No. S238544

IN THE

SUPREME COURT OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff and Appellant,

v.

EDMUND G. BROWN, JR., as Governor,

Defendant and Respondent.

Third Appellate District, No. C075126
Sacramento County Super. Court, No. 34-2013-80001412 CUWMGDS
Hon. Eugene Balonon, Judge

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-RESPONDENT

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APPLICATION TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-RESPONDENT EDMUND G. BROWN, JR.

The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California (Estom Yumeka or Tribe) applies for leave to file the attached brief as amicus curiae in support of Defendant and Respondent Edmund G. Brown, Jr., Governor of California. (Cal. Rules of Court, rule 8.520.)

Estom Yumeka is a federally-recognized, sovereign Indian tribe with a unique interest and position in this matter. In 1965, the United States transferred the Tribe's only usable land to the State of California to be used in the construction of the California State Water Project. Neither the State nor the United States ever provided any replacement land. For decades, this taking left Estom Yumeka without a viable land base and its citizens in poverty. Beginning in the early 2000s, the Tribe sought to address these issues by acquiring new land and developing a casino there as authorized by the federal Indian Gaming Regulatory Act (IGRA). Specifically, Estom Yumeka sought determination under 25 U.S.C. § 2719(b)(1)(A), which authorizes casino gaming on newly-acquired tribal trust land if (i) the Secretary of the Interior (Secretary) determines that gaming is in the best interest of the applicant tribe and would not be detrimental to the surrounding community; and (ii) the Governor of the state in which the land is located

concurs in those determinations. In Indian law practice, this is often called a two-part determination. After a careful, decade-long review process involving more than 15,000 pages of economic and environmental studies, numerous opportunities for public and agency comments, and consultations with nearby state, local and tribal governments, the Secretary determined that Estom Yumeka's proposed gaming project met the two-part requirements. The Governor concurred in the Secretary's determination. That is the concurrence at issue in this case.

Estom Yumeka has reviewed the briefing in the Court of Appeal, the decision of the Court of Appeal, the papers filed in connection with the petition for review, and the parties' briefs in this court. The Tribe is familiar with the issues and believes that it can assist the court by providing an important perspective on (i) the facts underlying the Governor's concurrence in the two-part determination here at issue; (ii) elements of California gaming law and policy that have not been emphasized by either party; (iii) the importance of harmonizing state and federal law addressing tribal gaming; and (iv) errors in petitioner's analysis of the Governor's implied authority to concur in a two-part determination.

No party or counsel of any party has authored Estom Yumeka's proposed amicus curiae brief in whole or in part. Nor has any party or counsel for any party made a monetary

contribution intended to fund the preparation or submission of the brief.

Respectfully submitted,
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PROPOSED *AMICUS CURIAE* BRIEF OF THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA

I. Introduction.

The Court of Appeal got it right. Its unanimous decision follows settled law and policy in holding that the Governor had inherent executive power to concur in an IGRA two-part determination for Estom Yumeka. The contrary allegations of petitioner United Auburn Indian Community of the Auburn Rancheria (United Auburn) do not withstand scrutiny. Part II, *post*, reviews the facts underlying the Governor's concurrence and shows that the Governor neither created a new state gaming policy nor prevented citizens and their elected officials from having a say in the two-part determination process. Part III.A, *post*, identifies case law that has not been addressed by either party but nonetheless confirms the Governor's inherent executive concurrence power. Part III.B, *post*, addresses the importance of harmonizing state and federal law in the field of Indian gaming and explains why adopting United Auburn's position would destroy that harmony. And Part IV, *post*, shows that even if concurrence were not an inherent executive power, it would fit comfortably within the Governor's implied authority. For each of these reasons, the judgment of the Court of Appeal should be upheld.

II. Additional Facts Bearing on the Governor's Concurrence.

The parties have focused their factual summaries on the specific actions by which the Governor's concurrence was issued and challenged. (Appellant's Opening Brief on the Merits (AOBM) pp. 13–15; Respondent's Answer Brief on the Merits (RABM) pp. 17–20.) But the Governor's act of concurrence is a comparatively small part of a much larger regulatory process involving cooperative decision-making among Estom Yumeka, the United States, the State of California, and local governments. And because United Auburn's claims attack the Governor's role in that larger process, a wider factual lens may be helpful in placing the concurrence in its proper context.

A. The Estom Yumeka Maidu Tribe.

Estom Yumeka is a federally-recognized Indian tribe whose Maidu ancestors have lived for thousands of years near the Feather River, an area of California that includes modern-day Yuba County. During the Gold Rush, settlers killed or enslaved the vast majority of the Tribe's ancestors. The overall Maidu population was reduced from 8,000 to 900, with the survivors forced into hiding in the most remote and inhospitable corners of the Feather River basin.

In an effort to remedy this situation, the United States acquired two 40-acre parcels of land for Estom Yumeka. One parcel, known as Enterprise 1 (after an old mining camp

nearby), turned out to be a steep, remote hillside that could not accommodate Estom Yumeka's housing and economic development needs. The other parcel, known as Enterprise 2, was more suitable for those purposes. Both parcels were supposed to be held in trust for the Tribe's perpetual use and benefit.

In 1965, however, the United States transferred Enterprise 2—Estom Yumeka's only serviceable land—to the State of California for use in the construction of the California State Water Project. Members of the Tribe lost their land, their homes, and their community. Today Enterprise 2 is submerged beneath a man-made body of water known as Lake Oroville, the second-largest reservoir in California.

Upon taking Enterprise 2 from Estom Yumeka, the United States provided a small reimbursement to four Tribal citizens. Others received no compensation. Nor did the Tribe itself receive any compensation or replacement land from the United States or the State of California.

The loss of Enterprise 2 left Estom Yumeka without a land base from which to pursue economic opportunities capable of funding essential government services. As a result, the Tribe's 900 citizens have had few educational opportunities, suffer high rates of unemployment and poverty, and are disproportionately reliant on state and federal assistance programs. More than 50% of Estom

Yumeka's labor force either is unemployed or earns less than $10,000 per year.

B. Estom Yumeka's Casino Project.

Congress enacted IGRA to help address these very problems. The stated purposes of the statute include providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." (25 U.S.C. § 2702(1).)

Consistent with IGRA, Estom Yumeka sought to develop a casino gaming project and pursue economic self-sufficiency. In 2002, the Tribe acquired rights to a 40-acre property within its aboriginal territory in Yuba County (Yuba Site). The Yuba Site is well-suited for development. Among other things, it is near an existing 20,000-seat concert venue and within a 900-acre "Sports and Entertainment" zoning area established by the voters of Yuba County. The County has confirmed that Estom Yumeka's proposed construction of a casino at the Yuba Site is consistent with County land-use plans and zoning.

Estom Yumeka's development plans require that the Yuba Site be transferred from private fee ownership into federal trust for the Tribe. Recognizing that the fee-to-trust transfer will prevent Yuba County from collecting the taxes, development fees, and mitigation funds that would normally

apply to a development project on private fee land, Estom Yumeka has agreed to a schedule of "in-lieu" tax and fee payments that will compensate the County for the lost amounts. These payments are memorialized in a negotiated Memorandum of Understanding between Estom Yumeka and the County.

C. The Two-Part Determination.

The Tribe sought a two-part determination under 25 U.S.C. § 2719(b)(1)(A), a provision of IGRA which authorizes gaming on newly-acquired tribal trust land if (i) the Secretary determines that gaming is in the best interest of the applicant tribe and would not be detrimental to the surrounding community; and (ii) the governor of the state in which the land is located concurs in the Secretary's determination.

The Secretary undertook a careful review process lasting nearly a decade, which included preparation of—and multiple rounds of public and agency comments on—more than 15,000 pages of economic and environmental studies. As part of that process, the Secretary specially consulted with officials of nearby State, local, and tribal governments. (*See* 25 U.S.C. §2719(b)(1)(A).)

Among other things, the studies, comments, and consultations demonstrated that Estom Yumeka's proposed casino project would (i) create 1,300 construction jobs and

more than 1,900 permanent jobs; (ii) generate substantial revenues for non-tribal businesses and governments in the surrounding area; (iii) allow Estom Yumeka to provide housing, education, and employment assistance to its citizens; (iv) have no significant environmental impacts; and (v) not have a detrimental impact on the surrounding community. After carefully reviewing the studies, the comments thereon, and the results of the consultation process, the Secretary determined that Estom Yumeka (and the Yuba Site) met the two-part requirements. That determination is memorialized in a detailed 70-page Record of Decision explicitly explaining the roles and positions of local and state agencies.

Following a year-long review of his own, the Governor concurred in the Secretary's determination. In issuing his concurrence, the Governor noted that (i) the two-part process was exceptionally thorough; (ii) Estom Yumeka faces significant economic hardship; (iii) the Project will create needed employment in Yuba County, which suffers from high unemployment; (iv) the Project is consistent with a voter-approved County zoning ordinance; (v) the Project will not be located within a major metropolitan area; and (vi) Estom Yumeka has a significant historical connection to the Yuba Site.

Thus, contrary to United Auburn's suggestion, the Governor's concurrence did not establish a new policy

permitting "casinos in downtown San Francisco or Los Angeles." (AOBM p. 8.) Nor did it prevent citizens or their elected officials from having a say in whether and how Estom Yumeka's project is allowed to proceed at the Yuba Site. The Governor simply discharged his limited responsibility—concur or do not concur in the determination of the Secretary—under IGRA. As explained *post*, nothing in the California Constitution prevented him from doing so.

III. Concurrence Lies Within the Governor's Inherent Executive Power.

In 2002, United Auburn acquired gaming-eligible land in Placer County, outside the boundaries of its original reservation, where it operates one of the nation's largest and most profitable tribal casinos. During the administrative process described *ante*, Auburn expressed several concerns about Estom Yumeka's request for a two-part determination. But those concerns focused on the possibility that Estom Yumeka might one day become an economic competitor, not on the role of the Governor. Indeed, United Auburn's written comments on the proposed two-part determination explicitly acknowledged the Governor's concurrence power.[1]

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[1] For example, a 2009, comment letter describes the two-part determination as follows: "The Secretary must complete a two-part determination...[and] the Governor of California must concur in the determination of the Secretary." United Auburn repeated statements like this one throughout the administrative process.

After the two-part process was complete, however, United Auburn dressed up its commercial concerns in constitutional clothing. It filed a petition for writ of mandate and complaint for injunctive relief alleging that the Governor's concurrence violates the separation of powers doctrine. The superior court rejected United Auburn's contention and sustained the Governor's demurrer. The Court of Appeal unanimously affirmed, holding that the Governor's concurrence is "in the nature of an executive act" and falls within his inherent executive authority "because it involves the implementation of California's existing Indian gaming policy." (*United Auburn Indian Community v. Brown* (2016) 4 Cal.App.5th 36, 51, review granted Jan. 25, 2017, No. S238544.)

United Auburn has proposed just one basis for reversing the Court of Appeal's holding that the Governor has inherent executive authority to concur:[2] In Auburn's view, concurrence cannot be an executive matter of policy implementation because the California Constitution

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[2] Auburn's remaining arguments focus on (i) whether the Governor's power to negotiate and execute tribal-state gaming compacts includes an implied power to concur in a two-part determination (AOBM pp. 18–23, 27–33); and, if so, (ii) whether the Governor has the power to negotiate such a compact for gaming on lands which have not yet been taken into tribal trust (AOBM 33-35). The court need not reach either issue because the Governor's concurrence power falls within his inherent executive authority.

establishes "a broad and far-reaching prohibition on gaming" which cannot be lifted by the Governor. (AOBM p. 24.) This view must be rejected for each of two independent reasons. *First*, the California Constitution does not, in fact, establish a policy broadly prohibiting tribal gaming. (Part III.A, *post.*) *Second*, Auburn's proposed construction of California gaming policy is contrary to the well-established interpretive rule requiring that state law be construed in harmony with federal requirements so as to avoid preemption. (Part III.B, *post.*)

A. California Gaming Policy Does Not Prohibit Class III Gaming On Tribal Lands.

United Auburn's position on the question of inherent executive authority is premised on the notion that California Constitution, article IV, section 19 establishes a general policy against gaming. (AOBM pp. 24–25.) That premise is inaccurate. Settled case law confirms that California gaming policy does not prohibit gaming on tribal lands.

The issue was squarely addressed in *Artichoke Joe's Cal. Grand Casino v. Norton* (9th Cir. 2003) 353 F.3d 712, a decision not addressed by either party. There, a group of non-tribal card rooms challenged the validity of certain gaming compacts between the State of California and several Indian tribes. (*Artichoke Joe's,* 353 F.3d at pp. 718-719.) The card rooms alleged the challenged compacts violated 25 U.S.C. §2710(d)(1)(b), a section of IGRA providing, in part,

that Class III gaming "shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purposes by any person, organization, or entity. " (*Id.* at pp. 718–19.) The Ninth Circuit rejected that contention, explaining that California Constitution, article IV, section 19 subdivision (f) "explicitly states that slot machines, lottery games, and banking and percentage card games *are hereby permitted* to be conducted and operated on tribal lands" within the boundaries of the State, subject to IGRA's compacting requirements. (*Id.* at p. 721 [court's emphasis].) In other words, California gaming policy does not prohibit—and in fact *permits*—gaming on tribal lands like the Yuba Site.

B. United Auburn's Proposed Construction of California Gaming Policy Cannot Be Harmonized with IGRA.

Whenever possible, state law and policy should be construed in harmony with federal law so as to avoid preemption. (*Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 231, citing *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93.) That interpretive rule is especially relevant in cases involving Indian gaming. The Indian Commerce Clause gives Congress plenary power over all Indian affairs, including gaming. (U.S. Const., art. I, § 8, cl. 3.) Congress has declared that IGRA is "an explicit preemption of the field of gaming in

Indian Country." (Sen. Rep. No. 100-446, 2d. Sess., p. 36 (1988).) Case law agrees. (*See Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1424–1427 [confirming that IGRA fully occupies the field and citing authorities].) And the United States Supreme Court has held that California has no other regulatory authority over gaming on tribal lands. (*California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202, 207–208.) Thus, any disputed provisions of the state's gaming policy should be interpreted in a manner that harmonizes them with IGRA.

Auburn interprets California gaming policy as a strict prohibition on the Governor's ability to concur in a two-part determination, and alleges that the prohibition can only be amended (or "lifted") by the Legislature. (AOBM pp. 24–25, 27–33.) This interpretation simply cannot be harmonized with the plain language and legislative history of IGRA.

IGRA clearly states Congress's intent that Indian tribes be permitted to game on newly-acquired trust land if it is in the interest of the tribe and not detrimental to the surrounding community. (25 U.S.C. § 2719(b)(1)(A).) The statute is equally clear that such gaming can occur upon concurrence by "the Governor of the State." (*Ibid.*) Indeed, "the Governor of the State" is the *only* state official with a role in the two-part process. (*Ibid.*)

The legislative history of the two-part determination confirms Congressional intent to authorize gaming upon concurrence by the Governor. Early, unadopted versions of IGRA would have required additional concurrence by state legislatures (as well as local officials).[3] Congress declined to adopt that requirement, and the final version of IGRA identifies the Governor—and the Governor alone—as the concurring party. (25 U.S.C. § 2719(b)(1)(A).)

Also important is the distinction between the provisions of IGRA establishing the two-part determination process and those establishing requirements for Class III tribal-state gaming compacts. As explained *ante*, the former expressly assign concurrence to "the Governor of the State." (25 U.S.C. § 2719(b)(1)(A).) The latter delegate a regulatory

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[3] At the end of the 99th Congress, both the Senate and House versions of the proposed IGRA explicitly included a role for State legislatures and local officials in the two-part process: "Subsection (a) shall not apply if the Indian tribe in question acquisition of such lands in trust obtains the concurrence of the Governor of the State, *the State legislature, and the governing bodies of the county and municipality in which such lands are located.*" (H.R. No. 1920, 99th Cong., 2d Sess., § 3, p. 3 (1986); Sen. No. 902, 99th Cong., 2d Sess. (1985) [emphasis added]; *see also* Remarks of Sen. Andrews, 132 Cong. Rec. S15385-90 (daily ed. Oct. 6, 1986) [explaining status of S. 902 at the close of the 99th Congress].) Neither bill was enacted. Instead, the 100th Congress passed, and the President signed, a version of IGRA limiting concurrence to "the Governor of the State." (25 U.S.C. 2719(b)(1)(A).).

role to "the State" and incorporate "state laws and regulations," thereby implicating state legislatures. (25 U.S.C. § 2710(d)(5).) There is no such reference to state laws and regulations in the two-part determination provision. (*See* 25 U.S.C. § 2719(b)(1)(A).)

United Auburn's proposed construction of state gaming policy cannot be harmonized with this statutory scheme. By prohibiting the Governor from concurring absent legislative approval, it would preclude that which Congress has explicitly authorized and establish requirements Congress expressly refused to impose. Thus, it is fundamentally contrary to the language, purpose, and structure of federal law.[4]

In contrast, the Court of Appeal's holding that concurrence falls within the Governor's inherent executive authority is in harmony with both the plain language and the legislative history of IGRA. The holding is consistent with explicit statutory language authorizing gaming, pursuant to a two-part determination, upon concurrence by the Governor. It is compatible with statutory language and clear Congressional intent assigning the concurrence role to the Governor. And it accords with Congress's decision not to require concurrence by state legislatures. Therefore,

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[4] Nothing in this analysis would prohibit the Governor from refusing to concur in cases where the facts do not justify concurrence. But that situation is not presented here.

pursuant to the interpretive rule favoring harmony with federal law, the Court of Appeal should be affirmed.

IV. Even If Concurrence Were Not an Inherent Executive Power, It Would Fall Within the Governor's Implied Authority.

Because concurrence lies within the Governor's inherent executive power, the court need not reach Auburn's alternative contentions regarding implied authority. (AOBM pp. 18–23, 25–26.) Estom Yumeka addresses the issue here primarily out of concern that it has been briefed unfairly and developed insufficiently.

The question is whether the Governor's powers to negotiate tribal-state gaming compacts implicitly authorize concurrence in a two-part determination. United Auburn gave the issue cursory treatment in its opening brief. (AOBM pp. 20–21.) The Governor explained his office's implied power thoroughly but succinctly. (RABM pp. 25–30.) United Auburn then used the advantage of the final brief to argue new matter, citing Court of Appeal cases never before discussed in this appeal. (Appellant's Reply Brief on the Merits (ARBM) pp. 8–24.) The ARBM must not stand as the last word.

IGRA divides Indian gaming into three classes. Class III gaming—which includes slot machines, blackjack, and other games proposed to be provided in Estom Yumeka's casino—is lawful if conducted (i) on Indian lands located in a

state that "permits such gaming" and (ii) pursuant to a tribal-state compact or alternative procedures prescribed by the Secretary. (25 U.S.C. §§ 2710(d)(1), 2710(d)(7)(B)(vii).) As explained *ante*, California is a state that "permits such gaming." (*See* part III.A, *ante*; Cal. Const., art. IV, § 19, subd. (f).) When a tribe intends to enter into Class III gaming, California must negotiate a tribal-state compact in good faith. (25 U.S.C. § 2710(d)(3)(A).)

It is beyond dispute that California Constitution, article IV, section 19, subdivision (f) provides the Governor with express power to conduct such negotiations "in accordance with federal law." The constitutional language confirming that power applies to any Class III gaming that is or will be conducted on "Indian lands," without imposing any limitation on the location or date of acquisition of such lands. (*Ibid.*). Thus, the Governor's compacting power applies both to newly acquired tribal land and to tribal land held since before IGRA's enactment.

The Governor avows that the power to concur in a two-part determination of gaming eligibility for newly acquired land is implicit in the power to negotiate a compact for gaming on the same land "in accordance with federal law." (RABM pp. 25–30, quoting Cal. Const., art. IV, § 19, subd. (f).) Estom Yumeka agrees. Concurrence is but one step in the process by which a tribal-state gaming compact addresses Class III gaming on newly acquired trust land.

Accordingly, common sense dictates that concurrence must be necessary and incidental to the Governor's compacting authority.[5] But United Auburn spends 17 pages searching for authority to overcome common sense, so rebuttal is appropriate.

A. United Auburn Proposes the Wrong Test for Analyzing Implied Governmental Powers.

United Auburn's argument (ARBM pp. 8–14) hangs on Court of Appeal cases addressing implied statutory terms rather than implied governmental powers. This erroneous approach undermines all of its contentions.

Auburn's treatment of *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429 (*Woodland*) illustrates the error. (*See* ARBM p. 9.) In *Woodland*, a teacher alleged that a statute authorizing dismissal for " '[p]ersistent violation of or refusal to obey the school laws . . .' " implied a requirement of warning and progressive discipline. (*Woodland*, 2 Cal.App.4th at p. 1450.) The Court of Appeal rejected the

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[5] *Keweenaw Bay Indian Community v. United States* (6th Cir. 1998) 136 F.3d 469, cited by United Auburn at AOBM page 20 and ARBM pages 10–11, is not contrary to common sense or to the Governor's position. It correctly holds that in order to engage in Class III gaming pursuant to the two-part determination process, both a two-part determination and a compact are required (136 F.3d at p. 476). But that does not mean the process of achieving the two requirements must be conceptually bifurcated in the California Constitution.

argument to imply terms into the statute. (*Id.* at p. 1451.) In so holding, it cited, quoted, and added emphasis to the test for implying language into a statute that is set forth in volume 2B, section 55.03 of the 1992 (fifth) edition of Sutherland Statutes and Statutory Construction (Sutherland Treatise).[6] (*Ibid.*) That standard includes the following statement: " ' "*A necessary implication within the meaning of the law is one that is so strong in its probability that the contrary thereof cannot reasonably be supposed.*" ' " (*Ibid.*, italics by *Woodland* court.) This language remains in the current version of the Sutherland Treatise. (2B Singer & Singer, Sutherland Statutes and Statutory Construction (7th ed. 2014) § 55.03, p. 453.)

Estom Yumeka does not suggest any error in *Woodland*, *supra*, 2 Cal.App.4th 1429. The problem is that United Auburn has argued for the application of *Woodland*—and, with it, the Sutherland Treatise test for implying terms in a statute—even though the Sutherland Treatise states a different test for determining implied powers. And it has done so without disclosing the existence or substance of the Sutherland Treatise's clear distinction between the two standards.

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[6] The Court of Appeal explicitly recognized the Sutherland Treatise as providing the " 'usual standard used to interpret a statute by implication or inference. . . .' " (*Woodland*, 2 Cal.App.4th at p. 1451.)

Both in 1992 and today, the Sutherland Treatise states a specific standard for determining a governmental body's implied powers to effectuate a statute. (2B Singer, Sutherland Statutes and Statutory Construction, *supra*, § 55.04, pp. 283–286; 2B Singer & Singer, *supra*, § 55:4, pp. 457–462.) The standard is as follows: "A statute which confers powers or duties in general terms includes by implication all powers and duties incidental and necessary to make the legislation effective." (2B Singer & Singer at p. 457.) Thus, "Courts have most frequently extended statutes by necessary implication in the realm of laws which delegate powers to public officers and administrative agencies. The powers granted may involve a multitude of functions discoverable only through practical experience." (*Id.* at pp. 459–460, footnote omitted.) United Auburn has entirely failed to address—or even to disclose—this authority.

United Auburn relies on *Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525 under the same cover of silence. (*See* ARBM pp. 8–9, 17.) Following *Woodland,* the Court of Appeal in *Lubner* refused to imply a cause of action for simple negligence into a statute that creates causes of action for intentional or grossly negligent mutilation or destruction of a work of fine art. (*Lubner*, 45 Cal.App.4th at pp. 529–530.) The case does not speak about implied governmental powers. (*Ibid.*)

Likewise, *San Diego Service Authority for Freeway Emergencies v. Superior Court* (1988) 198 Cal.App.3d 1466, cited by Auburn at ARBM page 8, refused to imply into an authorizing statute a limit on the agency's ability to contract. (198 Cal.App.3d at p. 1472.) Neither in holding nor in language does it state or imply anything relevant to the Governor's implied power to concur with the Secretary. (*Ibid.*)

The three cases discussed *ante* are all the California authority on which United Auburn relies in its attempt to undermine the Governor's implied power to concur. (ARBM pp. 8–14.)[7] None of the three involved implied governmental powers. And none applies the correct test for analyzing those powers.

B. The Governor Stated the Correct Test.

The Governor correctly stated the standard for determining whether a government agency has implied powers incidental and necessary to render legislation effective. (RABM pp. 27–30.) The key cases are this Court's,

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[7] *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190 (see ARBM pp. 17–19) applies "the doctrine of *expressio unius est exclusio alterius*" to an express exemption from the California Environmental Quality Act; it is not an implied powers case (*Wildlife*, 18 Cal.3d at pp. 196–197). And Auburn's scattered quotations from the fractionated, review-granted opinions in *Stand Up for California! v. State of California* (2016) 6 Cal.App.5th 686 are not authority at all. (Cal. Rules of Court, rule 8.1115(e).)

and they generally follow the Sutherland formulation for implied powers. (*Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 810 (*Dickey*); *Crawford v. Imperial Irrigation Dist.* (1927) 200 Cal. 318, 333–334; *Bateman v. Colgan* (1896) 111 Cal. 580, 587–588.) As this Court held in *Dickey*, "[i]t is well settled in this state that governmental officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute governing the powers." (*Dickey*, 24 Cal.2d at p. 810.)

To United Auburn's charge that the Governor's cases are too old (ARBM pp. 15–16), Estom Yumeka responds that *People v. Maikhio* (2011) 51 Cal.4th 1074, 1088, reaffirms the standard of *Dickey*. The issue is not one of age but of substance: this Court generously finds implied government powers to effectuate legislation, but a tighter standard applies when a party argues for implied terms that would substantively alter legislation.

It is also worth noting that the court deals here with a constitutional provision. It is fatuous for United Auburn to suggest "it would have been very easy" for the voters to address in express terms the topics of newly acquired lands and the Governor's concurrence power. (ARBM, p. 21.) The voters could only vote yea or nay on what the proponents

drafted. The proponents' language does not make any distinction between tribal lands eligible for gaming pursuant to a two-part determination and tribal lands eligible for gaming on other grounds. (Cal. Const., art. IV, § 19, subd. (f).) And nothing in United Auburn's discussion of election materials suggests that the proponents intended to deny the Governor the power to concur in the former. (ARBM pp. 19–23.)

Thus the question of implied powers returns to common sense. United Auburn has not proposed any sensible reason the proponents or the voters would have distinguished between tribal land taken into trust after October 17, 1988, and land taken into trust earlier, nor between compacting and concurring-and-compacting. And if such vigorous, zealous, and able advocates cannot find a reason, the court can rest comfortable there is none.

V. Conclusion.

For the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,
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Certificate of Compliance

I, Matthew G. Adams, appellate counsel to the Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California, certify that the foregoing brief is prepared in proportionally spaced Century Schoolbook 14 point type, and, based on the word count of the word processing system used to prepare the brief, the brief is 4,521 words long.

September 22, 2017

Matthew G. Adams

PROOF OF SERVICE

I, Cynthia Lakes, hereby declare: I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years, and not a party to the within action. My business address is Dentons U.S. LLP, 1999 Harrison Street, Oakland, California 94612. I am over the age of 18 and not a party to the within action.

I am personally and readily familiar with the business practice of Dentons U.S. LLP for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service.

On September 22, 2017, I served the foregoing document, described as

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* AND BRIEF OF THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-RESPONDENT

on the interested parties in this action by placing a true copy thereof, on the above date, enclosed in a sealed envelope, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of September, 2017, at Oakland, California.

/s/ Cynthia Lakes
Cynthia Lakes

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