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**Appeal No. 13-4172**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**Lynn D. Becker**

Plaintiff and Appellant

vs.

**Ute Indian Tribe of the Uintah and Ouray Reservation, et al**  
Defendants and Appellees

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
THE HONORABLE DEE BENSON, JUDGE  
DISTRICT COURT CASE NO. 2:13-CV-00123

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**BRIEF OF APPELLANT LYNN D. BECKER**

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**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF PRIOR OR RELATED APPEALS**

There are no prior or related appeals.

## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Plaintiff/Appellant Lynn D. Becker ("Becker") alleged that the district court had jurisdiction pursuant to 28 U.S.C. § 1331. The district court's ruling that it lacked Section 1331 jurisdiction is the basis for this appeal. The district court issued a final Memorandum Decision and Order dismissing the action on November 5, 2013 and a Judgment of dismissal was entered by the Clerk of the Court on November 15, 2013. With this order and judgment, the district court disposed of all parties' claims. Becker timely filed his Notice of Appeal on November 25, 2013.

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

I. Did the district court err in concluding that Section 1331 "substantial federal question" jurisdiction was lacking where Becker alleged substantial federal issues that were actually disputed and necessary to be decided, and that did not disrupt any congressionally approved balance of federal and state court responsibilities, including: (1) whether all defendants had tribal sovereign immunity; (2) whether all defendants had waived their tribal sovereign immunity; (3) whether defendants had waived exhaustion of tribal remedies and other related rights; and (4) whether the

Agreement at issue required approval by the United States Secretary of the Interior under 25 U.S.C. § 81.

II. Did the district court err by requiring the a substantial federal issue must be an “element” of the state-created claims, even though this requirement is not included in the sense in which the district court used the term in the above four factors held by the Supreme Court to be sufficient for “substantial federal issue” jurisdiction in federal courts?

III. Did the district court err in refusing federal jurisdiction based upon the court’s determination that all of the substantial federal questions expressly alleged in the complaint were nevertheless only anticipated, peripheral, conditional defenses that the defendants may never actually assert, even though those issues had already been asserted by the defendants in their motion to dismiss and/or in their response to Becker’s claims?

## **STATEMENT OF THE CASE**

### **Relevant Pleadings and Facts**

Defendants challenged the district court’s jurisdiction by both a Rule 12(b)(1) motion based upon the complaint and proffered evidence, and by a Rule 12(b)(6) motion based upon the pleadings of the First Amended Complaint.<sup>1</sup> The district court did not specify whether it had considered evidence or whether its ruling was

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<sup>1</sup> Aplt Appx pp. 18-21.

based upon Rule 12(b)(1) or 12(b)(6).<sup>2</sup> This Court reviews this ruling de novo.<sup>3</sup> The following was established by the pleadings and evidence.

Effective in 2004, Becker entered into an Independent Contractor Agreement (“Agreement”) with defendants<sup>4</sup> pursuant to which he provided valuable services for several years that included: restructuring and development of the Ute Tribe’s Energy and Minerals Department; researching and analyzing data for claims by the Ute Tribe against the U.S. Department of Interior; and negotiating, drafting, reviewing and implementing contracts with third parties for the development of tribal mineral and energy resources.<sup>5</sup> The Ute Business Committee duly approved the Agreement by resolution.<sup>6</sup> The Tribe agreed, for these services, to pay Becker a specified

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<sup>2</sup> Since the ruling was solely based upon jurisdiction, the ruling is deemed to have been under Rule 12(b)(1). *Colorado Environmental Coalition v. Wenker*, 353 F.3d 1221, 1227 (10<sup>th</sup> Cir. 2004).

<sup>3</sup> *Colorado Environmental Coalition*, *supra*, 353 F.3d at 1227.

<sup>4</sup> The defendants are the Ute Indian Tribe of the Uintah and Ouray Reservation, a federally recognized Indian tribe headquartered in Ft. Duchesne, Utah (“Ute Tribe”); the Ute Indian Tribe of the Uintah and Ouray Reservation, a federal corporation chartered under 25. U.S.C. § 477 (“Ute Corporation”); the Uintah and Ouray Tribal Business Committee (“Ute Business Committee”); and Ute Energy Holdings, LLC, a Delaware limited liability company whose sole member was the Ute Tribe or the Ute Corporation (“Ute Energy Holdings LLC”). First Amended Complaint ¶¶ 2-5, Aplt Appx pp. 9-10. The distinctions among the defendants are mostly irrelevant to this appeal, and the defendants are referred to jointly here as the “Tribe” or “defendants” except where the distinctions matter.

<sup>5</sup> Aplt Appx pp. 10-13, 85, 96, 113-14.

<sup>6</sup> Aplt Appx pp. 12-13, 67-68, 84-98.



monthly compensation plus “a beneficial interest of two percent (2%) of net revenue distributed to” the Ute Energy Holdings LLC.<sup>7</sup>

By the Agreement and authorizing resolution, the parties agreed that the federal court in Utah was the sole proper forum for resolving all disputes related to the Agreement: “All disputes arising under or relating to this Agreement shall be resolved in the United States District Court for the District of Utah.”<sup>8</sup>

To emphasize and clarify this intent, the Agreement specified: (1) that the Tribe waived and surrendered its sovereign immunity for a full determination by the Utah federal district court of factual and legal issues relating to claims under the contract; (2) that the Tribe unequivocally submitted to the jurisdiction of the federal district court of Utah for all such actions; and (3) that the Tribe waived any requirement that any party must sue in tribal court or exhaust any tribal remedy:

**Article 23. Limited Waiver of Sovereign Immunity; Submission to Jurisdiction**

If any Legal Proceeding (definition follows) should arise between the Parties hereto, the Tribe agrees to a limited waiver of the defense of sovereign immunity, to the extent such defense may be available, in order that such legal proceeding be heard and decided in accordance with the terms of this Agreement. For purposes of this Agreement, a “Legal Proceeding” means any judicial, administrative or arbitration proceeding conducted pursuant to this Agreement and relating to the interpretation, breach, or enforcement of this Agreement. To the extent the course of dealing between the Parties might be interpreted to have

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<sup>7</sup> Apl't Appx pp. 10-11, 21-22, 86, 88-90, 97.

<sup>8</sup> Agreement, Article 21, Apl't Appx p. 93.

modified or extended the terms of this Agreement, the limited waiver of sovereign immunity shall apply to such modification or extension. A Legal Proceeding shall not include proceedings related to royalty or similar interests in lands held by the Tribe that are not expressly subject to the terms of this Agreement. The Tribe specifically surrenders its sovereign power to the limited extent necessary to permit the full determination of questions of fact and law and the award of appropriate remedies in any Legal Proceeding.

The Parties hereto unequivocally submit to the jurisdiction of the following courts: (i) U.S. District Court for the District of Utah, and appellate courts therefrom, and (ii) if, and only If, such courts also lack jurisdiction over such case, to any court of competent jurisdiction and associated appellate courts.... The court or courts so designated shall have, to the extent the Parties can so provide, original and exclusive jurisdiction, concerning all such Legal Proceedings, and the Tribe waives any requirement of Tribal law stating that Tribal courts have exclusive original jurisdiction over all matters involving the Tribe and waives any requirement that such Legal Proceedings be brought in Tribal Court or that Tribal remedies be exhausted.

Each Party hereto consents to service of processing [sic] for any such Legal Proceeding filed in the court or courts so designated. The Tribe's limited waiver of sovereign immunity and submission to jurisdiction also extends to any arbitration and all review and enforcement of any decision or award of the panel so convened in the court or courts so designated. The Tribe's limited waiver of sovereign immunity shall be further evidenced by a Tribal Resolution delivered at the time of execution of this Agreement in accordance with Tribal laws, that expressly authorizes the foregoing submission to jurisdiction of the courts so designated and the execution of this Agreement.<sup>9</sup>

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<sup>9</sup> Agreement, Article 23, Aplt Appx p. 93-94.

After the Tribe refused to pay Becker the 2% of the specified net revenue<sup>10</sup> that the Tribe agreed to pay, Becker sent letters to the Tribe demanding payment. In response, the Tribe sent Becker a letter refusing to pay the 2% interest.<sup>11</sup> The Tribe's refusal to pay was based upon arguments under federal law, not state law.<sup>12</sup> These asserted federal issues were that the Agreement was void because it had not been approved by the U.S. Bureau of Indian Affairs and the U.S. Secretary of Interior; that the Agreement constituted a charge upon the Tribe's mineral estate in violation of the federal Indian Mineral Development Act;<sup>13</sup> and that the Agreement was void because the Tribe had not clearly and unequivocally waived its sovereign immunity as required by federal and tribal law.<sup>14</sup>

Becker sued in the United States District Court for the District of Utah for payment. In his Amended Complaint, Becker did not allege that federal law created any of his causes of action, but did allege the other long-recognized basis for Section 1331 jurisdiction -- namely the "substantial federal question" prong of Section 1331 -- as follows:

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<sup>10</sup> Becker estimated that the net revenue to Ute Energy Holdings LLC as to which his 2% interest should be applied was hundreds of millions of dollars; Becker claims that under the Agreement the Tribe owes Becker several million dollars. Becker Declaration ¶11, Aplt Appx p. 115.

<sup>11</sup> Aplt Appx pp. 136-137.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 because this action raises substantial issues of federal law, including the following: that the Agreement did not require approval by the United States Secretary of the Interior under 25 U.S.C. § 81; that the Agreement is a valid Mineral Agreement within the meaning the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2018; that the Agreement was effective without approval by the United States Secretary of the Interior under 25 U.S.C. § 2013; that each defendant properly waived whatever sovereign immunity, if any, each defendant may otherwise have had in the absence of the waiver; that each defendant validly agreed under federal law that all disputes arising under or relating to the Agreement shall be resolved in the United States District Court for the District of Utah; that the submission by each defendant to the jurisdiction of this Court was effective; that the waiver of the applicability of Tribal Law and of the jurisdiction of the Tribal Court that otherwise might have applied in the absence of the waiver was effective under federal law; that the consent to service of process for this action was effective under federal law; and that the waiver of any duty or right of the exhaustion of Tribal remedies that otherwise might have applied was effective under federal law.<sup>15</sup>

### **Procedural History and Rulings Presented for Review**

The Tribe moved under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss the action for lack of Section 1331 jurisdiction, arguing that the district court lacked jurisdiction both because the complaint failed properly to allege federal question jurisdiction and because the defendants were protected by and had not waived tribal sovereign immunity.<sup>16</sup> The district court granted the motion on its determination that the court lacked Section 1331 subject matter jurisdiction because the complaint

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<sup>15</sup> Apl't Appx 93-94.

<sup>16</sup> Apl't Appx pp. 16-62.

had not properly alleged a federal question.<sup>17</sup> The district court did not address the defendants' jurisdictional argument based upon tribal sovereign immunity.<sup>18</sup>

### **SUMMARY OF THE ARGUMENT**

The district court's dismissal constituted reversible error because:

1. Section 1331 jurisdiction clearly embraces a narrow but important branch of federal question jurisdiction known as "substantial federal issue" jurisdiction in cases, including this one, that allege only state-law-created causes of action but satisfy the following requirements recently confirmed by the United States Supreme Court: the federal issues are (1) necessarily raised; (2) actually disputed; (3) substantial; and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.

2. The court erroneously held that a federal complaint that asserts only state law claims does not create Section 1331 jurisdiction unless the complaint also alleges that at least one of the "elements" of the state-law-created claims includes a federal right or federal cause of action. Section 1331 jurisdiction clearly exists even where the state-law claims do not include a federal "element" in the sense that the district court required.

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<sup>17</sup> Appt Appx pp. 149-153.

<sup>18</sup> Id.

3. The district court erroneously held that the federal issues in the case were peripheral and could arise only as defenses that defendants might or might not assert, when in fact substantial federal issues, hotly disputed, were plainly and necessarily raised by the complaint, and did not depend upon the defendants' raising the issues as defenses.

## **ARGUMENT**

### **I. All Issues on this Appeal Are Reviewed De Novo**

Because this Court reviews de novo Rule 12(b)(1) and Rule 12(b)(6) dismissals for lack of subject matter jurisdiction, all issues on this appeal should be reviewed de novo.<sup>19</sup>

### **II. The District Court Had Section 1331 “Substantial Federal Issue” Jurisdiction Over the State-Law-Created Claims Here Because the Complaint Necessarily Raises Substantial, Disputed Federal Issues that Do Not Disrupt the Congressional Allocation of Functions Between Federal and State Courts**

There are two independent prongs of Section 1331 jurisdiction. The most common prong is invoked by a complaint asserting “a cause of action created by federal law....”<sup>20</sup> This common branch of Section 1331 jurisdiction has nothing to

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<sup>19</sup> *Gilmore v. Weatherford*, 694 F. 3d 1160, 1170 (10<sup>th</sup> Cir. 2012); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 n.5 (10<sup>th</sup> Cir. 1999).

<sup>20</sup> *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005).

do with this action. Though the defendants argued this prong -- that the complaint should be dismissed because the alleged claims are not created by federal law<sup>21</sup> -- Becker neither pled<sup>22</sup> nor argued<sup>23</sup> nor asserts here that federal law created his claims for relief.

But Becker pled,<sup>24</sup> argued,<sup>25</sup> and asserts here a second, independent, historically “unruly”<sup>26</sup> but well-established branch of federal question jurisdiction over claims created solely by state law. This narrow but important branch of Section 1331 jurisdiction was authoritatively re-affirmed by the United States Supreme Court in 2006 in the watershed *Grable*<sup>27</sup> opinion; applied in an extensive analysis by this Court in 2012 in *Gilmore*,<sup>28</sup> and crystalized in a four-part formula just last year by the Supreme Court in *Gunn*.<sup>29</sup> The *Grable* court held that this branch of Section 1331 jurisdiction, known as “substantial federal question” jurisdiction, exists for claims created solely by state law if the “state-law claim necessarily raise[s] a stated

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<sup>21</sup> Apl't Appx p. 21.

<sup>22</sup> Apl't Appx p. 11.

<sup>23</sup> Apl't Appx p. 75-76.

<sup>24</sup> First Amended Complaint ¶ 8, Apl't Appx p. 11.

<sup>25</sup> Apl't Appx pp. 75-76.

<sup>26</sup> *Gunn v. Minton*, 133 S. Ct. 1059, 1065, 185 L. Ed. 2d 72 (2013) (this “unruly doctrine” is painted on a canvas that “looks like one that Jackson Pollock got to first”).

<sup>27</sup> *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005).

<sup>28</sup> *Gilmore v. Weatherford*, 694 F. 3d 1160, 1170-71 (10<sup>th</sup> Cir. 2012).

<sup>29</sup> *Gunn v. Minton*, *supra*, 133 S. Ct. at 1065.

federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”<sup>30</sup> In 2012, this Court thoroughly reviewed and applied *Grable* in *Gilmore v. Weatherford*,<sup>31</sup> an opinion that clearly demonstrates that Becker’s complaint properly asserts “substantial federal issue” jurisdiction. In 2013 in *Gunn*, the Supreme Court affirmed and distilled *Grable*, clarifying that “substantial federal issue” jurisdiction lies in federal courts for claims created solely by state law if the complaint alleges a federal issue that is “(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.”<sup>32</sup>

Becker’s complaint specifically alleged this branch of federal question jurisdiction: “This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 because this action raises substantial issues of federal law, including the following....”<sup>33</sup> The following shows that the federal issues that Becker alleged meet the four requirements of *Grable*, *Gilmore* and *Gunn*.

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<sup>30</sup> *Id.*, 545 U.S. at 314.

<sup>31</sup> *Gilmore v. Weatherford*, 694 F. 3d 1160, 1170-71 (10<sup>th</sup> Cir. 2012).

<sup>32</sup> *Gunn v. Minton*, 133 S. Ct. 1059, 1065, 185 L. Ed. 2d 72 (2013). *See also Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005);

<sup>33</sup> First Amended Complaint ¶8, Aplt Appx. p. 11, quoted above.



**Necessarily Raised:** A federal issue can form part of the basis for federal question jurisdiction over a claim created solely by state law if the complaint raising solely state-law claims “necessarily raises” a substantial federal issue<sup>34</sup> or if resolution of the claims “necessarily depends on resolution of a substantial question of federal law.”<sup>35</sup> Though this jurisdiction cannot arise solely from anticipated defenses that the defendant might or might not decide to assert,<sup>36</sup> a federal issue necessarily implicated by the complaint does not get erased from jurisdictional consideration merely because the issue also might be raised by a defendant as a defense. Substantial federal issues are considered “necessarily raised” under the *Gunn/Grable/Gilmore* doctrine even if the plaintiff might lose his action based upon non-federal grounds, so long as it is clear from the complaint that the plaintiff cannot win without prevailing on these issues.”<sup>37</sup>

Becker’s complaint alleges substantial federal issues that must be resolved for Becker to prevail. Becker’s complaint alleges, for example, that the defendants are

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<sup>34</sup> *Gunn, supra*, 133 S. Ct. at 1065.

<sup>35</sup> *Gilmore, supra*, at 694 F.3d at 1170 quoting *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 690 (2006).

<sup>36</sup> *E.g., Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914) (Section 1331 jurisdiction “must be determined from what necessarily appears in the plaintiff’s statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.”)

<sup>37</sup> *Gilmore, supra*, at 694 F.3d at 1170 (“although plaintiffs could lose their [state-law] claim without the court reaching the federal question, it seems that they cannot win unless the court answers that question”)

a federally recognized Indian tribe, an Indian corporation, the business committee of a federally recognized Indian tribe, and a limited liability company whose sole member was the Ute Indian tribe or Ute Indian Corporation.<sup>38</sup> The complaint alleges that “substantial issues of federal law” include whether any defendant is protected by tribal sovereign immunity and, if so, whether any such defendant properly waived tribal sovereign immunity.”<sup>39</sup> Defendants admitted that tribal sovereign immunity was a significant issue – indeed, that tribal sovereign immunity was a jurisdictional issue.<sup>40</sup> The defendants also argued that the Agreement had not waived sovereign immunity as to any defendant.<sup>41</sup> The law is clear that tribal sovereign immunity<sup>42</sup> and the question whether such immunity has been waived are both substantial, jurisdictional issues of federal law.<sup>43</sup> Because both are jurisdictional issues that a court must address *sua sponte* even if not raised as a defense, these issues are “necessarily raised” by the complaint here.<sup>44</sup>

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<sup>38</sup> First Amended Complaint ¶¶ 2-4, Aplt Appx pp. 9-10.

<sup>39</sup> First Amended Complaint ¶ 8, Aplt Appx p. 11.

<sup>40</sup> Aplt Appx pp. 23-31.

<sup>41</sup> Aplt Appx. pp 23-31.

<sup>42</sup> *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144 (10<sup>th</sup> Cir. 2012) (affirming Rule 12(b)(1) dismissal for lack of subject matter jurisdiction based upon tribal sovereign immunity);

<sup>43</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) (“As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”)

<sup>44</sup> *Somerlott, supra*, 686 F.3d at 1151-1152 (federal courts must examine their own subject matter jurisdiction *sua sponte* if the parties have not raised the issue).

This conclusion is supported by this Court's 1984 opinion in *Tenneco Oil Company*,<sup>45</sup> which is wholly consistent with *Grable* and *Gunn* but pre-dated *Grable* by 20 years. In language predating *Grable* by 20 years, this Court held that Section 1331 jurisdiction existed because there was a substantial federal issue as to whether some of the Indian defendant entities or individuals were protected by tribal sovereign immunity:

An inquiry into whether Congress has in fact limited tribal sovereignty in a given case necessarily triggers federal concerns.... Manifestly, measuring the interests of the National Government [in establishing tribal sovereign immunity] poses a federal question.... The Tribe argues that federal questions about the validity of the tribal ordinance arise only in defense to the Tribe's attempted enforcement and cannot be the basis for federal jurisdiction. We disagree. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 39 L. Ed. 2d 73, 94 S. Ct. 772, the Supreme Court held that because Indian title to land could be terminated only by federal act or consent, even a simple state law possessory action could be the basis for federal question jurisdiction. A similar analysis applies to the assertion of Indian sovereignty.... Because such power is circumvented and defined by federal law a federal question is raised necessarily by the attempt to exercise it.<sup>46</sup>

The district court rejected Becker's argument that *Tenneco* supported the district court's jurisdiction, holding that *Tenneco* raised "overriding interests of the National Government" not present here. In fact, however, the

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<sup>45</sup> *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 575 (10<sup>th</sup> Cir. 1984)

<sup>46</sup> *Tenneco Oil Co.*, *supra*, 725 F.2d at 575.

“overriding interest” that the *Tenneco* court held anchored federal jurisdiction was tribal sovereign immunity,<sup>47</sup> precisely the federal interest presented here.

Moreover, Becker’s complaint alleged that by the Agreement and resolution the defendants had waived any duty or right of exhaustion of tribal court processes and remedies – including provisions of the Agreement that all contract disputes would be resolved in federal court, that each defendant waived service of process and submitted to the personal jurisdiction of the federal court, and that any application of Tribal law was waived.<sup>48</sup> Whether these agreements validly waived exhaustion of tribal remedies was a substantial federal issue necessarily raised by the complaint, and therefore supporting Section 1331 jurisdiction.<sup>49</sup> Where, as here, the waiver of exhaustion of tribal remedies is clear, a federal court has jurisdiction to determine that waiver as a matter of federal law without deferring to the tribal court to determine whether tribal court jurisdiction and exhaustion have been waived.

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<sup>47</sup> *Tenneco Oil Co.*, *supra*, 725 F.2d at 575.

<sup>48</sup> First Amended Complaint ¶ 8, Aplt Appx p. 11.

<sup>49</sup> See, e.g., *National Farmers Ins. Cos. V. Crow Tribe*, 471 U.S. 847, 853 (1985); *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 28 (1<sup>st</sup> Cir. 2000);

Also, as Becker alleged,<sup>50</sup> whether the Agreement is invalid because it creates an interest in the Tribe's mineral estate under the Indian Minerals Development Act of 1982 and therefore required approval by the Secretary of Interior, as the Tribe maintains,<sup>51</sup> is an additional substantial federal issue supporting Section 1331 jurisdiction.<sup>52</sup>

**Actually Disputed:** There is no doubt that each of the above federal issues was actually disputed. Becker alleged each such federal issue<sup>53</sup> and the Tribe disputed each, either in its motion to dismiss<sup>54</sup> or in the Tribe's letter that Becker submitted in opposition to the Tribe's the motion to dismiss.<sup>55</sup>

**Substantial:** The "substantial federal question" prong of Section 1331 jurisdiction "demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum."<sup>56</sup> The federal questions raised in this action are clearly substantial. For example, whether Becker's Agreement with the Tribe required approval by the Secretary of Interior was a substantial federal issue anchoring

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<sup>50</sup> First Amended Complaint ¶ 8, Aplt Appx p. 11.

<sup>51</sup> Aplt Appx p. 136.

<sup>52</sup> See *Gilmore v. Weatherford*, 694 F. 3d 1160, 1173 (10<sup>th</sup> Cir. 2012)

<sup>53</sup> First Amended Complaint ¶ 8, Aplt Appx p. 11.

<sup>54</sup> Aplt Appx pp. 20-62.

<sup>55</sup> Aplt Appx pp. 136-137.

<sup>56</sup> *Grable, supra*, 545 U.S. at 313.

Section 1331 jurisdiction.<sup>57</sup> Whether the Tribe’s waiver of tribal sovereign immunity was ineffective because a tribal rule required such waivers to be within the four corners of the formal, written resolution of the Ute Business Committee as opposed to incorporated in the resolution by reference to the written agreement<sup>58</sup> is a substantial federal issue supporting federal question jurisdiction.<sup>59</sup> The other alleged federal issues are indisputably substantial because they are essential to federal court jurisdiction, as shown above.

**Federal-State Balance:** The doctrine of Section 1331 “substantial federal question” jurisdiction in an action created by state law requires consideration of the essential purposes, competencies and essential functions of state courts versus those of the federal courts. The doctrine “captures the commonsense notion that a federal court ought to ... hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues....”<sup>60</sup> The doctrine invites consideration of “the advantages thought to be inherent in a

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<sup>57</sup> See *Gilmore, supra*, 694 F.3d at 1164 (the issue as to whether Bureau of Indian Affairs approval is required for the transfer of Indian property is a “substantial” federal issue for Section 1331 federal question jurisdiction).

<sup>58</sup> First Amended Complaint ¶ 15, Aplt Appx pp. 12-13; Aplt Appx p. 25-27, 30, 37-15, 67-70.

<sup>59</sup> See *Tenneco, supra*, 725 F.2d at 575 (Tenneco’s argument “that the Tribe’s regulations are contrary” to federal law was a substantial federal issue).

<sup>60</sup> *Grable, supra*, 545 U.S. at 313.

federal forum” and whether under the circumstances “federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts....”<sup>61</sup>

This doctrine requires the district court to make an initial assessment of the relative and importance and complexity of state law issues compared to federal law. Here, the heft of federal issues clearly outweighs the state issues. Utah state law presumably will provide the basic elements of contract law here such as promise, breach and damages.<sup>62</sup> But the federal district court deals daily with such basic Utah contract issues.

Here, the federal issues will overwhelm the state issues in importance, contest and complexity. For example, as shown above, federal law will control: whether the Agreement violated the Indian Mineral Development Act; whether the Agreement required approval by the United States Secretary of Interior and Bureau of Indian Affairs; whether Ute Energy Holdings LLC is protected by tribal sovereign immunity; whether the Tribe waived tribal sovereign immunity; whether Becker was

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<sup>61</sup> *Grable, supra*, 545 U.S. at 314.

<sup>62</sup> Agreement, Article 21, re Governing Law and Forum (“This Agreement and all disputes arising hereunder shall be subject to, governed by and construed in accordance with the laws of the State of Utah. All disputes arising under or relating to this Agreement shall be resolved in the United States District Court for the District of Utah.”)

required to exhaust tribal remedies; and whether the Tribe effectively waived the application of tribal law and exhaustion of tribal remedies.

Though state courts generally have jurisdiction over some Indian-related matters, the federal government in general and federal courts specifically have a unique charge, history and competence regarding Indian-related disputes.<sup>63</sup>

### **III. The Federal Issues Here Are Essential “Elements” of Becker’s State-Law Claims**

The Supreme Court has acknowledged that the “substantial federal issue” branch of Section 1331 has historically been “unruly,” like a “canvas ... that Jackson Pollock got to first.”<sup>64</sup> *Grable* and *Gunn* were the Supreme Court’s effort to “bring some order” to this doctrine by condensing prior cases to what is now the four-part *Gunn-Grable* formula analyzed above.

The term “element” has historically been sand in the machinery of Section 1331 analysis, and was eliminated from the *Gunn-Grable* formula. Some of the confusion comes from two crucially different uses of the term “element.” One sense of the term, called “elemental” here,<sup>65</sup> refers to whether the elements of a state-law claim for relief actually contain a federal element. For example, basic Utah contract

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<sup>63</sup> See generally *U. S. v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323-25 (2011).

<sup>64</sup> *Gunn*, *supra*, 133 S. Ct. at 1065.

<sup>65</sup> The terms “elemental” and “elementary” are coined here, not because any court has used these terms this way, but because the terms, as defined here, help clarify a distinction often smudged in the “unruly” cases about this issue.



law states that a claim for breach of contract has four “elements” – (1) a contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages.<sup>66</sup> Since no federal right or duty is included among these elements, any court requiring a federal element to be included in a state-created claim in this “elemental” sense would find a lack of substantial federal issue jurisdiction. This is the erroneous “elemental” argument that the Tribe made – that only “if federal law is a direct element in the plaintiff’s claim; it is not enough for federal law to be implicated indirectly or peripherally.”<sup>67</sup> The district court here erred by accepting this argument.<sup>68</sup>

But this “elemental” requirement was exactly what the Supreme Court rejected in *Gunn* and *Grable*.<sup>69</sup> Instead, the *Grable* Court found federal question jurisdiction if the complaint alleges what might be termed an “elementary” or

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<sup>66</sup> *Bair v. Axiom Design, LLC*, 20 P.3d 388, 392 (Utah 2001).

<sup>67</sup> Apl’t Appx p.21.

<sup>68</sup> “Because plaintiff’s complaint does not, on its face, plead causes of action created by federal law, and because plaintiff’s causes of action do not include, as an essential element, any right or immunity created by federal law, the court concludes that plaintiff’s claims do not meet the ‘arising under’ standard for federal-question jurisdiction.” Apl’t Appx p. 152.

<sup>69</sup> *Grable* granted certiorari to resolve a split in circuit courts as to whether *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986) always required a federal cause of action for federal question jurisdiction. *Grable*, 545 U.S. at 311-312. Of course, a federal issue that *is* an “essential element” in the “elemental” sense defined might be sufficient for federal question jurisdiction over a state cause of action (*see Grable*, 545 U.S. at 315), but *Grable* makes clear that an “elemental” federal issue is not required, but only an “elementary” federal issue.

fundamental or important federal issue – or, in the language of *Grable*, a complaint that “implicates”<sup>70</sup> a federal issue that is necessarily raised, actually disputed, substantial and non-offending of congressional allocation of state-federal judicial roles, even if the elements of the state law claims are solely created by state law. Moreover, last year the *Gunn* court held that the patent issue in question was not among the four “elements” necessary for the state-law legal malpractice claim at issue, but that under the circumstances alleged the federal patent issue was “necessary” as defined by *Grable*.<sup>71</sup>

In short, in the terms defined here, the district court erred by requiring “elemental” federal issues without accepting that Becker’s complaint clearly alleged jurisdiction-creating “elementary” federal issues repeatedly found sufficient by this Court and by the Supreme Court.

#### **IV. Defense**

The Tribe argued that the federal issues that Becker’s complaint alleged actually could only be raised as possible defenses, and that defenses cannot create federal jurisdiction.<sup>72</sup> The district court accepted this argument: “Plaintiff merely

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<sup>70</sup> 545 U.S. at 313 (“this Court [has] recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that *implicate* significant federal issues”) (emphasis added).

<sup>71</sup> *Gunn*, 133 S. Ct. at 1065.

<sup>72</sup> Aplt Appx p. 22.

anticipates the defenses that Defendants may raise ... [but] ... federal jurisdiction cannot lie based on alleged possible defenses.”<sup>73</sup> This section shows that, though the Tribe might be able to assert the federal issues here as defenses, those issues properly anchor Section 1331 jurisdiction because they meet the *Grable* “necessarily raised” and other requirements.

From the earliest days of Section 1331 “substantial federal issue” jurisdictional analysis,<sup>74</sup> and even after *Grable*,<sup>75</sup> federal courts have recited that such federal issues cannot create federal question jurisdiction if the issues are potentially in the case only as defenses, even if the complaint anticipates those defenses.<sup>76</sup> But the application of this rule should be no broader than the rationale that creates the rule: federal question jurisdiction may not and should not be predicated upon a federal issue that may never be asserted and that is not necessarily raised by the complaint, as the *Gunn*<sup>77</sup> court held, and as did this Court held in *Tenneco*.<sup>78</sup> The district court erred here by ending its analysis with the conclusion

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<sup>73</sup> Aplt Appx p.143.

<sup>74</sup> E.g., *Tennessee v. Union & Planters’ Bank*, 152 U.S. 454, 461 (1894) (a federal court cannot exercise federal question jurisdiction “in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend....”)

<sup>75</sup> *Gilmore, supra*, 694 F.3d at 1173.

<sup>76</sup> *Id.*

<sup>77</sup> *Gunn, supra*, 133 S. Ct. at 1065.

<sup>78</sup> *Tenneco, supra*, 725 F.2d at 575 (“because [tribal sovereign immunity] is ... defined by federal law a federal question is raised necessarily by the attempt to exercise it”)

that the federal issues alleged in the complaint could be asserted as defenses, without analyzing whether, as shown above, those issues were necessarily raised, either because the issues were jurisdictional or otherwise.

### **CONCLUSION**

Becker respectfully requests that the Court reverse the district court's order and final judgment; that the Court determine that the district court has subject matter jurisdiction under 28 U.S.C. § 1331; and that the Court remand this action to the district court for further proceedings.

### **ORAL ARGUMENT**

Pursuant to Fed. R. App. P. 24, Becker requests oral argument.

Date: March 14, 2014

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**CERTIFICATE OF SERVICE**

I certify that the foregoing Appellant's Brief was served upon defendants by ECF this 14<sup>th</sup> day of March, 2014.

/s/ David K. Isom

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