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Atty Gains Deeper View Of Trust Land Pitfalls As Tribal Leader

By **Andrew Westney**

Law360 (May 26, 2020, 12:06 PM EDT) -- The Ione Band of Miwok Indians has finally succeeded in its yearslong, heavily litigated bid to have the federal government take the California tribe's land into trust for a casino project, but Ione Band Chairperson and Kaplan Kirsch & Rockwell LLP partner Sara Dutschke Setshwaelo's immersion in that process showed just how difficult, expensive and uncertain it can be, she told Law360 in an exclusive interview.

Almost 20 years after asking the government to take 228 acres of land in Plymouth, California, into trust for the tribe, and nearly eight years after the U.S. Department of the Interior agreed to do so, the government at last moved the land into trust in March — a "game-changer for us," said Dutschke Setshwaelo, chairperson since 2018 of the roughly 750-member Ione Band.

"We have not been able to engage in significant economic development activities simply because we have a lack of resources to engage in those activities, and lack of a land base to do it," said Dutschke Setshwaelo, whose tribe wasn't federally recognized until 1994.

"Having a land base to call our own really changes things fundamentally when it comes to the exercise of our sovereign jurisdiction and our investment in the tribe itself and that community," she added. "Myself as well as other members of the tribe have listened to our grandparents and great-grandparents talk about their efforts to secure a homeland for the tribe, a land base for the tribe, recognition of the tribe, and literally, this has taken over 100 years."

And while Dutschke Setshwaelo has long dealt with other tribes' land-into-trust issues as a partner in Kaplan Kirsch & Rockwell's San Francisco office and for almost a decade previously with Dentons, leading her own tribe's efforts has given her a greater appreciation of the difficulties that entails, she said.

"As attorneys working for our tribal clients, a lot of those issues are already vetted before we're tasked with assisting on a fee-to-trust process," including finding the right piece of land to acquire to begin with, she said.

And she "underestimated" just how political the whole process can be, which "injects a level of uncertainty" that makes it much harder for a tribe to pursue its economic development plans, Dutschke Setshwaelo said.

"I can't have somebody on a plane going to Washington to lobby for us every month," she said. "And to the extent we've had lobbyists, they've been grand, but it's been for short periods of time."

"Regardless of who's on what side [politically], just the fact that's a necessary part of this process makes it even more difficult, especially for tribes with extremely limited resources," Dutschke Setshwaelo said.

The Ione (pronounced "eye-own") Band won approval for its trust application from the DOI for its Plymouth land — some 45 miles east of Sacramento — in May 2012, but soon saw a court challenge from Amador County and two advocacy groups.

The DOI's decision came just months before a change in departmental regulations that allowed tribes to have land taken into trust before dealing with any litigation challenges, according to Dutschke Setshwaelo, and "that really put us at a disadvantage" in attracting partners to the planned casino project.

So the tribe faced several more years dealing with the litigation, culminating in an **October 2017 ruling by a Ninth Circuit panel** that the DOI didn't violate the Indian Reorganization Act or the Indian Gaming Regulatory Act in approving the land-into-trust request.

And the stage was finally set for the land transfer to be made when the U.S. Supreme Court late in 2018 **rebuffed the county's petition** to hear the case. The county had claimed that the Ione Band didn't qualify to have its land taken into trust under the Supreme Court's 2009 decision in **Carciere v. Salazar**, which interpreted the IRA as requiring tribes to show they were under federal jurisdiction at the time the law was enacted in 1934.

The case illustrates the especially long road tribes recognized after 1934 may have to travel, and Dutschke Setshwaelo said she'd still like to see a congressional "Carciere fix" to make all federally recognized tribes eligible to have land taken into trust.

"We're spending a lot of time, energy and resources arguing about an issue that we really shouldn't be arguing about," she said, adding that she doesn't know if a fix is likely to happen in the current political climate.

While the tribe has finally seen its land taken into trust, "it was a really long, painful process," and "did damage to our relationships with partners who wanted to work with us," she said.

Now the tribe can feel secure its land is protected, she said, despite another pending suit in California federal court challenging the 2012 DOI decision and the National Indian Gaming Commission's approval of the tribe's gaming ordinance.

"I think we should expect further challenges as we move forward, but at least we made it over the biggest hurdle, which is, alongside the United States, defending the record of decision not just to acquire land into trust for the tribe, but that the tribe is in fact a real tribe, and eligible to have land acquired in trust for it under the IRA," Dutschke Setshwaelo said.

It was "bittersweet" for the tribe to finally have its land taken into trust just as the coronavirus pandemic hit, but amid the crisis the land acquisition "did bring a good deal of joy to the membership," she said.

The pandemic also makes it difficult to move forward with the tribe's casino plans, after a longtime development partner had to pull out, and it's now an "all-in process seeking a new partner," Dutschke Setshwaelo said.

And in that light, the land transfer marks an "important milestone" that potential partners

can see — as well as showing tribes that may be struggling with the same land-into-trust problems that they can be overcome, she said.

--Editing by Katherine Rautenberg and Alyssa Miller.

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