



## Indian Law

### SEMINAR ON DOING SUCCESSFUL BUSINESS ON INDIAN RESERVATIONS

#### "How To Do Successful Business in Indian Country"

#### For Energy and Mineral Resource Companies Engaged or Contemplating Project Development on Indian Reservations

The law firm of Van Ness Feldman offers a one-day legal seminar, *"How To Do Successful Business in Indian Country"* for businesses in the energy and minerals sector that are contemplating energy development on Indian lands, are seeking rights-of-ways, permits, or leases on Indian reservations, are seeking to relicense a facility where a tribe is an interested party, or have other business dealings with Indian tribes.

The seminar provides a basic overview of Indian law, including the scope of tribal sovereignty and tribal jurisdiction, tribal environmental laws, Tribal Employment Rights Officess (TERO), Native American Graves Protection and Repatriation Act (NAGPRA) and the role of the Bureau of Indian Affairs (BIA). This will be followed by a practical and company-specific discussion of ways to approach negotiations with tribes and ways to find common ground so that projects can move forward and all parties can benefit.

The attorneys at Van Ness Feldman have represented both energy sector firms in negotiating with tribes and assisted tribes in negotiating with energy companies. In both situations, the firm's focus has been on assisting our clients enter into beneficial business relationships based on mutual respect and a full understanding of each party's needs, rights, and responsibilities. Our focus is on helping our clients get deals done and make business happen. Bringing together its 30 years of experience working with energy companies and tribes, the firm has prepared a training program that will provide energy company personnel with a full background on Indian law along with practical advice and creative approaches for negotiating with tribes that can help the company to find common ground and avoid ending up in the kind of confrontational position that is not conducive to successful long-term business relationships.

The training program focuses on achieving three objectives:

- On the most basic level, it provides a structured course that provides representatives of energy firms with a comprehensive understanding of the unique legal structure that regulates doing business on reservations, including the structure and authority of tribal governments and the role of the Bureau of Indian Affairs in regulating business activities on reservations. It will focus on those aspects of tribal government activity that most directly impact companies doing business on reservations, such as the roles and authorities of a Tribal Employment Rights Office and new tribal authority to grant environmental approvals.
- Secondly, tribes are changing their priorities when negotiating with energy sector businesses coming on their reservations. For example, more and more tribes are moving from being passive rights-of-way lessors or royalty holders to seeking ownership interests and a more active involvement in the business. The second purpose of the course is to assist energy companies, even those that have had extensive dealings with tribes in the past, to understand the changing dynamics, so they can approach tribes in ways that are more responsive to the tribes' present thinking.
- Third, Van Ness Feldman's experience is that a confrontational approach when dealing with tribes is neither necessary nor conducive to a successful long-term business relationship. Having worked for both sides, the firm has a greater ability to understand the other side's position and find ways to be responsive to the tribes, while still promoting the business needs of the energy companies. Therefore, a third goal of the training program is to use this experience to assist energy companies develop tools for finding common ground when negotiating with tribes.

The course will be tailored to the specific business area of the company. For example, for oil and gas developers, the training will emphasize planning for the possible location of human remains and leasing of reservation land; for pipeline or transmission companies, the training will have sections devoted to the laws and regulations regulating rights-of-ways across Indian land; for hydro companies the training will have sections devoted to Indian water rights; for companies seeking sites for generation it will focus on leasing of reservation land.

---

#### **OUTLINE OF NATIVE AMERICAN LAW TRAINING COURSE**

- 1) Overview of the Goals of the Course – Providing a legal foundation to assist the Company find common ground when engaging in business activities with Indian Tribes.
- 2) “The Past is Prologue” – A brief history of Federal Indian Policy –
  - a) The Treaty Period (1750-1871)
  - b) The Reservation Era (1850-1887)
  - c) The Allotment Era (1887-1934)
  - d) The New Deal – The Indian Reorganization Act (1934-1953)
  - e) The Termination Era (1953-1975)
  - f) The Self-Determination Era (1975-present)
- 3) Tribal Governments – Powers and Structure –
  - a) The authority of tribal governments and tribal courts on their reservations
    - i) Sources of tribal power

- ii) Authority over Indians
    - iii) Authority over non-Indians
  - b) Taxation – Tribal authority, state authority and the issue of dual taxation
  - c) Tribal Sovereign Immunity
  - d) The structure and operation of tribal governments – legislative, executive and judicial branches
  - e) The Government-to-Government relationship between the United States and Tribal governments
    - i) Relationships with Congress
    - ii) Relationships with Executive Branch
  - f) Self-Determination – Tribes’ assumption of responsibility for programs formerly administered by the Bureau of Indian Affairs
  - g) Sources of Funding for the Operation of Tribal Governments
  - h) Tribal Regulation of Labor Related Matters by Private Employers on Reservations
    - i) Tribal Employment Rights Offices (TEROs)
    - ii) Indian Preference in employment and contracting
    - iii) Employment discrimination based on gender, religion, age and handicap – respective authorities of the tribe, EEOC and state Human Rights Agencies
    - iv) Respective authority of tribe and OSHA over occupational safety and health on the reservation
    - v) Regulation of collective bargaining activity on reservations – tribal versus NLRB authority
- 4) Tribally-owned business enterprises
  - a) Different structures tribes use to own and operate businesses
  - b) Sovereign immunity of tribal businesses and approaches a business partner of a tribal enterprise can take to insure its agreements are enforceable
  - c) Special procurement rights of tribal businesses under the SBA 8(a) program, the Buy-Indian Act and other authorities
- 5) Tribal-State Relationship –
  - a) Limits on State authority over Indians on their reservations
  - b) Scope of State authority over non-Indians on reservations
  - c) Tribal versus State taxation of business activity on reservations
- 6) Reservation Land
  - a) The different kinds of land status on reservations

- b) The Federal trust responsibility over tribal and Indian trust land
  - i) The ramifications of the trust status of Indian land
  - ii) The roles and responsibilities of the Bureau of Indian Affairs (BIA)
- c) The dominant role of the Tribe in negotiating uses of tribal land
- d) The dominant role of the BIA in negotiating uses of individual Indian-owned allotted land
- e) The BIA land records and appraisal systems
- f) Traditional land use systems found on certain reservations such as Navajo.
- g) The *Cobell* case – the class action law suit alleging BIA mismanagement of Indian trust funds and assets.

7) Mineral Development on Reservations

- a) Obtaining leases and environmental permits for coal and non-coal minerals, including coalbed methane.
- b) Rentals and royalty issues
- c) Obtaining Rights-of-Ways across tribal and individual Indian-owned land and the Section 1813 controversy regarding rights of ways across Indian-owned land
- d) Obtaining business site leasing for facilities engaged in the processing of minerals, electric generation, and similar activities.
- e) The Indian Minerals Development Act, Tribes' growing interest in having ownership interests rather than lease or royalty interests in Reservation energy projects, and model approaches for partnership development agreements with Tribes
- f) Resource development conflicts
- g) Taxation concerns
- h) Tribal water rights

8) Application of Federal Environmental laws on Indian Reservations

- a) General principles – Federal environmental laws apply on reservations, so that EPA, not the State, has primary enforcement responsibility
- b) Tribal Treatment-as-State Authority – Tribal authority to assume delegated responsibility for enforcing the Clean Air and Clean Water Acts
- c) Tribal Energy Resource Agreements – Tribal authority to assume NEPA compliance authority for energy projects on reservations
- d) Native American Graves Protection and Repatriation Act (NAGPRA)
- e) Section 106 National Historical Preservation Act Consultations, and related laws

9) Alaska Natives

- a) Alaska Native Claims Settlement Act of 1971
  - i) Land Settlement – Fee Land

- ii) Alaska Native Regional Corporations
- iii) Alaska Native Village Corporations
- b) Alaska Native Tribes and Tribal Organizations
  - i) IRAs or Traditional Councils
  - ii) No Land Base
- c) No “Indian Country” in Alaska
  - i) Venetie Case
  - ii) Exceptions – Metlakatla Indian Reservation; Native Allotments