patrol, city and county law enforcement agencies, the Hispanic and Latino American affairs commission, the advisory commission on African-

American affairs, the department of revenue, Kansas district courts, Kansas civil rights advocates and others who can assist in the uniform collection of data. The task force shall make a final report and recommendations to the governor and the legislature not later than February 1, 2006.

Sec. 3. (a) It shall be unlawful for any law enforcement officer or any law enforcement agency to engage in racial profiling.

(b) Violation of this section is a class A nonperson misdemeanor.

Sec. 4. (a) The race, ethnicity, national origin, gender or religious dress of an individual or group shall not be the sole factor in determining the existence of probable cause to take into custody or to arrest an individual or in constituting a reasonable and articulable suspicion that an offense has been or is being committed so as to justify the detention of an individual or the investigatory stop of a vehicle.

Sec. 5. (a) All law enforcement agencies in this state shall adopt a detailed, written policy to preempt racial profiling. Each agency's policy shall include the definition of racial profiling found in section 1, and amendments thereto.

(b) Policies adopted pursuant to this section shall be implemented by all Kansas law enforcement officers within one year after the effective date of this act. The policies and data collection procedures shall be available for public inspection during normal business hours.

(c) The policies adopted pursuant to this section shall include, but not be limited to, the following:

(1) A prohibition of racial profiling.

(2) Annual educational training which shall include, but not be limited to, an understanding of the historical and cultural systems that perpetuate racial profiling, assistance in identifying racial profiling practices, and providing officers with self-evaluation strategies to preempt racial profiling prior to stopping a citizen.

(3) For law enforcement agencies of a cities of the first class, establishment or use of current independent citizen advisory boards which include participants who reflect the racial and ethnic community, to advise and assist in policy development, education and community outreach and communications related to racial profiling by law enforcement officers and agencies.

(4) Policies for discipline of law enforcement officers and agencies who engage in racial profiling.

(5) A provision that, if the investigation of a complaint of racial profiling reveals the

officer was in direct violation of the law enforcement agency's written policies regarding racial profiling, the employing law enforcement agency shall take appropriate action consistent with applicable laws, rules and regulations, resolutions, ordinances or policies, including demerits, suspension or removal of the officer from the agency.

(6) Provisions for community outreach and communications efforts to inform the public of the individual's right to file with the law enforcement agency or the attorney general's office complaints regarding racial profiling, which outreach and communications to the community shall include ongoing efforts to notify the public of the law enforcement agency's complaint process.

(7) Procedures for individuals to file complaints of racial profiling with the agency, which, if appropriate, may provide for use of current procedures for addressing such complaints.

(d) Each law enforcement agency shall compile an annual report of all complaints of racial profiling received and shall submit the report on or before January 31 to the office of the attorney general for review. The annual report shall include: (1) The date the complaint is filed; (2) action taken in response to the complaint; (3) the decision upon disposition of the complaint; and (4) the date the complaint is closed. Annual reports filed pursuant to this subsection shall be open public records and shall be posted on the official website of the attorney general.

Sec. 6. (a) Any person who believes such person has been subjected to racial profiling by a law enforcement officer or agency may file a complaint with the law enforcement agency. The complainant may also file a complaint with the attorney general's office. If a complaint is filed with the attorney general's office, the attorney general or the attorney general's designee shall review and, if necessary, investigate the complaint. The attorney general or attorney general's designee, shall consult with the head of the law enforcement agency before making final recommendations regarding discipline of any law enforcement officer or other disposition of the complaint.

(b) Upon disposition of a complaint by the attorney general's office, the complainant shall have a civil cause of action in the district court against the law enforcement officer or law enforcement agency, or both, and shall be entitled to recover damages if it is determined by the court that such persons or agency engaged in racial profiling. The court may allow the prevailing party reasonable attorney fees and court costs.

(c) A law enforcement agency shall not be eligible to receive grants or other moneys

from the state for the fiscal year following a finding by the attorney general or the attorney general's designee that a law enforcement agency has engaged in racial profiling or has failed to discipline a law enforcement officer in accordance with the recommendations of the attorney general or the attorney general's designee pursuant to this section. The provisions of this subsection shall not apply if the complainant files a civil cause of action pursuant to this section and the district court finds that racial profiling did not occur.

Sec. 7. This act shall take effect and be in force from and after its publication in the statute book.

Whitney B. Damron, P.A.
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February 22, 2005

The Honorable Pete Brungardt, Chair
And members of the
Senate Committee on Federal and State Affairs
State Capitol Building, Room 143-North
Topeka, Kansas 66612

Re: Constitutionality of Proposed Gaming Legislation in Kansas

Dear Chairman Brungardt and Members of the Committee:

In late 2003, my clients, the Kickapoo Tribe and the Sac and Fox Nation, retained the services of Mr. Jim Borthwick of the Kansas City, Missouri-based law firm, Blackwell Sanders Peper Martin, LLP in order to ascertain the constitutionality of several gaming bills that were scheduled to come before the 2004 Kansas Legislature as well as review gaming legislation had been considered by the Kansas Legislature in earlier legislative sessions.

Blackwell Sanders Peper Martin is recognized as one of the top law firms in the Midwest with an emphasis on commercial litigation. The Firm is headquartered in Kansas City, Missouri and has offices throughout the United States and around the world.

Mr. Borthwick provided an opinion to the Tribes dated January 8, 2004 that reviewed gaming legislation introduced in the 2003 legislative session, researched constitutional law in Kansas relating to gaming and lottery and germane case law from other jurisdictions. Later that year, several new gaming bills were introduced, including SB 499, which was known as the Governor's gaming proposal for 2004. In light of new legislative proposals coming forth last year, we asked Mr. Borthwick to review those bills and provide the Tribes with an updated opinion on their constitutionality. His second opinion is dated March 18, 2004.

In 2005, so far we have two more gaming proposals encompassed in three bills (SB 168, SB 170 and a companion bill to SB 168 in the House, HB 2415) as well as a video lottery bill in the House, which has not been reviewed (HB 2486). The Tribes requested Mr. Borthwick review those bills and provide them with a third opinion on the constitutionality of those gaming proposals. That opinion is dated February 21, 2005.

Included in this packet of information are all three opinions. All three opinions call into question the constitutionality of virtually all gaming proposals considered by the Kansas Legislature in recent years.

We are pleased the Committee will take the time to hear from Mr. Borthwick on the constitutionality of gaming in Kansas.

We invite you to read through these well-researched legal opinions on the constitutional requirements for a state-owned and operated lottery and contrast those requirements with the bills you have before you.

Thank you for your attention to this information. Please do not hesitate to contact me if we can provide additional information or respond to questions.

Sincerely,

Whitney Damron

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February 21, 2005

Kickapoo Tribe in Kansas
Attn: Ms. Emily Conklin, Vice Chair
1121 Goldfinch Road
Horton, Kansas 66439

Sac and Fox Nation of Missouri in KS and NE
Attn: Ms. Fredia Perkins, Vice Chair
305 North Main Street
Reserve, Kansas 66434

Re: Constitutionality of Proposed Gaming Legislation in Kansas

Dear Ms. Conklin and Ms. Perkins:

You have asked us to give our opinion whether Senate Bills 168 and 170, which have been introduced into the 2005 session of the Kansas Legislature, and which would authorize certain gaming activities in the state, would, if enacted, violate the Kansas Constitution.

We believe that the provisions providing for casino gambling in Bills 168 and 170 are clearly unconstitutional. The video lottery terminal provisions of Senate Bill 168 raise some constitutional issues, but they may well pass the constitutional test.

In January 2004 we provided you with our opinion concerning the requirements of the Kansas Constitution relating to gambling activities. We attach a copy of that opinion to this letter for your reference.

In our earlier letter, we noted that the Kansas Constitution authorizes the Legislature to "provide for a state-owned and operated lottery." The Kansas Supreme Court has defined "lottery" to include any form of gambling containing the elements of consideration, prize and chance. The Supreme Court has said that the words "state-owned and operated" must be construed to mean what the words imply to the common understanding of the average person, and particular attention should be paid to the intent and understanding of the people at the time the constitutional language was adopted. We discussed in our letter what we believe is involved if the State "owns" and "operates" particular gambling activities.

Senate Bill 168 provides for the expansion of gaming in Kansas (a) through the establishment of Destination Casinos (Sec. 3 and 4), and (b) through the implementation of a video lottery program whereby video lottery terminals are placed at parimutuel licensee locations and club locations (Sec. 11). After a developer's plan for a Destination Casino is approved by the Executive Director of the Kansas Lottery, (Sec. 3), the Lottery Commission can authorize the Executive Director to enter into a management contract (Sec. 4) with a Destination Casino

manager (Sec. 5(a)(12)). A Destination Casino manager is defined as a person authorized to "develop, construct and manage a Destination Casino" (Sec. 2(H)). A "person" is defined as a natural, person, association, corporation or partnership" (Sec. 36(H)). It is obvious that the bill contemplates a private individual or corporation, not the State, as the Destination Casino Manager (see also Sec. 4(5, 6)).

The bill provides that the Destination Casino Management Contract shall include a "comprehensive management plan" for "operation, oversight, and monitoring" of the Destination Casino. (Sec. 5(a)(12)). At the same time, the bill states that the plan shall place "full, complete and ultimate ownership and control of the gaming operation" with the Kansas Lottery Commission. (Sec. 5(a)(12)(c)(1) and 5(c)(1)). In Sections 7-9 of the bill, the Executive Director of the Kansas Lottery is given extensive regulation and oversight of the casinos' operations.

Although the definition of a Destination Casino is given as "a gaming operation which is owned and operated by the State of Kansas, approved by the Commission and managed by the Destination Casino Manager," (Sec. 2(d)) nothing in the text of the bill makes any provision for State ownership of gaming equipment or facilities and nothing provides for the State to operate the casino. Instead the Destination Casino Manager is given the responsibility to "manage" the casino. It is obvious that this is little more than a word meaning "operate" the casino.

The foregoing sections provide for extensive regulation of the casinos, but they do not appear to create an ownership interest in the State. Instead, ownership of the gaming operations (which are undefined in the bill) appears to be lodged with the Destination Casino Manager, a private entity.

In addition, the bill fails the test of State "operation" of the gambling activity. The definitions contained in the bill make it clear that "operation" of the casino will be in private hands, i.e., the Destination Casino Manager. All of the activities which we deemed important to the "operation" of a casino in our earlier letter are placed in the hands of the Manager, a private entity. Further, the officers, directors and "key employees" are all employed by and will apparently receive their paychecks from the Destination Casino Manager. In other words, hiring and firing will be in the hands of the private entity. These are critical factors in determining who "operates" the facility. We believe the Kansas Supreme Court will deem the "operation" of the casino to be by private entities, not the State, and thus Section 3c, Article 15 of the Kansas Constitution will be violated.

Perhaps the clearest indication in the bill that ownership and operation of the casino are in private hands, not the State, is the provision for the payment of casino revenues. Section 5 (b)(9) provides for not less than 22% of gaming revenues to go to the State, not less than 4% to the county and city where the casino is located, not less than 2% to an oversight fund, and not less

than .5% to a problem gambling grant fund. The Casino Manager can therefore receive as much as 71.5% of the revenues, presumably to be used for purchases, payroll and profit.

Another way of analyzing the Senate Bill 168 is to examine the role the State is given in the Destination Casino Management system. The role of the State is the following:

a. Review and approve applications for developing a casino (Sec. 3).
b. Enter into management contracts with Destination Casino managers (Sec. 4).
c. Conduct security, fitness and background checks of key employees and other persons involved (Sec. 5(a)(12)(F) and (G)).
d. Enforce personnel certification requirements (Sec. 5(a)(12)(I)).
e. Certify which electronic gaming machines can be used in casinos (Sec. 7(d)).
f. Purchase or lease equipment necessary to implement the communication system linking the gaming machines to the Kansas Lottery (Sec. 7(d)).
g. Investigate violations of the Kansas Lottery Act (Sec. 8(a).
h. Investigate the violations of the Kansas Lottery Act (Sec. 8(a)).
i. Audit the books of the Casino Manager (Sec. 8(b) and (g); Sec. 9)).
j. Inspect and view all machines, equipment, systems, and facilities (Sec. 8(d)).
k. Inspect and approve all advertising (e) requirement appropriate security (Sec. 8(f)).
l. Enforce the applicable law and regulations (Sec. 8(h)).

These are not the duties of the owner or operator of a business enterprise. They are the duties of a regulator of a business enterprise. In spite of language to the contrary in the Bill, the State will neither own nor operate the Destination Casinos, and this portion of the Bill is therefore unconstitutional.

On the other hand, the Video Lottery Terminal sections of Senate Bill 168 do have the appearance of a state-owned and operated enterprise. In these sections it is the Kansas Lottery that implements a program to place video lottery terminals at pari-mutuel licensee locations and club locations (Sec. 11). It is the executive director of the Kansas Lottery who has the responsibility to perform the actions set out in Section 13, which are as follows.

a. Establish a statewide network of video lottery terminals (Sec. 13(a)(1)).
b. Review applications (Sec. 12(a)(2).
c. Collect fees (Sec. 12(a)(4).
d. Determine the payout percentage on machines (Sec. 13(a)(6).

video lottery terminals. S.B. 170 provides for casino gambling at Lottery Gaming Facilities (Sec. 1(s) and (z)). The Bill provides for the building in which gambling occurs to be owned by the State (Sec. 1(s)). Section 4(g)(1) of S.B. 170 states that the Kansas Lottery owns or licenses all software programs used in any lottery facility game. But the Lottery Gaming Facility Manager purchases or leases all lottery facility games. That includes video terminals (Sub. Sec. 4(g)(2)). The ownership of the business enterprise which is carried on inside the building appears to be in the hands of the Lottery Gaming Facility Manager.

A Lottery Gaming Facility is operated by a Lottery Gaming Facility Manager (Sec. 1(u)). The Lottery Gaming Facility Manager is defined as "a corporation, limited liability company, or other business entity authorized to construct and manage, or manage alone, pursuant to a management contract with the Kansas lottery, and on behalf of the state, a lottery game enterprise and lottery gaming facility." (Sec. 1(u)).

Except for the foregoing, the Bill is silent regarding the ownership of assets and operation of a casino. Although some ownership interests are given to the State, the business enterprise is not. In addition to owning the enterprise, the Lottery Facility Manager has almost complete discretion in the management of the casino.

The statute provides in Section 8 that 50% of revenues shall be placed in an account for payment of expenses, and of the remaining 50%, the Lottery Gaming Facility Manager receives 25% and elementary, secondary and higher education receives 75%. Although Section 8(c)(ii) states that 75% of 50% (i.e. 37.5%) is to be used "exclusively" for education, the sentences which follow state that if it is necessary to pay principal on bonds issued to build the casino (Sec. 9), such amounts are to be paid from the education fund (Sec. 8(c)(ii)). The amount payable toward education could thus be substantially less than 37½ %. At the same time, the Lottery Gaming Facility Manager will received 25% of 50% (i.e. 12.5%) free and clear of any obligation to pay for expenses or bonds (Compare Sec. 8(c)(i) and 8(c)(ii)). The private entity is thus guaranteed a profit, but the State is not. These provisions not only demonstrate the operation of the casino by the private entity rather than the State, but they also give substantial preference to the economic interests of the private entity over those of the State.

We believe that because private entities, not the State, will own and operate the business enterprises constituting Lottery Gaming Facilities, Senate Bill 170 violates the Kansas Constitution.

Very truly yours,

Blackwell Sanders Peper Martin, LLP

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March 18, 2004

Kickapoo Tribe in Kansas
Attn: Ms. Emily Conklin, Vice Chair
1121 Goldfinch Road
Horton, Kansas 66439

Sac and Fox Nation of Missouri in KS and NE
Attn: Ms. Fredia Perkins, Vice Chair
305 North Main Street
Reserve, Kansas 66434

Re: Constitutionality of Proposed Gaming Legislation in Kansas

Dear Ms. Conklin and Ms. Perkins:

You have asked us to give our opinion whether House Bill 2632 and Senate Bill 499, which have been introduced in the 2004 Session of the Kansas Legislature, and which would authorize certain gaming activities in the state, would, if enacted, violate the Kansas Constitution.

We believe that House Bill 2632 and the destination casino sections of Senate Bill 499 are clearly unconstitutional. The constitutional validity of the video lottery terminal sections of Senate Bill 499 is less clear, but at the very least, those sections raise serious constitutional issues.

In January 2004 we provided you with our opinion concerning the requirements of the Kansas Constitution relating to gambling activities. We attach a copy of that opinion to this letter for your reference.

In our earlier letter, we noted that the Kansas Constitution authorizes the Legislature to "provide for a state-owned and operated lottery." The Kansas Supreme Court has defined "lottery" to include any form of gambling containing the elements of consideration, prize and chance. The Supreme Court has said that the words "state-owned and operated" must be construed to mean what the words imply to the common understanding of the average person, and particular attention should be paid to the intent and understanding of the people at the time the constitutional language was adopted. We discussed in our letter what we believe is involved if the State "owns" and "operates" particular gambling activities.

Senate Bill 499 provides for the expansion of gaming in Kansas (a) through the establishment of Destination Casinos (Sec. 3), and (b) through the placing of video lottery terminals in parimutuel licensee locations and club locations (Sec. 11). The bill creates a state

agency called the Destination Casino Commission which is attached to and becomes a part of the Kansas Lottery (Sec. 4). It is authorized to issue certificates of authority (Sec.5(c)) after approval of an applicant's comprehensive plan for the casino (Sec 6(a)(2)). The comprehensive plan must provide for the management of the casino by a Destination Casino Manager (Sec.6(a)(2)). A Destination Casino Manager is defined as a person authorized to manage a Destination Casino (Sec.3 (g)). A "person" is defined as "any natural person, association, corporation or partnership (Sec. 1(h)). As is obvious, "person" is not defined to include the State of Kansas; only private entities are included in the definition.

The bill provides that the comprehensive plan "shall place full, complete and ultimate ownership and control of the gaming operation of the Destination Casino with the Kansas Lottery" (Sec. 6(a)(2)). It also provides that the management contract which the Executive Director of the Lottery must enter into with the Destination Casino Manager must "place full, complete and ultimate ownership, and control of the gaming operation of the Destination Casino with the Kansas Lottery." Further, the Kansas Lottery "shall retain the ability to overrule any and all significant gaming decisions at any time, without notice and shall retain full control over all decisions concerning Destination Casino games, including which games are offered at a Destination Casino, the odds, the payout and other conditions under which Destination Casino games are played." (Sec. 6(d)).

The foregoing sections provide for extensive regulation of the casinos, but they do not appear to create an ownership interest in the State. Instead, ownership of the gaming operations (which are undefined in the bill) appears to be lodged with the Destination Casino Manager, a private entity.

In addition, the bill fails the test of State "operation" of the gambling activity. The definitions contained in the bill make it clear that "operation" of the casino will be in private hands, i.e., the Destination Casino Manager. All of the activities which we deemed important to the "operation" of a casino in our earlier letter are placed in the hands of a private entity. Further, the officers, directors and "key employees" are all employed by and will apparently receive their paychecks from the Destination Casino Manager. In other words, hiring and firing will be in the hands of the private entity. These are critical factors in determining who "operates" the facility. We believe the Kansas Supreme Court will deem the "operation" of the casino to be by private entities, not the State, and thus Section 3c, Article 15 of the Kansas Constitution will be violated.

In addition to Destination Casinos, Senate Bill 499 provides for the placement of up to 2500 video lottery terminals at either parimutuel licensee locations or club locations around the state (Sec. 12, 13(a)(6)(E)). The Kansas Lottery is directed to implement a video lottery program and adopt rules and regulations for its operation (Sec. 12). The bill requires that the rules and

regulations give the State extensive control (Sec. 13(a)(6)(A-K). The rules and regulations shall include the following:

a. The denomination of all bills, coins, tokens or other media needed to play the terminals (Subsec. B)

b. The certification of all officers, directors, board members and key employees of the licensees (Subsec. C)

c. The number of terminals at each location (Subsec. E)

d. Standards for advertising, marketing and promotion (Subsec. F)

e. The kind, type, number and location of terminals at any licensee location (Subsec. G)

f. Each terminal must be connected to the central video lottery terminal computer system which allows the State to audit, and even disable each terminal in the system (Subsec. c and d)

These activities are so detailed and specific that it is unusual to require them in rules and regulations, yet that is what the plain language of the bill requires. If the decisions for all of those activities are made by the State in rules and regulations, an argument can be made that the State is "operating" the terminals. However, one critically important function is placed in the hands of the private licensees. The licensees are given discretion to determine the payout from each terminal so long as it is between 87% and 95% on an average annual basis (Subsec. B). This is broad discretion in the video terminal business. This one factor may well be deemed so important that it causes the video lottery program also to fail the constitutional test. If the licensees are given any discretion to make other decisions, a decision of unconstitutionally is more likely.

The scope of House Bill 2632 is much more limited than Senate Bill 499. The House Bill provides only for placement of electronic gaming machines at parimutuel licensee locations (Sec 3). The licensees are selected by the executive director of the Kansas Lottery (Sec. 3). All electronic gaming machines under the act are subject to the ultimate control of the Kansas Lottery (Sec. 13(e)), but broad discretion is given to the licensees for the operation of the machines. In a contract with the licensee, the executive director "may" determine the location and operation of the machines, but the director cannot determine days and hours of operation or the number of machines (Sec. 13(g)(2)). The personnel operating the machines must meet minimum requirements (Sec. 13(g)(3)), but they are employees of the licensee, not the State.

Payout must average not less than 87% of the amount wagered over the life of the machine, but discretion for determining payout is otherwise left with the private licensee (Sec. 13(j)(1)). Each machine must be linked to a central lottery communications system for auditing purposes, but there is no provision for disabling the machine by state officials (Sec. 13(j)(2)). The decision of which machines to purchase is left to the licensee.

House Bill 2632, in our opinion, gives so much discretion to the licensees that it gives the "operation" of the electronic gaming machines to the private licensees, and is therefore unconstitutional.

Very truly yours,

Blackwell Sanders Peper Martin LLP

JB/cdc

4-8

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January 8, 2004

Kickapoo Tribe in Kansas
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Sac and Fox Nation of Missouri in KS and NE
Attn: Ms. Fredia Perkins, Vice Chair
305 North Main Street
Reserve, Kansas 66434

Re: Constitutionality of Proposed Gaming Legislation in Kansas

Dear Ms. Conklin and Ms. Perkins:

You have requested our opinion concerning the following issue:

> Would Senate Bill 249, introduced in the Kansas Legislature in the 2003 Session, or similar legislation which would authorize various types of casino gambling at parimutuel racetracks, violate the Kansas Constitution?

We believe the answer is that they would be found to be unconstitutional by the Kansas Supreme Court.

Since 1859 the Kansas Constitution has stated in Article 15, Section 3:

> Lotteries and the sale of lottery tickets are forever prohibited.

In a number of cases over many years the Kansas Supreme Court has broadly interpreted the word lottery to include all forms of gambling or wagering so long as three elements are present: consideration, prize and chance. State ex rel Frizzell v. Highwood Service Inc., 205 Kan. 821, 473 P.2d 97 (1970). As the Court said in State v. Nelson, 210 Kan. 439, 502 P.2d 841, 845 (1972):

> Although this constitutional provision was undoubtedly borrowed from states previously admitted to statehood, it is apparent that the framers of the constitution of this state consciously determined that prohibiting lotteries forever was a method of promoting a sound basis for the welfare and growth of this state. Since its adoption, many efforts have been made by persons and organizations to circumvent this constitutional provision. Such efforts have generally been made for profit, seeking to elicit money

> from those who cannot refrain from the instinctive weakness of humanity to gamble.
>
> This court has steadfastly adhered to the constitutional provision by striking down such efforts. (State Ex. Rel. Kellogg v. Mercantile Association, 45 Kan. 351, 25 P.984, (distribution of prizes by chance); In Re Smith, Petitioner, 54 Kan. 702, 39 P.707, (sale of lottery tickets); State Ex Rel Anthony Fair Association, 89 Kan. 238, 131 P.626 (bets on horse races); State Ex Rel Beck v. Fox Kansas Theatre Co., 144 Kan. 687, 62 P.2d, 929, (theatre bank night); City of Wichita v. Stevens, 167 Kan. 408, 207 P.2d 386, (punch boards); State v. Brown, 173 Kan. 166, 244 P.2d 1190, (punch boards); State Ex Rel Moore v. Dissing, 178 Kan. 111, 283 P.2d 418, (parimutuel betting on dog races).

Slot machines and table games commonly found in gambling casinos such as blackjack, craps, roulette and poker are within the Supreme Court's definition of a lottery as the word is used in the Kansas Constitution.

In 1986 Kansas voters approved an amendment to the Constitution which states:

> Notwithstanding the provisions of Section 3 of Article 15 of the Constitution of the State of Kansas, the legislature may provide for a state-owned and operated lottery, ...

The primary purpose of the amendment was to permit the establishment of a state-owned and operated lottery in the strict sense, that is, the sale of lottery tickets for which there is a drawing to determine prizewinners. At the same time, there is little doubt that because the Kansas Supreme Court has always broadly defined lottery to mean any game involving consideration, prize and chance, the Legislature can now authorize any game involving wagering, including all of those typically found in gambling casinos, so long as it is state-owned and operated.

In recent years various bills have been introduced in the Kansas Legislature which authorize private entities to engage in gambling activities, other than traditional lotteries. None have passed. Because such efforts are expected to continue, the question arises whether a statute which authorizes private interests to conduct gambling activities other than traditional lotteries, violates the constitutional requirement that lotteries be "state-owned and operated."

The Kansas Supreme Court has reserved to itself the power to interpret and define the language of the state constitution. It has repeatedly struck down legislative attempts to define constitutional terms. For example, in State v. Nelson, above, the Court said at 846:

> It is the function and duty of this court to define constitutional provisions. The definition should achieve a consistency so that it shall not be taken to mean one thing at one time and another thing at another time. It is the nature of the judicial process that the construction becomes equally as controlling upon the legislature of the state as the provisions of the constitution itself. (16 C.J.S. Constitutional Law, § 13.) Any attempt by the legislature to obliterate the constitution so construed by the court is unconstitutional legislation and void. Whenever the legislature enacts laws prohibited by judicially construed constitutional provisions, it is the duty of the courts to strike down such laws.
>
> The legislature, by enacting the statutes in question, attempted to declare that 'consideration' shall not include money paid to participate in a bingo game. The legislature, in effect, sought to remove 'consideration' as one of the elements of a lottery. In so doing, the legislature exceeded its constitutional power. The constitution must be interpreted and given effect as a paramount law of the state, according to the spirit and intent of its framers. A legislative enactment in evasion of the terms of the constitution, that is properly interpreted by the courts and frustrating its general and clearly expressed or necessarily implied purpose, is clearly void.

The court struck down a legislative attempt to permit tax-free organizations to engage in bingo games. The Legislature had sought to avoid the constitutional prohibition of lotteries by saying that the amount paid to play was a contribution to the organization and was not "consideration."

Two primary rules of interpretation have been consistently followed by the Kansas Supreme Court. These are best expressed in the Frizzell case, above, at 825:

> But while the constitutional ban against lotteries may be self-executing, it is not self-defining. That function is judicial in nature, evolving upon courts. We have heretofore had occasion to lay down general guidelines for its exercise. In Higgins v. Cardinal Manufacturing Co., supra, we observed that a constitution is not to be narrowly or technically construed but its language 'should be held to mean what the words imply to the common understanding of men' (P.18, 360 P.2d 462); that in ascertaining

> the meaning of constitutional provisions courts should consider what appears to have been the intendment and understanding of the people at their adoption. (See also, State v. Sessions, 84 Kan. 856, 115 P.641.) (Emphasis supplied)

The Court has never had occasion to consider the meaning of the words, "state-owned and operated," but application of the first principle stated above - - using the words in their commonly understood meaning - - can lead only to the conclusion that the State must own and operate the enterprise in fact, and not in name only. The second principle - - ascertainment of the intent and understanding of the voters at the time of adoption - - leads to the same result.

The Legislature can do little to influence the analysis. As stated above, even if the Legislature attempts to define "state-owned and operated," the Supreme Court will define those terms as it sees fit.

Only four other states have constitutions which contain language requiring the state to own and operate gambling activities. They are South Dakota, West Virginia, Rhode Island and Oregon. None of those states have defined "state-owned and operated" in either legislation or court opinions.

In South Dakota, video lotteries were struck down by the state supreme court before reaching the issue of "state-owned and operated." Poppen v. Walker, 520 N.W. 2d 238 (S.D. 1994). In West Virginia, the State Lottery Commission was found to have unconstitutionally licensed casino gambling operations without any legislative enactment. Mountaineer Park, Inc. v. Polan, 190 W.Va. 276, 438 S.E.2d 308 (1993). Neither Rhode Island nor Oregon have considered private gambling issues.

Kansas Attorney General Robert Stephan issued two formal opinions in the early 1990's which addressed the meaning of the "state-owned and operated" language. The first, Opinion 92-1, concluded that the phrase contemplates a situation where the state "owns the business and has ultimate and complete control of the operation." That opinion went on to say that the state does not need to own the building or equipment used in a lottery operation.

The second, Opinion 94-26, examined the issue in more detail, but many questions remained. After comparing constitutional provisions and stating that regulation alone would be insufficient, the Attorney General concluded:

a. The state can contract with private entities to construct a casino.

b. The state can contract with private entities to operate specific games of chance "so long as sufficient control and responsibility over the business as a whole remains with the State."

c. Although not all of the personnel employed at a casino must be state employees, "sensitive positions" need to be held by state employees.

d. The state can license private entities to place and maintain privately-owned casino gaming equipment as long as the state "retains ownership and control of, and responsibility for, the gaming operation." The state should determine "the types of games and gaming equipment to be made available for public use, the betting limits, the stakes, the odds, and essentially how the equipment will be used and patrolled."

e. Finally, "to permit a private entity to operate a casino in exchange for a set percentage of the take comes very close to regulation with a tax."

Although these opinions provide some guidance, a greater level of detail is desirable. Our thoughts on the subject are set out below.

As indicated above, the words "state-owned and operated" will be interpreted by the Kansas Supreme Court according to (a) the common understanding of the meaning of the words, and (b) the intent and understanding of the people when they approved the amendment.

The elements of "ownership" of a business, at a minimum, include (a) having title to or ultimate control over the assets of the business, and (b) taking the profits and suffering the losses of the enterprise. In other words, the state must bear the risk of the failure of the operation if it is to be considered the owner. Profits and losses must belong to the state.

Because the assets of a business can include leases of property as well as title to property, it is correct that the state need not own the building or the gaming equipment. All assets, however, whether leases, titles, accounts receivable, bank accounts, contracts or securities must be held in the state's name. The state, as the owner of the business must have the ability to acquire, use and dispose of the assets as it chooses.

If the state is engaged in the "operation" of the business, the state must employ the persons who make the key decisions in carrying out the activities of the enterprise and be responsible for their conduct. In a gaming enterprise, the key decisions are those which make the enterprise competitive with other forms of entertainment in general, and with other area casinos in particular. In the Kansas City metropolitan area, casinos are well-established and can be

expected to be aggressive competitors. Management of a state-owned casino would have to respond on a daily and weekly basis to that competition. Some of the day-to-day functions that state employees would be required to exercise are the following:

Daily review of departmental net win and expenses.
Review and approval of major marketing and promotional activities.
Credit and comp review and approval.
Major contract review and approval.
Allocation of hotel rooms and amenities.
Capital expenditures and gaming floor configuration.
Table game limits.
Chip control as it relates to slot odds.
Compliance issues and related problems.
Cage related issues.
Compliance with federal and Department of Treasury regulations.
Change in types of games.
Labor union issues.
Employee relations/discipline.
Compliance with OSHA and other federal and state safety regulations.
Compliance with state and local regulations for the sale of food and liquor.
Participation in charity and community projects (contributions).
Changes in employee benefits to remain competitive in the industry.

A competitive casino is usually operated in conjunction with a hotel, and the hotel is used primarily to satisfy gaming patron needs. The state's management personnel would therefore need to do such things as the following:

a. Determine room rates and special hotel promotions.

b. Upgrade or build additional rooms.

c. Build and operate restaurants, determine menus, prices, and decide all buffet and food service issues.

d. Build and operate a high-roller lounge.

e. Make internal or external structural changes as needed to attract more business.

4-14

f. Reconfigure or expand the gaming floor, including gaming machines and tables.

A casino executive staff is likely to include the following positions:

Chief Executive Officer
Chief Financial Officer
Chief Operating Officer
Vice President/Slots
Vice President/Table Games
Vice President/Marketing
Vice President/Food & Beverage
Vice President/Human Resources
Vice President/Hotel Services

Below the vice-president level, experienced casino executives are needed at the Director level. All of these personnel will be required to hold "key employee" licenses. Because all are responsible for the operation of the facility, all must be state employees. The salaries needed to attract competent personnel to fill these positions are likely to be far higher than those of most state officials, including the governor and supreme court judges.

If these persons are truly state employees, they will need to receive their paychecks from the state, and the state will be liable for their tortious or criminal conduct. As the court said in Jeffries v. State of Kansas, 147 F.3d 1220 (10th Cir. 1998):

> An employer is liable for: (1) any tort committed by an employee acting within the scope of his or her employment; (2) any tort committed by an employee in which the employer was negligent or reckless; or (3) any tort in which the employee purported to act or speak on behalf of the employer and there was reliance upon apparent authority or the employee was aided in accomplishing the tort by the existence of the agency relation.

The test of whether an employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. Mitzner v. Kansas Department of Soc. and Rehab. Services, 257 Kan. 258, 891 P.2d 435 (1995). On the other hand, if the state contracts for a person to work according to his or her own methods, without being subject to the state's control, except as to the results or product of his or her work, the person is an independent contractor and not a state employee. Id. If the

gaming operation is truly a "state-operated" business, the state cannot use independent contractors in any of the key positions and cannot seek to insulate itself from liability for their conduct.

In 2003 one of the gambling bills considered by the Kansas Legislature was Senate Bill 249. That bill would have authorized the director of the Kansas Lottery to contract with parimutuel licensees for the operation of electronic gaming machines at parimutuel locations after local voter approval. Under the proposed statute, a licensee could, if permitted by the contract, do the following:

a. Own the premises on which machines were located.
b. Decide which machines to purchase or lease (subject to state approval).
c. Decide payout percentages (within limits), location of machines, and all other day-to-day operating decisions.
d. Conduct advertising and promotions.
e. Determine hours of operation.
f. Interact with players (cashiers, instruction, etc.)
g. Provide security.
h. Perform bookkeeping.
i. Service and repair machines.
j. Employ the personnel to perform all of the above functions.
k. Receive 70% of the net funds generated.

If these functions were indeed performed by the licensee, we believe that the general public, and the Supreme Court as well, would consider such a "lottery" to be "operated" by the licensee rather than the State. It would thus violate the Kansas Constitution.

In the final analysis, whether a gaming enterprise authorized by the Legislature is constitutional will depend upon how the Legislature deals with the defining factors set out in this letter. If the Supreme Court does not perceive that the state owns and operates the enterprise, the legislation authorizing such the enterprise will be unconstitutional.

Very truly yours,

Blackwell Sanders Peper Martin LLP

JB/cdc

4-16

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Testimony re: SB 168
Senate Federal and State Affairs Committee
Presented by Ronald R. Hein
on behalf of
Prairie Band Potawatomi Nation
February 17, 2005

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for Prairie Band Potawatomi Nation (PBPN). The Prairie Band Potawatomi Nation is one of the four Kansas Native American Indian Tribes.

The PBPN opposes SB 168.

PBPN Position and IGRA

The Prairie Band Potawatomi Nation (PBPN) has consistently opposed legislation providing for the expansion of Class 3 gaming by the state of Kansas. The PBPN opposition stems primarily from the recognition that such gaming would negate the benefits that Tribal gaming provides to Native American Indian Tribes through the federal Indian Gaming Regulatory Act (IGRA.) IGRA was approved by Congress to promote economic development of Indian Tribes, and to provide for the regulation of gaming on Indian reservations. IGRA is administered at the federal level, but there are provisions for compacts to be entered into with the state, and the state is involved in the oversight of daily gaming operations. There are restrictions on the ability of the states to require payments to the state as a part of the consideration for gaming compacts.

Tribal Gaming Generates Tax Revenue and Economic Development

Expanded gaming proponents contend that the state receives no revenue from Tribal gaming. It is correct that the Tribes do not pay a specified percentage of gaming revenues to the state. State and local government, school districts, and other taxing subdivisions benefit from Tribal gaming by virtue of numerous taxes paid as a result of Tribal gaming and the economic development that they currently generate for Northeast Kansas.

The myth that no taxes are generated from Tribal gaming exists because some people believe that Native Americans do not pay taxes. So there is no misunderstanding, all Tribal members pay federal income taxes. Regarding state income tax, only those Tribal

members who both work and live on the reservation are exempt from state income taxes. Any Tribal member who lives off the reservation but works on the reservation and any Tribal member who lives on the reservation but works off the reservation pays state income taxes. A very small percentage of Tribal members both live and work on the reservation. Lastly, Tribal members pay sales taxes on purchases made off the reservation, which is virtually all purchases by tribal members.

Gaming is one of the few tools provided by federal law for Indian reservations to generate economic development and revenue necessary to run governmental programs. Other communities have expressed a need for gaming in order to help stimulate economic development. The areas being served by Tribal gaming and the reservations were severely economically disadvantaged before Tribal Gaming. I understand that prior to gaming, unemployment ran as high as 78% on the PBPN reservation

Other communities have available economic and tax advantages that do not exist for the four Kansas resident Tribes. Gaming has been the principal economic development program which the federal and state governments have allowed the Tribes to utilize. Now, expanded gaming threatens that source of revenue for the Tribes and the areas surrounding the reservations.

With Tribal Gaming, dollars generated for the Tribes are used for community improvements and services such as fire protection, education, elderly programs, low-income housing, and other social programs and remain within the state as additional economic development for Kansas and local communities,

Gaming History and the Slippery Slope

We have much to learn from the history of gaming from what has occurred with parimutuel gambling in Kansas, and with gaming in Missouri. Once the state starts down the slippery slope of casino gaming, the state will not be able to stop itself from falling further into expanded gaming as more groups and areas of the state demand to be included. That can be demonstrated by this bill. Just talking about expanding gaming has already caused Kansas to fall down the slippery slope of gaming. Originally, gaming legislation was slots at the tracks. Now we have a bill which will establish multiple destination casinos, plus Video Lottery Terminals (VLTs) at five (six) track facilities, plus VLTs at any of several hundred locations throughout Kansas at Veterans organizations. If the intent of this legislation is to insure that everyone in the state is within close proximity to a gaming machine, then this bill fulfills that intent.

A review of the history of parimutuel gaming in Kansas will demonstrate that even this massive gambling bill is probably not the end of efforts to expand gaming in Kansas. Gaming is likely to be a legislative issue every year for the next ten years as proponents

seek greater and greater benefits, less and less restrictions, and more and more money. The legislature should not be deceived that even this massive of a gambling bill will put an end to expanded gambling.

Today, slots at the tracks proponents claim that if the state is going to save parimutuel gaming, the tracks must have slot machines. The only reduction in gambling that may occur in the next few years will be dog and horse racing. With the competition of slots, parimutuel tracks will not survive, and I would suspect, in time, the gaming operators will turn more and more to just paying off the horse and dog operators with funds from slots. Actual racing will decline just like it did with parimutuel over the last 10 years.

Gaming Expansions Effect upon Economic Development and the State

In estimating revenue benefits to the state of Kansas from gaming, this committee should take into consideration the impact on Lottery revenues, the impact on bingo revenues, the impact on charities running bingo operations, and the impact on tax revenue and economic benefits of other businesses in the state who will lose business to the expansion of gaming. Also, our own studies show that the economy of our Tribe, of the other Tribes, and of Northeast Kansas will be seriously impacted by expanded gaming.

Our studies also indicate that of the total market for gaming in Kansas, the majority of such market will consist of revenues now committed to existing Kansas businesses, not new "economic development" generated from out of state sources.

The legislature should not make any recommendation for expanded gaming without determining how much of the revenue generated by expanded gaming will come from dollars already being spent at other businesses within the state, and how much state and local tax revenues will be lost from those businesses.

Governor's Gaming Committee Findings

The Governor's Gaming Committee spent a great deal of time researching gambling this summer. Among other things, they made some findings as set out below:

"The state should expand gaming in the form of **a** large destination casino. ...The state should **avoid "convenience gaming,"** in which the gaming facilities would merely redistribute dollars within the region. ...The **best location in Kansas for a destination casino is Wyandotte County**...A destination casino should not be established outside of Wyandotte County without convincing and significant evidence of such a venture's viability."

The Governor's Gaming Committee went on to recommend:

"A large destination casino–either state-owned and operated or Indian–in Wyandotte County, supplemented by slots at the tracks. ... In addition to this destination casino, the committee feels that the state should maximize its potential for immediate revenue by placing a **limited number** of video lottery terminals at the parimutuel tracks." [Emphasis supplied.]

The Governor's Gaming Committee also noted the following:
"Because the Kansas Constitution generally prohibits gaming, the **only two legal models currently available** (absent a constitutional amendment) **for a casino are a state-owned and operated casino** (under Article 15, Section 3c of the Kansas Constitution) **and an Indian casino** (under IGRA). ... To pass muster under Article 15, Sections 3 and 3c of the Kansas Constitution, the **gaming operation of a state-owned and operated casino must be controlled and directly managed by a state agency. ...This approach, however, would place the State of Kansas in the uncomfortable position of being the first state in the Union to own and operate a full casino. Taking the plunge into full-blown gaming presents the state with significant ethical and economic risks. The state should thus enter this territory with extreme caution.**" [Emphasis supplied.]

SB 168 Is Not the Way To Expand Gaming

SB 168 does not meet the findings or the recommendations of the Governor's Gaming Committee. There is some value in a destination casino in Wyandotte County. The case for other so-called "destination" casinos has not been made.

SB 168 goes to great lengths to call the multiple casinos contemplated by this legislation "destination casinos". But calling them that does not convert a "convenience casino" into a "destination casino". If the certificate holder spends enough money for the casino, there is no requirement to establish that it will bring in tourists from out of state. And for the cheaper casino, it sets a very low threshold (25%) for number of out of state tourists.

This demonstrates very clearly that even the proponents feel that the vast majority of the gamblers are going to be pulled from the surrounding communities. No matter what the bill calls them, these are "**convenience casinos**", which even the Governor's Gaming Committee recommended the state avoid. Calling it a different name in the bill does not change the casino's character.

The decision on additional casinos should be made by the legislature, not by the commission as provided for in SB 168.

This bill is dangerous because of the economic and ethical risks that are created, as noted by the Governor's Gaming Committee, with **one** state owned casino, let alone with the plethora of casinos and VLTs provided for in this bill. **This bill is gambling everywhere.** There can be 3 or more destination casinos, 4,000 VLTs at 6 parimutuel tracks, and an additional 500 VLTs at veterans clubs throughout the state. This virtually

assures the state that gambling will be competing with other tax-paying businesses, an that the vast majority of the money "earned" from gambling will be sucked out of the Kansas economy. This will virtually guarantee an adverse economic impact on state revenues from existing businesses in the state. This bill is the epitome of what the Governor's Gaming Commission was trying to avoid as it looked to the interests of the state of Kansas.

SB 168 spends a lot of words and space stressing all of the certification requirements of the casino manager. Even the certificate of authority arguably gives the casino manager a property right in the management of the casino. **IF** this is a state owned and operated casino, the state ought to just be able to enter into a contract that authorized the state to terminate the contract if the manager or its agents commit malfeasance of any nature. This bill sets up a procedure for "suspension, revocation or non-renewal" of the certificate. Most owners and operators of a business in the real world do NOT have to go through the gymnastics this bill provides for to hire or fire or contract with or terminate a contract with a manager.

If the state is the owner and operator of these casinos, I would think the legislature, as the board of directors, would want to know how much revenue the state is going to get, and how much revenue the casino manager is going to get. But apparently pursuant to SB 168, the board of directors has no say in that.

Lastly, I find it interesting this concept of the "manager" who is only contracted to "manage" must pay a $15,000 per machine payment. Let's say I own a restaurant, and I want to hire a manager. Do I tell the manager that he must buy the tables, and then pay me a $15,000 payment per table in advance, to be later deducted from the income that **MY** business generates from those same tables. Does this make sense to anyone? Anyone who can't see through this little game being played by the prospective casino managers who are willing to invest in these accelerated payments, in my opinion, because they expect to share in the profits of gaming. And if they are sharing in the profits of gaming, that raises the question why isn't the owner, the state of Kansas, enjoying all of the profits?

Who wrote this bill? This bill doesn't look like it was written for the benefit of the state of Kansas. **This bill looks like it was written to protect and further the interests of the casino managers.**

State Owned and Operated

Lastly, the Governor's committee was very clear that the state must "own and operate" the gaming as required by the Kansas Constitution. There is no language in the Kansas Constitution about "certificates of authority", as set out in SB 168, which, I believe, is an unlawful delegation of legislative authority, in violation of the Kansas Constitution. This seems to be a "certificate of authority" to operate the casino, in violation of the Kansas

Constitution. A casino which is not "owned and operated" by the state will not pass constitutional muster.

The language in this bill is more like the "licensed and regulated" language used in the Kansas Constitution for pari-mutuel gambling, which the Governor's legal counsel has noted is a completely different standard than the "owned and operated" requirement of the Constitution for the lottery.

SB 168 and other such proposals which provide for non-state companies to be granted a "certificate of authority" to operate gaming will be subject to legal challenge, are likely to be challenged as being unconstitutional, and are likely to be found unconstitutional.

If Gaming Must Be Expanded, How Should the State Expand Gaming

As stated at the beginning of this testimony, the Prairie Band Potawatomi Nation opposes state expansion of gaming. But if gaming is to be expanded in Kansas, it should involve Tribal Gaming (including a Tribal destination casino in Wyandotte County if coupled with closure of such Tribes' existing casinos), it should be restricted (both in number of communities and number of slot machines), and it should be structured to solve the issue for the foreseeable future, most preferably through a constitutional amendment. Gaming should not be omnipresent, nor should it be substituted for or operated to the detriment of other businesses which have made Kansas great.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.

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TESTIMONY

TO: **The Honorable Pete Brungardt, Chair**
And members of the
Senate Committee on Federal and State Affairs

FROM: **Whitney Damron**
On behalf of the:

- **Kickapoo Tribe in Kansas**
- **Sac and Fox Nation of Missouri in Kansas and Nebraska**

RE: **Testimony on SB 168 and SB 179; Expanded Gaming Proposals**

DATE: **February 17, 2005**

Good morning Chairman Brungardt and Members of the Senate Committee on Federal and State Affairs. I am Whitney Damron and I appear before you today on behalf of the Kickapoo Tribe and the Sac and Fox Nation to offer comments on SB 168 and SB 170 that propose to expand gaming in Kansas through state-owned and operated casinos and video lottery machines.

With me today are Ms. Emily Conklin, Vice Chair of the Kickapoo Tribe, Ms. Fredia Perkins, Vice Chair of the Sac and Fox Nation, leaders and members of both tribes and various advisors working with the Tribes on their Kansas City gaming compact.

By way of information for the Committee, the Kickapoo Tribe and the Sac and Fox Nation have successfully owned and operated casinos on their respective reservations in Kansas dating back to 1997. Those casinos were made possible by the Federal Indian Gaming Regulatory Act, which was adopted by Congress in 1987 and subsequent compacts negotiated between the Tribes and the State of Kansas in 1995.

In 2000, after eight years of gaming legislation failure, Governor Bill Graves sent a letter to the four resident tribes of Kansas encouraging them to join together to develop a large, 4-tribe destination resort and casino in Wyandotte County in hopes of resolving the perennial debate over expanded gaming once and for all. Ultimately only the Kickapoo Tribe and the Sac and Fox Nation decided to pursue this initiative. Since that time, my clients have worked diligently, if not patiently, to assemble a team of tribal leaders and

professionals to negotiate agreements with the State of Kansas, the Unified Government of Wyandotte County and Kansas City, Kansas, the Board of Public Utilities in Kansas City, Kansas and other parties as necessary.

As members of this committee are aware, the Kickapoo Tribe and the Sac and Fox Nation successfully concluded negotiations for a gaming compact with Governor Sebelius in the fall of 2004 after nearly two years of discussions and four months of intense negotiations with the Governor's office, which included participation by the office of the Attorney General. Although that compact could have been considered last fall by the Legislative Coordinating Council, as we know, that was not done. However, both the Governor and the Tribes have indicated a willingness to submit that compact to the Joint Committee on State-Tribal Relations for consideration later this session.

SB 168, SB 170 and other gaming bills do not necessarily preclude legislative consideration of the compact, but they obviously have ramifications for the Tribes' Kansas City project and their existing casinos and therefore both Tribes felt it appropriate to present these comments to you today.

SB 168 — An Act concerning lotteries; enacting the Kansas expanded lottery act; authorizing operation of destination casinos, electronic gaming machines, video lottery terminals and other lottery games at certain locations; prohibiting certain acts and providing penalties for violations.

SB 168 would authorize one or more "destination casinos" to be built in three geographic areas as defined in New Section 2 (k)(1-3):

- Wyandotte County
- Crawford and Cherokee Counties
- Sedgwick County

The total number of machines or positions allowed at the destination casinos are not defined and thus presumed to be market-driven and unlimited.

Most destination casino proposals for the Kansas City market suggest 2,500 machines per facility and perhaps the same or slightly less for Wichita and southeast Kansas. SB 168 allows for multiple casinos in each market, so one can assume there will be multiple proposals for each market area, resulting in a total of 12,000 to 15,000 gaming machines in our state at destination casinos.

SB 168 would also allow a pari-mutuel licensee to place electronic gaming machines at their facilities. The five pari-mutuel facilities allowed to receive machines are designated in the bill in New Section 16:

- Wyandotte County (The Woodlands)
- Sedgwick County (Wichita Greyhound Park)
- Crawford County (Camptown Greyhound Park)
- Greenwood County (Eureka Downs)
- Harper County (Anthony Downs)

The total number of video lottery machines allowed at all pari-mutuel tracks cannot exceed 4,000, as stated in the bill in New Section 13 (a)(6)(E).

SB 168 would also allow the placement of no more than a total of 500 video lottery terminals at veterans organizations, as defined by I.R.S. Code 501 (c)(19), as stated in the bill in New Section 13 (a)(6)(E).

In total, although not limited to this number, it is reasonable to assume the passage of SB 168 would result in at least 18,000 - 20,000 electronic gaming machines in Kansas.

Ownership Concerns.

One of the most troubling aspects of SB 168 is contained in sections dealing with disclosure of ownership interests and those subject to criminal background review.

Several sections of SB 168 require persons directly or indirectly owning a 5% or more interest in a destination casino management company, an electronic gaming machine manufacturer, technology providers, computer system providers and other such entities, including management services, to be disclosed to the state, be subject to a background review as the executive director of the Kansas Lottery deems appropriate and be subject to suspension, revocation or non-renewal of their license if they have provided false or misleading information to the Kansas Lottery or its employees (New Section 5 (a)(12)(F-I).

These provisions should be of great concern to this Committee and to the public at large.

New Section 4 (a)(4) requires a minimum investment in infrastructure, including ancillary destination enterprise operations, of at least $150 million or in the alternative, at least $50 million if 25% of a destination casino's gaming customers would reside outside the State of Kansas.

Are the proponents of SB 168 suggesting an individual, company or other entity with an ownership interest of less than 5% should not have to be disclosed to the State? Are those with less than a 5% ownership interest free to provide false or misleading information to the Kansas Lottery without recourse? Can felons, including those convicted of gambling-related offenses and crimes of moral turpitude escape disclosure and review of their background if they own less than 5% of such entities?

As we read the bill, there appears to be no limit on the number of such owners that can participate in such contracts or agreements. Could there be 15-20 or even more minority partners of such a venture who would not be required to disclose their interests to the public or the Kansas Lottery?

One legal advisor to one of the gaming proponents this year recently indicated in a newspaper article that should their project come to fruition, that he has an option to "convert his legal fees to equity in the project." Should SB 168 or something similar be passed, how many other such deals will the public never know about because they fall under the 5% limitations contained in this bill?

My clients believe this Committee and the Kansas Legislature should demand to know who is involved with promoting gaming legislation in our state. 5% limitations on the disclosure of ownership and background review are more suited to publicly traded companies with thousands of shareholders, not closely held companies, partnerships, LLC's and similar entities. This language should not be allowed to remain in any gaming legislation considered by the Kansas Legislature. We cannot imagine it would be a burden to disclose this information for any gaming proponent.

State Revenues.

New Section 5 (a)(I)(4) indicates the State shall receive not less than 22% of revenues from the destination casino.

New Section 5 (a)(I)(3) indicates a procedure for calculating and paying the operating expenses of the destination casino will be implemented. This entire section and issue is lacking any definition or detail. Expenses are not clearly defined; interest payments, principal payments, capital accounts, etc.

What happens if expenses exceed revenues? What happens if the facility goes into default or minimum payments are not made from operating revenues?

There appears to be no way out for the State should they find themselves locked into a 15 year management agreement with a destination casino manager that simply cannot make the casino work.

We are confident the State of Missouri and the Missouri Riverboats will not remain static. There is a reason that in the past, all four of the riverboats operating in the Kansas City area have lobbyists in Kansas. At this time, I believe at least three of four have lobbyists here and most likely in the audience (Harrah's, Ameristar, Isle of Capri and Argosy).

Any casino in the Kansas City market will face aggressive competition from Missouri and a long-term contract with a management company without a mechanism to dissolve the agreement for cause does not make sense.

Approval by Local Units of Government.

New Section 5 (a)(6) requires an applicant for a destination casino to "have formal endorsements from local units of government where the proposed destination casino will be built."

This section invites forum shopping by developers who may seek to circumvent consideration by one city over another. For example, we are currently seeing this in Wichita where the Iowa Nation is seeking to develop a casino in Park City, which is located adjacent to the city with the largest population center in the region: Wichita.

Similar proposals made to smaller cities located in close proximity to larger cities will lead to conflicts between municipalities, interfere with planned growth and possibly affect the delivery of public services (i.e., water, sewer, transportation, infrastructure, etc.).

The Governor's office has indicated they will not negotiate with the Iowa Tribe until a number of criteria are met, including the support of the City of Wichita and Sedgwick County. Similar language should be included in any gaming bill.

Temporary Facilities.

New Section 2 (q) would allow for temporary gaming facilities for a period of up to two years. A temporary facility in one of the three market areas identified in the bill would be a short-sighted attempt by a developer to maximize their revenues, shore up a shaky financial plan and do untold harm to the market area that would take many years to recover.

A temporary facility will diminish the gaming market by leading off with a substandard product that will make long-term success more difficult to achieve. A quality development would not want to rush into the market with a temporary facility. If a temporary facility is allowed, you can expect the final development in the years to come to be less than envisioned at the time of the award of licensure because the revenues from a temporary facility will no longer support the initial proposal. You can also expect to see efforts to extend the usage of a temporary facility and the financial markets will lower their projections for success at the facility based upon the lower revenues generated by a substandard facility that is not a destination resort.

In contrast, the Tribal agreement with the Unified Government specifically prohibits a temporary facility and this commitment was made at the request of the Tribes. The Tribes' contractor, J.E. Dunn, was selected in part because of their ability to construct the casino on a "flash track" schedule – 24/7, which would allow the casino to be completed in one year. The hotel and related amenities would be constructed on a traditional construction schedule and take approximately two years.

SB 170 An Act concerning lotteries; concerning electronic gaming, lottery facility games and other lottery games.

Our review of SB 170 would lead us to offer several comments on that legislation as well.

Section 1 (bb) Certificate of Authorization.

The executive director of the Kansas Lottery is given immense power and discretion to award a certificate of authorization to a casino developer with no stated oversight or approval required from the Kansas Lottery Commission, the Governor, the Kansas Legislature or other regulatory oversight authority.

There is no limit upon the number of certificates of authority that can be awarded to a specific city, county, geographic area or in the entire State of Kansas.

New Section 3 (a) says, The executive director shall issue a certificate of authorization to each prospective lottery gaming facility manager which meets the necessary requirements established by the executive director and as set forth herein.

New Section 3 (c)(1-3) outlines criteria related to sufficient financial resources, compliance with tax laws, gaming experience and other "necessary requirements established by the executive director and as set forth herein."

New Section 3 (d) says, "Subject to the requirements of this section, a certificate of authorization shall not be unreasonably withheld."

This language clearly sets Kansas on a path to an unlimited expansion of gaming, potentially in every county of our state. By statutory direction in SB 170, the executive director shall issue a certificate of authorization to any and all applicants who meet minimum standards and such authorization shall not be unreasonably withheld.

New Section 4 (4) establishes the minimum number of machines that can be placed at a lottery gaming facility at 300. To put this number in context, as discussed earlier, proposals for casinos in the major market areas of Kansas indicate they intend to place 2,500 or more machines in their facilities. A minimum requirement of 300 machines will lead to proposals for "mini casinos" throughout Kansas.

Similar discretion is given to the executive director of the Kansas Lottery for the approval of management agreements with proposed gaming contractors. Minimum criteria for consideration of a management contract are also included in the bill, in New Section 4 (b), including the size of the facility, the geographic area of the facility market, tourist and entertainment attractions , types of games to be offered and "such other factors as the executive director deems appropriate."

Management contracts appear to be negotiated by the executive director of the Kansas Lottery with the approval of the Lottery Commission. The agreement is signed by the executive director and the Governor, but it is not clear what the Governor's role in this process is, other than having some kind of veto power by withholding her signature.

And again we see the language in New Section 4 (a), the "approval of a management contract by the executive director and the commission shall not be unreasonable withheld."

Finally, in New Section 4 (a), it appears the primary factors for considering the awarding of a management contract is whether such gaming facility will promote tourism and economic development. It is difficult to imagine any gaming proposal that could not make these claims.

Length of License.

New Section 4 (c)(1) sets an initial license term for a gaming facility manager at a minimum of five years and a maximum of seven years.

It would appear this term is intended to provide a mechanism for the State to remove itself from an unfit manager, renegotiate better terms or place the contract up for bid in a relatively short period of time.

But a the same time, the manager is allowed, encouraged or even required to develop ancillary gaming facility amenities that would encompass or be a part of the state-owned and operated casino. Such operations may include hotels, restaurants, theaters, food and beverage services to the casino and related amenities. These facilities are not licensed by the State and the State would likely have no recourse against the owner of these facilities should it be dissatisfied with the operation of the casino.

Should the state seek to find a new gaming facility manager in 5-7 years, what are they going to do about the same manager who owns all of the hotel rooms, restaurants, ingress/egress, food and beverage and other essential services of the casino? One would assume the owner of the ancillary services will be in a strong negotiating position with the state or any subsequent casino manager for their infrastructure and services, creating an untenable situation for all.

State Financing.

Perhaps the single item that insures a broad expansion of gaming in our state is the availability of state financing through the Kansas Development Finance Authority (KDFA).

New Section 9 authorizes KDFA bonds to be used to "pay the development and construction costs associated with a lottery gaming facility and the amount of the accelerated lottery gaming facility net payment, plus all amounts required for the costs of bond issuance and any required reserves on the bonds."

With this scenario, what would a potential gaming facility manager be expected to pay out-of-pocket? Development costs are included, construction costs are included and pre-paid accelerated payments to the state is included. With KDFA financing, would a potential gaming facility manager be required to have any financial resources or capital contribution of significance?

Should one be successful in obtaining a certificate of authorization and then gain voter approval for a project, the inclusion of "development costs" would allow for the payment or repayment of untold expenses related to the project, including lobbying services, marketing and media campaigns in support of the local election, legal fees and virtually any other such costs incurred in the past or going forward for the project.

KDFA financing would also insure there would not be a lack of proposals from throughout Kansas.

SB 168 & SB 170

Both bills contain loans from the licensees to the state in the amount of $15,000 per gaming machine. These loans are generally assumed to the repaid over a five year period and will necessarily reduce revenues to the State during that time.

Both bills are silent as to whether interest will be charged to the State on these loans. Neither bill has a prohibition for interest. And, since the State will be required to pay the operating expenses for any casino, it is assumed the costs for borrowing this money will be included in such payments.

Constitutionality

Proponents of both bills have gone to great lengths to opine upon the constitutionality of both of these gaming bills, just as they have done each and every year. At more than one hearing over the years there have been attorneys stand before legislative committees and render legal opinions on the constitutionality, citing and interpreting past attorney general opinions and minimal case law.

We believe the constitutionality of the gaming bills is a very important issue and cannot be ignored by the Legislature, nor will it be ignored by the courts if a gaming bill is passed.

In early 2004, the Kickapoo Tribe and the Sac and Fox Nation sought a legal opinion on the constitutionality of gaming legislation introduced into the 2004 Legislature as well as earlier gaming legislation. The Tribes sought the legal services of Mr. Jim Borthwick, a respected partner with the Kansas City-based law firm of Blackwell Sanders Peper Martin, LLP. Mr. Borthwick has over 40 years litigation experience and is well-respected in the legal community. His firm, Blackwell Sanders, has a worldwide presence and is recognized as one of the leading commercial law firms in the Midwest. Suffice to say, Mr. Borthwick and his firm have the capability to research and render an opinion on the constitutionality of gaming legislation.

We have asked Mr. Borthwick to review both SB 168 and SB 170 in light of the requirement for a state-owned and operated lottery under the Kansas Constitution. Although Mr. Borthwick could not be hear today, we appreciate the accommodation by Chairman Brungardt and look forward to the opportunity for the Committee to hear from Mr. Borthwick next week.

Obviously there will be no accelerated payments made to the state under either of these bills until all constitutional questions have received a final determination in the courts.

Conclusion.

Expanded gaming legislation dates back to 1993, but has failed each and every year. The reasons are many, but I think most would agree the proposals for expanded gaming have gotten progressively bigger as the years have passed by and that has contributed to the apprehension of the Legislature and the public for expanding gaming in our State.

Initially the pari-mutuel track owners sought permission for a few hundred video lottery gaming machines to "save pari-mutuel". Those proposals began to expand over the years from more than just a few hundred to thousands. And then other interests began to pay attention: the fraternals, the bowling alleys, convenience stores and others. And finally, the proposals for "full blown casinos" began to appear and have grown stronger in the past few years.

Gaming proposals that once suggested three to five locations now range from dozens to an unlimited number of locations and machines, driven by the perceived economic success of the Missouri riverboats and of course, the lure of profits for the proponents of expanded gaming.

Wyandotte County has certainly been at the forefront of efforts for expanded gaming and I believe most Kansans and even a majority of the Kansas Legislature would not begrudge casino gaming in Wyandotte County. But we do not have a bill confined just to Wyandotte County. Each and every year, more and more entities come to Topeka and ask to be part of a gaming bill.

After thirteen years, there is no end in sight to the proposals and until the State either approves a tribal gaming compact that includes a defined market for the State or a constitutional amendment is passed to allow state regulated, privately owned casinos, then the gaming debate will continue.

If the Legislature passes legislation like SB 170, then we will have ubiquitous gaming in our state. If the Legislature passes legislation like SB 168, then for ever more, the Legislature will be subjected to an annual parade of gaming interests who have been left out of the perceived Holy Grail of economic prosperity: Their very own local casino.

We believe the law is clear: If the state wants additional gaming, there are two avenues they can pursue today; State-owned and operated gaming or expansion of tribal gaming, as my clients have proposed for Wyandotte County. What we have hear today and what the Legislature has seen in the past from gaming interests is an attempt to put a square peg in a round hole – which is a metaphor for saying they are attempting to create a state-owned and operated gaming scheme that in reality is state regulated and privately operated.

We respectfully urge the Committee not to proceed with these or other gaming proposals and instead carefully consider the benefits of expanded tribal gaming that can bring economic benefits to the state and potentially resolve the gaming debate for years to come.

Thank you for your consideration of our thoughts today. I would be pleased to stand for questions at the appropriate time.