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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, UTAH Plaintiff, v. STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; DUCHESNE CITY, a municipal corporation; MYTON, a municipal corporation; and UINTAH COUNTY, a political subdivision of the State of Utah, Defendants.	**PLAINTIFF'S MOTION TO DISMISS DEFENDANT UINTAH COUNTY'S COUNTERCLAIM** Consolidated Action Civil Case Nos. 2:13-cv-00276-BSJ & 2:75-cv-00408-BSJ Senior Judge Bruce S. Jenkins

The Ute Indian Tribe respectfully moves to dismiss the counterclaim filed by Defendant Uintah County, Dkt. 162, for lack of subject matter jurisdiction, or alternatively, for failure to state a claim upon which relief can be granted. Defendant Uintah County's counterclaim seeks declaratory and injunctive relief against the Tribe based on the Tribe's (1) alleged participation in "illegal suits against Uintah County officials" in the Ute Tribe's tribal court; (2) alleged interference with the County's law enforcement authority on state and county roads within Uintah County; and (3) alleged illegal exercise of civil and regulatory authority. Uintah County's counterclaim must be dismissed based on (*i*) the absence of an Article III case or controversy; (*ii*) lack of standing; (*iii*) the Tribe's sovereign immunity from suit, or alternatively (*iv*) because the counterclaim fails to state a claim for relief.

A. STATEMENT OF FACTS

The Ute Tribe Does Not Claim Exclusive Criminal Jurisdiction over Roadways

The complaint filed by Uintah County does not identify a single non-Indian individual who has been:

(*i*) stopped, detained, cited, or arrested by tribal police, or

(*ii*) incarcerated in a tribal jail, or

(*iii*) prosecuted and convicted by the Ute Tribe in its tribal court.

Facts such as these would exist if, as alleged by Uintah County, the Ute Tribe was asserting *and exercising* "exclusive" criminal jurisdiction over state and county roadways inside the Tribe's reservation boundaries.

Furthermore, in contrast to the Tribe's complaint, Dkt. 2 ¶¶ 21-23, the Uintah County complaint contains no allegation that the Ute tribal police:

(*i*) conduct routine police patrols on lands outside the reservation boundaries, or

(*ii*) conduct roadblock inspections of non-Indian motorists or regularly impound motor vehicles belonging to non-Indian individuals, or

(*iii*) racially profile, stop and detain, arrest, cite, and otherwise harass non-Indians when those non-Indians travel inside the Tribe's reservation boundaries.

The Ute Tribe sent letters to Uintah County dated January 20, 2011, August 29, 2011, and January 30, 2012. See **Exhibits 1**, **2** and **3**. When read in context, none of the letters makes an assertion of exclusive tribal jurisdiction over state and county roadways inside the Tribe's reservation. In the initial letter of 1/20/11, the Tribe complained of Uintah County's "patrolling and arrest and detention *of members of the Ute Indian Tribe* . . . on Tribal lands or roads, and over rights-of-way for [the] United States, state and county roads running through and across the Uintah and Ouray Reservation." (emphasis added) See **Exhibit 1**. The letter stated that "[b]ased on case law and federal statute, state officers do not have criminal jurisdiction *over Indians* with[in] Indian Country including rights-of-way through reservations." (emphasis added) Id. The Tribe's letter cited 18 U.S.C. ¶ 1151 which defines Indian Country to encompass

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation*,

* * * *

(c) all Indian allotments, the Indian titles to which have not been extinguished, *including rights-of-way running through the same*. (emphasis added)

The Tribe's letter did not ask Uintah County to cease *all* law enforcement on roadways inside the reservation; to the contrary, the letter asked only that the County "cease and desist from engaging in further law enforcement activities that result in the unlawful arrest, detention or harassment *of our tribal members*." (emphasis added) Id.

The Tribe's subsequent letters of 8/29/11 and 1/30/12 are of the same tenor. See **Exhibits 2** and **3**. The Tribe's letters are a clear objection to Uintah County's assertion of criminal jurisdiction over *tribal members* inside the Tribe's reservation boundaries. The letters make no claim to "exclusive" Tribal jurisdiction over roadways within the reservation; to the contrary, the letters voice a legitimate protest against the actions of Uintah County in extending *its* jurisdiction "into the boundaries of the Tribe's Reservation without consent of the Tribe or a tribal-state compact allowing such jurisdiction." *State v. Cummings*, 679 N.W.2d 484, 487 (S.Dakota 2004) (holding state officers had no jurisdiction to pursue a traffic offender onto the Pine Ridge Reservation).

The Ute Tribe Is Not Exceeding Its Civil Regulatory Authority

Under paragraphs 44 - 65 of its complaint, Uintah County alleges that the "Ute Tribe is exceeding its civil and regulatory authority." See Dkt. 162. Uintah County premises its claim on the enactment of the Ute Tribal Employment Rights Office

Ordinance ("UTERO Ordinance"), Ordinance 13-016, on March 27, 2013.[1] Uintah County claims the Ordinance exceeds the Tribe's civil and regulatory authority because enactment of the Ordinance violated the Disclaimer of Civil/Regulatory Authority ("Disclaimer") executed by the Tribe in 1998.[2] However, the Disclaimer was terminated on July 8, 2011—more than two and one-half years before the UTERO Ordinance was enacted on March 27, 2013.

By its express terms the Disclaimer permitted the Tribe to terminate the Disclaimer for any reason, or for no reason whatsoever, "at any time by giving 60 days' advance notice, in writing, to the State of Utah and the Counties of Duchesne and Uintah." See Dkt. 162-2, p. 4. By letter dated May 9, 2011, the Ute Tribe gave written notice that the Disclaimer would be terminated effective July 8, 2011. See **Exhibit 4**. Under the foregoing facts Uintah County cannot plausibly claim a violation of the Tribe's civil regulatory authority based on the violation of a non-existent limitation on the Tribe's civil regulatory authority.

Moreover, under the Ute Tribe's Constitution, tribal ordinances do not take effect until approved by the Secretary of the Department of Interior ("DOI"). See Ute Tribe Const., Art. VI, Sec. 2., attached hereto as **Exhibit 5**. The Superintendent of the Bureau of Indian Affairs ("BIA"), DOI, Uintah and Ouray Agency, has approved Ordinance No. 13-016, subject to additional technical and legal review by the DOI's regional office. See **Exhibit 6.** In approving the Ordinance, the BIA Superintendent necessarily determined that the UTERO Ordinance (*i*) does not violate federal law, and

[1] Attached to the County's complaint as Exhibit C.
[2] Attached to the County's complaint as Exhibit B.

(*ii*) is otherwise an appropriate exercise of the Tribe's civil and regulatory authority. See Section 18 of Secretarial Order No. 2508, 14 FR 258, 259 (Jan 18, 1949); see e.g., 34 FR 637 (Jan. 16, 1969; 40 FR 17046 (Apr. 16, 1975).[3]

The Tribe Has No Involvement in Suits Against Uintah County Officials in Tribal Court

The Uintah County complaint alleges that three (3) Uintah County officials have been sued in the Ute Tribe's tribal court. See Dkt. 162, ¶ 12. However, the County's complaint (*i*) does not identify by case name or number the alleged actions in tribal court, (*ii*) does not identify the parties to the alleged actions, (*iii*) does not identify the nature of the lawsuits, and (*iv*) does not state the disposition of the alleged cases in the tribal courts. The complaint alleges, "on information and belief" that "the Ute Tribe provides financial assistance to those who are filing claims against County officials in a clear attempt to interfere with County business." See Dkt. 162, ¶ 13. However, the complaint fails to include any articulable facts demonstrating a basis for the County's belief that the Ute Tribe "provides financial assistance to those who are filing claims against County officials."

The non-identified lawsuits mentioned in the County's complaint may have been filed by tribal lay advocates, Lynda Kozlowicz and Edson Gardner, who do business as Kozlowicz and Gardner, Inc. Lay advocates are not employed by the Ute Tribe and do

[3] The authority formerly delegated to Indian Commissioners was delegated to the Assistant Secretary of Indian Affairs in 1977, when that position was established. See Secretarial Order No. 3010, 42 FR 53682 (Oct. 3, 1977).

not represent the Tribe in any capacity. The Ute Tribe's Law and Order Code, Section 1-5-1(1) states that:

> Any person appearing as a party in any judicial proceeding before a Court of the Ute Indian Tribe shall have the right to be represented by a lay counselor (not a professional attorney) and to have such person assist in the preparation and presentation of the case.

See **Exhibit 7**. However, Section 1-5-1(2) states expressly that:

> The Ute Tribe shall have no obligation to provide or pay for such lay counselors and such obligation shall rest entirely with the person desiring such a counselor.

Lay advocates are subject to oversight and supervision, both by the Tribal Court, see **Exhibit 7**, Section 1-5-1(3), and by the Tribe's Executive Director. *See* Ordinance No. 04-003, attached hereto as **Exhibit 8**. On July 10, 2012, Lynda Kozlowicz and Edson Gardner were placed on suspension for a period of 60 days based on their pattern of filing frivolous lawsuits. See attached Letter from Executive Director Michelle Sabori to Kozlowicz, dated March 21, 2013, attached hereto as **Exhibit 9.** On March 21, 2013, Kozlowicz and Gardner were again suspended for 90 days for filing frivolous suits. Id. Then, on May 7, 2013. Kozlowicz and Gardner were permanently disbarred as lay advocates in the courts of the Ute Indian Tribe for re-filing lawsuits and appeals against state and county officials during their suspension. See attached Letter from Executive Director Sabori dated, May 7, 2013, attached hereto as **Exhibit 10**.

When improper suits have been filed in the Ute Tribal Court against county officials, those suits have been dismissed for lack of jurisdiction. See attached cases, attached hereto as **Exhibit 11**: *Reed v. Dalton,* Case No CV12-111 (Ute Indian Tribal Court 2012); *Swain v. Poulson*, Case No., CV 12-207 (Ute Indian Tribal Court 2012*);*

Slim v. Duchesne County Justice Court, CV-12-139 (Ute Indian Tribal Court 2012); *In the Matter of Severance: Farmcreek Reed Cemetery and Tribal Right-a-Way* [sic], Case No. 09-039 (Ute Indian Tribal Court).

As explained below, the dearth of facts alleged by Uintah County in its complaint do not establish (*i*) an Article III case or controversy, or (*ii*) constitutional or prudential standing on Uintah County's part, or (*iii*) a claim on which relief can be granted. Alternatively, the Ute Tribe has sovereign immunity against all of Uintah County's claims.

B. LEGAL ARGUMENT

"Federal courts are courts of limited jurisdiction . . . empowered to hear only those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress." *Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994) (citations omitted). A plaintiff generally bears the burden of demonstrating the court's jurisdiction to hear his or her claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). In the Tenth Circuit, motions to dismiss for lack of jurisdiction "generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject-matter jurisdiction; or (2) a challenge to the actual facts upon which subject-matter jurisdiction is based." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002).

The Tribe's motion to dismiss is based on both a facial challenge to the countercomplaint and a challenge to the facts on which subject-matter jurisdiction is based.

I. THERE IS NO ARTICLE III CASE OR CONTROVERSY

Article III of the Constitution limits the jurisdiction of federal courts to "cases and controversies," requiring that cases be "ripe" for adjudication. It is a constitutional limitation on the power of federal courts, not just a statutory limitation as contained in 28 U.S.C. §§ 1331 and 1332. *See New Mexicans for Richardson v. Gonzales*, 64 F.3d 1495, 1498-99 (10th Cir. 1995) (stating that the ripeness inquiry "bears on the court's subject matter jurisdiction under the case or controversy clause of Article III of the Constitution).

Designed to avoid "premature adjudication," ripeness is a justiciability doctrine that both implements Article III's case-or-controversy requirement and reflects additional, prudential considerations that require the federal courts to refrain from premature intervention in nascent legal disputes. *Nat'l Park Hospitability Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (citing *Abbott Labs v. Gardner,* 387 U.S. 136, 148-49 (1967)). Even in its prudential form, ripeness is a doctrine that the Court may invoke on its own initiative, regardless of whether it has been raised and decided below. *Id.*

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. U.S.*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 580-81 (1985) (The purpose of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements.")) Where the likelihood of harm is speculative, the Supreme Court has found cases unripe. *See, e.g., Nat'l Park Hospitability Ass'n,* 538 U.S. at 811; *Reno v. Catholic Social*

Servs., Inc., 509 US. 43, 59 n. 20 (1993); *Poe v. Ullman,* 367 U.S. 497, 508 (1961). It cautions courts against adjudicating "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 580-81 (1974). And if "no irremediable adverse consequences flow from requiring a later challenge," judicial intervention may be premature. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).

Here, there is no Article III case or controversy under Uintah County's complaint for the following reasons: first, the Ute Tribe is neither claiming, *nor exercising*, "exclusive" criminal jurisdiction authority over roadways inside the Tribe's reservation boundaries; secondly, the complaint fails to identify any orders issued by the Ute Tribal Court that violate federal law; and thirdly, the enactment of UTERO Ordinance does not violate federal law and does not exceed the Tribe's civil regulatory authority.

II. ALTERNATIVELY, UINTAH COUNTY LACKS STANDING

A federal court may hear only those cases where a plaintiff has standing to sue. Standing has two components. First, standing has a constitutional component arising from Article III's requirement that federal courts hear only genuine cases or controversies. Second, standing has a prudential component. *See Habecker v. Town of Estes Park, Colo.*, 518 F.3d 1217, 1224 n.7 (10th Cir. 2008)(noting that in addition to constitutional standing requirements, "the Supreme Court recognizes a set of 'prudential' standing concerns that may prevent judicial resolution of a case even where constitutional standing exists"). The burden of establishing standing rests on the plaintiff. *See*, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

The plaintiff must "allege . . . facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." *FW/PBS v. City of Dallas*, 493 U.S. 215, 231 (1990)(internal citations and quotations omitted). Moreover, where the defendant challenges standing, a court must presume lack of jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312. 316 (1991)(Quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986) (internal quotation omitted). "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings but rather must affirmatively appear in the record." *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997)(quoting *FW/PBS v. City of Dallas*, 493 U.S. at 231)(internal citations and quotations omitted).

A. Uintah County Lacks No Constitutional Standing

"Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies." *San Juan County, Utah v. United States*, 503 F.3d 1163, 1171 (10th Cir. 2007). *See* U.S. Const. art. III § 2. The standing doctrine ensures that a litigant's claims arise in a concrete factual context that is appropriate for a judicial resolution. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). To have standing, (1) a litigant must have suffered an "injury in fact," defined as an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action; and (3) it must be likely, not merely

speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992). The injury cannot be conjectural or hypothetical, and must be "certainly impending to constitute injury in fact." *Whitemore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotations omitted). It is the claimant's burden of proof to establish each element of the standing inquiry. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61.

"Standing is determined as of the time the action is brought." *Smith v. U.S. Court of Appeals, for the Tenth Circuit*, 484 F.3d 1281, 1285 (10th Cir. 2007)(quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149m 1154 (10th Cir. 2005)).

Uintah County lacks constitutional standing because it cannot satisfy even the first prong of the three-pronged test: Uintah County has not suffered any injury-in-fact. Nor does Uintah County face the threat of any actual imminent harm.

B. Alternatively, There Is No Prudential Standing

"Prudential standing is not jurisdictional in the same sense as Article III standing." *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007). Prudential standing consists of "a judicially-created set of principles that, like constitutional standing, places limits on the class of persons who may invoke the courts' decisional and remedial powers." *Bd. Of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002)(internal quotation marks omitted). Generally, there are three prudential-standing requirements: (i) "a plaintiff must assert his own rights, rather than those belonging to third parties"; (ii) "the plaintiff's claim must not be a generalized grievance shared in substantially equal measure by all or a large class of citizens"; and

(iii) "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bd. Of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d at 1112 (internal quotation marks and citations omitted).

Most relevant here is the rule that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Aid for Women v. Foulston*, 441 F.3d 1101, 1111 (10th Cir. 2006)(quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). There is an exception to this general rule, however, known as third-party standing or *jus tertii*. Third-party standing is allowed when: (i) "the party asserting the right has a close relationship with the person who possesses the right"; and (ii) "there is a hindrance to the possessor's ability to his own interests." *Aid for Women v. Foulston*, 441 F.3d at 1111-12.

Here, there is no prudential standing because Uintah County cannot base its claim to relief on the legal rights or interests of individuals residing in, or businesses transacting business in, Uintah County. See Dkt. 162, ¶¶ 59-64.

III. THE TRIBE HAS IMMUNITY AGAINST UINTAH COUNTY'S CLAIMS

As a matter of law Indian tribes and their governing bodies are not subject to suit unless a tribe has waived its sovereign immunity or Congress has expressly authorized the action. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1988). The issue of tribal sovereign immunity is jurisdictional. *Ramey Constr. Co., Inc. v. The Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). Indian tribes enjoy immunity from suits whether the conduct giving rise to a complaint occurs

on or off reservation. *Id*. Moreover, tribal immunity applies to suits for damages as well as those for declaratory and injunctive relief. *E.g.*, *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991). As pertinent here, a tribe does not waive its sovereign immunity "from actions that could not otherwise be brought" against it merely because the claims are "pleaded in a counterclaim to an action filed by the tribe." *Oklahoma Tax Comm'n v. Potawatomie Indian Tribe*, 498 U.S. 505 (1991). This rule applies even to compulsory counterclaims under Rule 13(a). *Macarthur v. San Juan County*, 391 F. Supp.2d 995, 1036 (D. Utah 2005).

The Tenth Circuit has recognized that tribal sovereign immunity does not preclude suits brought to enjoin alleged violations of federal law that are ongoing. *Crowe & Dunlevy P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011) (extending the *Ex parte Young* exception to tribal sovereign immunity). In *Dunlevy* the violation of federal law consisted of a tribal court's issuance of an unlawful order in excess of the tribal court's jurisdiction. *Id.* at 1155-56. However, *Dunlevy* is readily distinguishable from the case at bar in the following respects: first, the Uintah County complaint does not allege any violations of federal law by the Ute Tribe's tribal court; secondly, the enactment of UTERO Ordinance does not violate federal law and does not exceed the Tribe's civil regulatory authority; and thirdly, the Ute Tribe is neither claiming, *nor exercising*, "exclusive" criminal jurisdiction authority over roadways inside the Tribe's reservation boundaries.

Because the Ute Tribe has not waived immunity to the claims alleged by Uintah County, the County's counterclaims must be dismissed for lack of subject matter jurisdiction based on tribal sovereign immunity.

IV. ALTERNATIVELY, UINTAH COUNTY HAS FAILED TO STATE A CLAIM FOR RELIEF

A Rule 12(b)(6) motion turns on whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). To pass muster, a plaintiff must provide "enough facts to state a claim to relief that is plausible on its face," and that requires "more than an unadorned, the-defendant-unlawfully harmed-me accusation." *Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 570 (2007). Under this standard a claim need not be probable, but there must be facts showing more than a "sheer possibility" of wrongdoing. *Id.* Although all reasonable inferences must be drawn in the non-moving party's favor, a complaint will only survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, LLC v. Schneider,* 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp.*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

Here, the dearth of allegations in the Uintah County complaint do not establish any claim on which relief may be granted. The complaint does not allege a single instance in which the Ute Tribe has illegally exercised criminal jurisdiction over a non-Indian individual. Nor does the complaint cite a single instance in which the Tribe's

tribal court has entered an order against a non-Indian in excess of the Tribal Court's jurisdiction. Finally, Uintah County cannot, with a straight face, argue that enactment of the UTERO Ordinance exceeds the Tribe's civil regulatory authority based on the violation of a non-existent limitation on the Tribe's civil regulatory authority, i.e., the Disclaimer of Civil/Regulatory Authority that was lawfully terminated in 2011.

CONCLUSION

Based on the arguments and authorities cited herein, the Court must dismiss Uintah County's counterclaims.

Respectfully submitted this 29th day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2013, I electronically filed the foregoing **PLAINTIFF'S MOTION TO DISMISS DEFENDANT UINTAH COUNTY'S COUNTERCLAIM** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to all parties of record as follows:

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