

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.

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.

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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

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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.

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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

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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 (KDFFA). 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.