

ICGR White Paper Series on the Regulation of Tribal Sports Wagering

*State-Specific Analysis of Applicable Regulation Under Tribal-State
Compacts in New York*

June 2021

Kathryn Rand & Steven Light

Part I: Project Overview

This White Paper addresses the question of how tribally owned and operated sports books are being regulated for key markets in states that have legalized sports wagering. It provides an overview and synthesis of federal regulation (or lack thereof) and takes a closer look at regulation of tribal sports wagering in New York state to explain and analyze a state-specific example of applicable regulation under Class III tribal-state compacts. We use this example to explore and develop a methodology that could be scaled to look at this developing area of law and policy in other states and to begin to consider what data, categories, or metrics would be useful in identifying emerging practices in tribal sports betting regulation or relevant to other ICGR initiatives.

1. Findings

Our findings include:

- The provisions of a tribal-state compact (1) allocating regulatory authority between the tribe and state generally and (2) setting or incorporating minimum standards or other applicable rules and regulations for sports betting specifically are the most important informational source.
- Beyond the tribal-state compact, the ready availability of applicable state or tribal regulations varies by jurisdiction. Tribal regulations are generally more difficult to obtain than state regulations.
- In New York, based on available information, it appears most likely that tribes are adhering to state regulations for retail sports wagering (though each tribe's tribal gaming regulatory authority may be performing some functions, such as licensing, while adhering to the standards in the state regulations).
- Findings limited by available information, such as the one immediately above, could be confirmed or corrected through individual contacts with state and/or tribal regulators as needed.

2. Methodology

We identified states in which tribal sports books are operational or at least legalized. We then worked to narrow our scope to an initial example or case study. New York state was selected.

We took the following steps:

- Reviewed NIGC materials for any relevant guidance
- Reviewed information regarding New York’s legalization of sports betting
- Reviewed New York State Gaming Commission website
- Located and reviewed each tribal-state compact entered into in New York for provisions related to regulatory authority and sports betting
- Located and reviewed each tribe’s tribal gaming ordinance for provisions related to regulatory authority and sports betting
- Sought to locate and identify or determine as possible what entity (e.g., tribal gaming commission) has authority to promulgate regulations specific to sports betting
- Sought to locate and review tribal regulations for each tribe
- Conducted web searches for other accessible sources of relevant information (e.g., tribal government websites, journalistic accounts, industry press releases, etc.)

Part II: NIGC Guidance and Other Federal Law re Tribal Sports Books

1. Class III games, including sports betting, are regulated according to the tribal-state compact rather than NIGC regulations.

The NIGC has provided limited guidance on tribal sports betting to date. NIGC regulations specifically related to sports betting are limited to clarifying that it is a Class III game. Until 2006, the National Indian Gaming Commission (NIGC) asserted regulatory authority over Class III gaming, including promulgating minimum internal control standards (MICS) for Class III games. In 2006, however, a federal court case, *Colorado River Indian Tribes v. NIGC* (D.C. Cir. 2006), held that the NIGC did not have regulatory authority over Class III gaming. Instead, under IGRA, *regulation of Class III gaming was assigned to the state and tribe to determine via the tribal-state compact*. Subsequently, the NIGC has reclassified its Class III MICS as non-binding agency guidance. The NIGC suspended the Class III MICS, found at 25 C.F.R. pt. 542 and available at <https://www.nigc.gov/general-counsel/commission-regulations>, but allowed them to remain “on the books” as guidance. These Class III MICS were last substantively revised in 2005, well before the Supreme Court struck down PASPA and the subsequent rapid spread of state legalization of sports betting.

The NIGC's Class III MICS do not include sports betting. To date, the NIGC has not indicated that it plans to issue sports betting MICS as agency guidance. As a result, applicable regulatory authority and any MICS for sports betting should be found in the tribal-state compact rather than federal regulations.

2. The NIGC has issued agency guidance for tribal sports books focused on management contracts and tribes' sole proprietary interest considerations.

In January 2020, the NIGC issued Bulletin 2020-1, "IGRA and Sports Book Operations" (available at https://www.nigc.gov/images/uploads/bulletins/2020.01.24_Bulletin_Sports_Betting_Models_and_Dec_Ltrs_%28Final%29.pdf). The Bulletin outlined *four models for tribal sports books operating on Indian lands under IGRA's regulatory scheme*: (1) a sports book wholly operated by the tribe (internal or home-grown model); (2) a tribally-owned sports book with data or other selected services from outside vendors (tailored or hybrid model); (3) a tribally-owned sports book wholly managed and operated by a third party (external or plug-and-play model); and (4) an individually-owned sports book licensed by the tribe to operate on tribal lands (IGRA permits tribes to issue gaming licenses for both Class II and Class III gaming to operators; very few tribes have utilized this option for any form of gaming).

The focus of the NIGC's guidance in the bulletin was on two important considerations for tribes in working with outside vendors and third-party managers and operators: what would fall within a management contract, thus triggering IGRA's requirements for management contracts including NIGC approval, and what is necessary to ensure that the tribe retains sole proprietary interest for its gaming activity, as required by IGRA.

Part III: Regulation of Tribal Sports Wagering in New York State

1. Executive Summary

After a 2013 state constitutional amendment to expand gaming to include commercial casinos, New York legalized sports betting in 2019, permitting retail betting by "persons physically present" in "a sports wagering lounge located at a casino." The state's four commercial casinos, along with the seven tribal casinos located in the state, all operate in-person sports books. The existing tribal-state compacts expressly permit the tribes to operate any Class III game subsequently legalized by the state. Therefore, no formal amendments to the compacts were necessary to authorize sports wagering; when the state legalized commercial sports betting it

effectively authorized tribal sports betting. These “automatic amendment” provisions allow a tribe to opt to operate the newly legalized game under the “state’s specifications”; this appears, in the case of sports betting, to include state regulations for retail sports wagering (though each tribe’s tribal gaming regulatory authority may be performing some functions, such as licensing, while adhering to the standards in the state regulations).

In 2021, New York authorized mobile sports betting. Under the new law, the server must be physically located on the premises of one of the state’s commercial casinos. This appears to exclude tribes from offering mobile sports wagering under IGRA. However, it allows for the possibility of partnering with a commercial casino, either through a revenue-sharing arrangement with the tribe (operators who enter into such agreements will have an advantage in competing for a license) or to locate the tribe’s server on the casino’s premises. Tribes also are eligible to seek an operator license under state law (that is, as a commercial gaming operator).

An additional issue is how New York’s mobile sports betting law interacts with existing compacts. The law specifies that the wager occurs where the server is located, but tribes have raised the issue of whether state-wide mobile wagering may violate the exclusivity provisions of the compacts.

The New York State Gaming Commission has adopted rules for retail sports wagering. It appears that, per the “automatic amendment” provisions in the compact, tribes likely are operating retail sports betting in accordance with these state rules. The State Commission currently is in the process of developing draft mobile sports wagering regulations as well as a call for applications for mobile platform providers and operators; the target release date for both is July 1, 2021. The state anticipates licensing four platform providers in the state. The goal is to have mobile sports betting operational in time for the 2022 Super Bowl.

Methodology or emerging practices note: Identification of the above issues, the questions they raise, and potential answers, spotlights a number of the current legal and regulatory unknowns for tribal sports betting as well as overall for the developing New York state sports betting market.

2. Tribal Casinos in New York

Tribe (Commercial Partners)	Casino
Oneida Indian Nation (Caesars Entertainment, Scientific Games OpenBet)	Turning Stone Casino Resort Verona, NY Yellow Brick Road Casino Chittenango, NY Point Place Casino Bridgeport, NY
Saint Regis Mohawk Tribe (Stars Group FoxBet, IGT PlaySports)	Akwesasne Mohawk Casino Hogansburg, NY
Seneca Nation of Indians (Kambi, Bragg Gaming Group)	Seneca Buffalo Creek Casino Buffalo, NY Seneca Allegany Casino & Hotel Salamanca, NY Seneca Niagara Casino Niagara Falls, NY

3. New York Tribal-State Compacts: Provisions Relevant to Sports Betting Regulation

Tribal-state compacts for each of tribes operating Class III gaming in New York are available at <https://www.bia.gov/as-ia/oig/gaming-compacts>. While the compacts are not identical, they generally include the same or substantially similar provisions for each tribe.

Permitted Games. Each compact includes an appendix (Appendix A) that lists the Class III games the tribe is permitted to operate at its casino. The compacts include a provision that allows the tribes to operate any new Class III game legalized by the state. These “*automatic amendment*” provisions allow a tribe to opt to operate the newly legalized game under the “*state’s specifications*”; in this case, the game is automatically added to the list of permitted games effective on the date the tribe adopts the state specifications. Alternatively, the tribe may submit its own specifications; the state must accept the tribe’s specifications before the tribe may operate the game. Though the automatic amendment provisions indicate that the new game “shall be added to Appendix A,” it does not appear that such automatic amendments have formally been added to the compacts, thus triggering federal review and approval (under

the Interior Secretary's regulations, amendments to compacts "entered into" by the tribe and state as evidenced by the parties' signatures, are subject to review and approval by the Secretary; see 25 C.F.R. sections 293.2 to 293.4).

Methodology or emerging practices note: An updated Appendix A for any of the compacts is not readily available through web searches, making it challenging for outside parties to know what are the current permitted games and when new games have been added.

State Regulation. New York takes an "active" regulatory role under the compacts, with daily monitoring of tribal gaming operations by onsite state regulators. The compacts specify tribal and state regulatory obligations, and include operating standards and licensing procedures in the appendices. As noted above, it appears that a tribe may opt to operate a newly legalized game, i.e. sports betting, under the state specifications. Although "specifications" is not defined in the compacts, it is used in reference to the description of the permitted games in the compacts' appendix, which include detailed provisions regarding equipment, rules of play, bets and odds, minimum and maximum wagers, etc. It appears, then, that at least similar "specifications" for sports betting, as adopted by the state, apply to tribal sports books. It appears *likely*, though this was *not confirmed*, that *tribes also are adhering to other state regulations for retail sports wagering* (though each tribe's tribal gaming regulatory authority may be performing some functions, such as licensing, while adhering to the standards in the state regulations).

Methodology or emerging practices note: The U.S. General Accounting Office (GAO) conducted a broad analysis in 2015 of Class III gaming regulation. It classified states as having either an "active, moderate, or limited" regulatory role. The categorization of New York as an "active" regulatory regime renders it likely that the state would seek to take a similarly active role in the regulation of tribal sports wagering.

Revenue Sharing. With New York's expansion of legalized gambling, the compacts' revenue-sharing provisions, which guarantee some degree of geographic exclusivity, have come under question. The latest issue is whether New York's 2021 legalization of mobile betting statewide violates the geographic exclusivity promised under the compacts.

Methodology or emerging practices note: The question of the interaction of compact exclusivity and revenue-sharing provisions, especially related to the legalization of mobile sports wagering, is a significant issue as identified, and gives rise to potential long-term issues to be resolved. These in turn impact the certainty of the market environment.

4. Tribal Law & Regulation: Tribal Gaming Ordinance, Tribal Gaming Regulatory Authority

Tribal gaming ordinances for each of tribes operating Class III gaming in New York are available at <https://www.nigc.gov/general-counsel/gaming-ordinances>. *None of the tribes' gaming ordinances speak directly to sports betting*; instead, the ordinances reference the games authorized by the compact.

Oneida Indian Nation: The tribal gaming ordinance available on the NIGC website is the original, adopted in 1994.

The Oneida Indian Nation Gaming Commission (OGC) is comprised of three commissioners, appointed by the Nation Representative (the tribal chief executive) for 4-year terms. The OGC is charged with regulation of all gaming authorized by the tribal gaming ordinance, along with authority to adopt “written standards of operation and management” for gaming, including the “rules of each game of chance” and licensing of gaming employees. The OGC also employs an executive director and 15 gaming inspectors. The OGC’s website is at <https://www.oneidanationgamingcommission.com/>.

Methodology or emerging practices note: The OGC rules and regulations are not readily available through web searches.

Saint Regis Mohawk Tribe: The tribal gaming ordinance available on the NIGC website includes the original, adopted in 1994, as well as multiple amendments, the most recent in 2002.

The Saint Regis Mohawk Tribal Gaming Commission (TGC) is comprised of three commissioners, appointed by the tribal council for 5-year terms. The TGC is charged with regulation of all gaming authorized by the tribal gaming ordinance, along with authority to adopt “written standards of operation and management” for gaming, including the “rules of each game of chance” and licensing of gaming employees. There is a relatively barebones webpage for the TGC at https://www.srmt-nsn.gov/tribal_gaming_commission1.

Methodology or emerging practices note: The TGC rules and regulations are not readily available through web searches.

Seneca Nation of New York: The tribal gaming ordinance available on the NIGC website includes the original, adopted in 1994, as well as multiple amendments, the most recent in 2021.

The Seneca Gaming Authority (SGA) is comprised of three commissioners, appointed by the tribal council for 3-year terms. The SGA has authority to promulgate rules and regulations regarding the conduct of Class III gaming, as well as licensing authority. The SGA also employs a fulltime executive director and other staff. It does not appear that the SGA maintains a web presence. (The Seneca Gaming Corporation, a tribally chartered corporation that operates all of the tribe’s Class III gaming, has a website at <https://senecacasinos.com/>.)

Methodology or emerging practices note: The SGA rules and regulations are not readily available through web searches.

5. State Law & Regulation: Provisions Relevant to Sports Betting Regulation, State Regulatory Authority for Tribal Gaming

The New York State Gaming Commission (NYSGC) was formed in 2013, when New York merged the state Racing and Wagering Board with the state Division of Lottery into a single state agency charged with regulating all aspects of gaming in the state, including Class III tribal gaming. (The compacts, which predate the creation of the NYSGC, sometimes reference the former New York State Racing and Wagering Board.) The NYSGC has an extensive website at <https://www.gaming.ny.gov/>.

The NYSGC has adopted rules for retail sports wagering (9 NYCRR pt. 5329 (New York Codes, Rules & Regulations, Title 9, Chapter IV, Division of Gaming, Subchapter B, Casino Gaming, Part 5329, Sports Wagering, available at [https://www.gaming.ny.gov/pdf/legal/New%20York%20State%20Gaming%20Commission%20rules%20Chapter%20IV,%20Subchapter%20B%20\(Gaming,%20Casino%20Gaming\)%20updated%202021-06.pdf](https://www.gaming.ny.gov/pdf/legal/New%20York%20State%20Gaming%20Commission%20rules%20Chapter%20IV,%20Subchapter%20B%20(Gaming,%20Casino%20Gaming)%20updated%202021-06.pdf)).

It appears that, per the “automatic amendment” provisions in the compact, tribes are operating retail sports betting under these state specifications and likely in accordance with these rules.

The rules include these topics:

PART 5329:	Sports Wagering
5329.1	Definitions
5329.2	Sports pool license petition
5329.3	Term of license and review
5329.4	Vendor licensing
5329.5	Reporting of changes
5329.6	Licensing of individuals

5329.7	Misconduct and improper associations
5329.8	Internal controls
5329.9	Sports wagering lounge
5329.10	Sports pool system requirements
5329.11	Automated ticket machines
5329.12	House rules
5329.13	Wager types
5329.14	Parlay card wagers
5329.15	Layoff wagers
5329.16	Information posting
5329.17	Manner of placing wagers
5329.18	Wagering tickets
5329.19	Wagering restrictions
5329.20	Certain payouts; ticket control
5329.21	Cancellation of wagers
5329.22	Structuring of multiple wagers
5329.23	Patron complaints
5329.24	Operator reserve requirements
5329.25	Prohibited actions
5329.26	Duties to report
5329.27	Sports pool integrity; confidential information
5329.28	Tax
5329.29	Gross gaming revenue reports and reconciliation
5329.30	Accounting and financial records
5329.31	Duties to give evidence
5329.32	Reporting of compliance
5329.33	Review, examination of records
5329.34	Responsible gaming
5329.35	Other regulations apply
5329.36	Suspension, fines, revocation and other discipline

In 2021, New York authorized mobile sports betting. Under the new law, the server must be physically located on the premises of one of the state's commercial casinos. *It does not appear that the new mobile sports betting law will permit tribes to offer mobile wagering for the tribal casino sports books.* Instead, tribes have the option of *partnering with a commercial casino*, either through a revenue-sharing arrangement with the tribe (operators who enter into such agreements will have an advantage in competing for a license) or to locate the tribe's server on

the casino's premises. Tribes also are eligible to seek an operator license under state law (that is, as a commercial gaming operator). All of these options appear to be subject to state law and regulation, rather than IGRA or the tribal-state compacts.

The NYSGC currently is in the process of developing draft mobile sports wagering regulations as well as a request for applications for mobile platform providers and operators; the target release date for both is July 1, 2021. The state anticipates licensing four platform providers in the state; the goal is to have mobile sports betting operational in time for the 2022 Super Bowl. The NYSGC has detailed FAQs regarding the competitive RFA process and other details on its website at <https://www.gaming.ny.gov/pdf/MSW%20FAQ%206.3.21.pdf>.

About the Authors of this Report

Kathryn Rand

Senior Distinguished Fellow at UNLV ICGR; Professor of Law and Co-Director of the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota

Kathryn Rand is Professor of Law and Co-Director of the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota. In spring 2022, she will be the Inaugural Visiting Professor in Indian Nations Gaming & Governance at the Boyd School of Law at the University of Nevada, Las Vegas (UNLV), where she also is Senior Distinguished Fellow in Tribal Gaming at the International Center for Gaming Regulation (ICGR). At UND, the Tribal Gaming Institute is the first university research center dedicated to advancing knowledge and understanding of Indian gaming. With Institute Co-Director Steve Light (UND College of Business & Public Administration), Rand has published and presented extensively on the law, policy, regulation, and socioeconomic impacts of gaming. Their most recent book is *INDIAN GAMING LAW: CASES AND MATERIALS*, 2d ed. (2019). Rand serves on the Editorial Board of the *Gaming Law Review*, is Vice President for Educator Members of the International Masters of Gaming Law, and is a member of the American Bar Association Business Law Section's Gaming Law Committee. She has been quoted extensively in such media as the *New York Times*, *Washington Post*, *NPR*, and *Indian Country Today*.

Steven Light

Senior Distinguished Fellow at UNLV ICGR; Professor of Political Science and Public Administration and Co-Director of the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota

Steve Light is Professor of Political Science and Public Administration and Co-Director of the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota. In spring 2022, he will be the Inaugural Visiting Professor in Indian Nations Gaming & Governance at the Boyd School of Law at the University of Nevada, Las Vegas (UNLV), where he also is Senior Distinguished Fellow in Tribal Gaming at the International Center for Gaming Regulation (ICGR). At UND, the Tribal Gaming Institute is the first university research center dedicated to advancing knowledge and understanding of Indian gaming. With Institute Co-Director Kathryn Rand (UND School of Law), Light has published and presented extensively on the law, policy, regulation, and socioeconomic impacts of gaming. Their most recent book is *INDIAN GAMING LAW: CASES AND MATERIALS*, 2d ed. (2019). Light serves on the Editorial Board of the *Gaming Law Review* and is a member of the International Masters of Gaming Law and the American Bar Association Business Law Section's Gaming Law Committee. He has been quoted extensively in such media as the *New York Times*, *Washington Post*, *Wall Street Journal*, and *Indian Country Today*.