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Honorable Edward J. Lodge

8 Attorneys for Defendants the Coeur d'Alene Tribe of Indians, et al.

9
10 **UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF IDAHO**

12 ST. ISIDORE FARM, LLC, an Idaho
13 limited liability company; and
14 GOBERS, LLC, a Washington limited
15 liability company,

16 Plaintiffs,

17 vs.

18
19 COEUR D'ALENE TRIBE OF
20 INDIANS, a federally-recognized
21 Indian tribe, JOHN DOES 1-10, each
22 of which are Members of the Coeur
23 d'Alene Tribe of Indians,

24 Defendants.

No. CV-13-00274-EJL

**RESPONSE RE:
TEMPORARY
RESTRAINING ORDER**

25
26 COME NOW the Defendants, by and through their attorneys, and
27 herewith respond to Plaintiffs' Temporary Restraining Order.
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30 RESPONSE RE:
TEMPORARY RESTRAINING ORDER – 1

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1 **PLAINTIFFS' TEMPORARY RESTRAINING ORDER**

2 Plaintiffs obtained a temporary restraining order, hereinafter TRO, issued
3
4 by the Court on June 28, 2013, without notice and without the attorney
5 certification in writing regarding efforts to give notice and the reasons why
6
7 notice should not be required.

8 The Court's temporary restraining order is in effect for fourteen days
9
10 pursuant to federal rule.

11 **THE TRIBE'S RESPONSE**

12
13 The Coeur d'Alene Tribe, hereinafter the Tribe, is a federally recognized
14 sovereign Indian Tribe located in the State of Idaho. The tribe is immune from
15
16 suit and nothing contained herein should be construed to be a waiver of
17
18 immunity.

19 Plaintiffs, St. Isidore Farm, LLC, and Gobers, LLC, are limited liability
20 corporations conducting the spreading and disposal of untreated and untested
21
22 human waste from septic tanks and portable toilets on real property located
23
24 within the exterior boundaries of the Coeur d'Alene Tribal Reservation.

25 The Tribe provided notice to Plaintiffs herein that the conduct in question
26
27 was a threat to the Coeur d'Alene Tribe and in violation of Chapter 57 of the
28 Coeur d'Alene Tribal Code, "Tribal Waste Management Act." The Tribe
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30 RESPONSE RE:
TEMPORARY RESTRAINING ORDER – 2

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1 demanded the Plaintiffs cease and desist the conduct, and Plaintiffs continued to
2 dispose of untested, untreated human waste.

3
4 The Tribe filed suit in Tribal Court and served the Plaintiffs with the
5 Tribal Court suit. Shortly after commencement of the suit in Tribal Court,
6 attorneys for Plaintiffs and counsel for the Tribe met and conferred regarding the
7 Tribal Court action at which time the attorneys for Plaintiffs were given
8 assurance that they would have adequate time to respond to the suit in Tribal
9 Court. (See, Declaration of Everett B. Coulter, Jr.)
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13 Plaintiffs then proceeded to file the present suit in Federal Court
14 challenging the jurisdiction and sovereign authority of the Coeur d'Alene Tribe
15 to pursue the action in Tribal Court. The present suit was provided to the Tribe's
16 attorney on June 24, 2013. An email was sent to Plaintiffs' attorneys on June 25,
17 2013, indicating acceptance of service of process was not approved at present
18 and that it would take some time given the fact the Coeur d'Alene Tribe is a
19 sovereign entity with various decision-making departments. Plaintiffs were
20 assured nothing was going to happen in Tribal Court pending the proceedings in
21 Tribal Court. Within the email string to Plaintiffs' attorneys, the attorneys were
22 advised the Tribal Court action would be stayed pending the proceedings in
23 Federal Court and, in fact, the Motion to Stay Proceedings was served upon
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30 RESPONSE RE:
TEMPORARY RESTRAINING ORDER – 3

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1 Plaintiffs' attorneys on June 27, 2013, and is set for hearing on July 11, 2013, at
 2 1:00 p.m. before Tribal Court. (*See*, Declaration of Everett B. Coulter, Jr.)

3
 4 Contrary to the suggestions and assertions of Plaintiffs, no criminal action
 5 was investigated or opened by the Coeur d'Alene Tribe. (*See*, Declaration of
 6 Cody SiJohn.)

8 LEGAL ANALYSIS

10 (1) Summary of Argument.

11 Plaintiffs obtained a TRO without notice and without Plaintiffs' attorneys
 12 certifying in writing why notice should not be given. Plaintiffs' attorneys well
 13 knew the Tribe had an attorney pursuing the matter in Tribal Court and also well
 14 knew that the attorney representing the Tribe in Tribal Court had on more than
 15 one occasion provided assurances that nothing would be transpiring in Tribal
 16 Court pending the proceedings in Federal Court and further indicating there was
 17 no criminal action being asserted by the Tribe regarding the conduct of Plaintiffs
 18 disposing of human waste.

19 The Tribe is pursuing Plaintiffs pursuant to the second exception in
 20 *Montana v. United States*, 450 U.S. 544 (1981) and specifically that the United
 21 States Supreme Court under *Montana, supra*, permits an Indian Tribe to regulate
 22 the noxious conduct of non-Indians on fee land when the conduct threatens,

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 30 RESPONSE RE:
 TEMPORARY RESTRAINING ORDER – 4

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menaces, imperils or has a direct impact upon the health or welfare of the Tribe.
See, Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S.
 316, 341 (2008), *citing Montana*, 450 U.S. at 566.

Plaintiffs’ original Memorandum of Law mentions in passing the
 “exhaustion doctrine” giving no credence to the requirement that exhaustion is a
 prerequisite to seeking relief in Federal Court. *See, Grand Canyon Skywalk
 Development, LLC v. SA-NYU Wa, Inc.*, 715 F.3d 1196, 2013 WL 1777060 (9th
 Cir. 2013).

(2) Temporary Restraining Order.

Federal Rule of Civil Procedure 65(b) covers the issuance of temporary
 restraining orders. The rule provides that the Court may issue a TRO without
 notice upon specified conditions which include (1) clear evidence irreparable
 injury would occur without the temporary order and, (2) “The movant’s attorney
 certifies in writing any efforts made to give notice and the reasons why it should
 not be required.” Federal Rule of Civil Procedure 65(b)(1)(B).

Plaintiffs’ attorneys in this case were amply aware that the Tribe was
 represented by counsel based upon an in-person meeting of the attorneys and
 secondly an email string wherein the undersigned, as the attorney for the Tribe,
 made clear that no action was going to take place in Tribal Court pending the

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 TEMPORARY RESTRAINING ORDER – 5

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1 Plaintiffs' challenge in Federal Court regarding the jurisdiction of Tribal Court.
2 The undersigned specifically indicated the Tribal Court proceedings would be
3 stayed and the stay could be based upon a stipulation or a motion and, in fact, a
4 motion was submitted to Tribal Court.
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6
7 The Court's attention is called to *Reno Air Racing Association, Inc. v.*
8 *McCord*, 452 F.3d 1126 (2006) wherein the Ninth Circuit Court of Appeals
9 addressed the issue of temporary restraining orders being issued ex parte without
10 notice pursuant to Rule 65(b). The Court pointed out that temporary restraining
11 orders were an extraordinary remedy subject to stringent restrictions on the
12 issuance citing *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-439
13 (1974). The Ninth Circuit Court of Appeals went further and noted there are very
14 limited exceptions when ex parte temporary restraining orders are to be granted.
15
16 The whole purpose is to preserve the status quo and in the present case the Coeur
17 d'Alene Tribe as sovereign entity voluntarily agreed to a stay on the status quo
18 regarding the Tribal Court action pending the jurisdictional issues resolution in
19 Federal Court.
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22 Plaintiffs should not be permitted to invoke the Court's injunctive
23 jurisdiction as a way to gloss over the exhaustion requirement. The legal
24 propriety of granting a temporary restraining order should not be properly
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30 RESPONSE RE:
TEMPORARY RESTRAINING ORDER – 6

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1 determined without considering whether the Court should stay its hand under the
2 exhaustion doctrine. *See, Elliott v. White Mountain Apache Tribal Court*, 566
3 F.3d 842, 848 (9th Cir. 2009).

4
5 Plaintiffs have the burden of establishing (1) that they are likely to
6 succeed on the merits; (2) that they are likely to suffer irreparable harm in the
7 absence of a TRO; (3) that balance of equities tips in their favor; and
8 (4) injunctive relief is in the public interest. *See, Winter v. Natural Res. Def.*
9 *Council, Inc.*, 555 U.S. 7, 20 (2008).

10
11 Plaintiffs have not shown a likelihood of succeeding on the merits
12 regarding Tribal Court jurisdiction. For the reasons set forth in the following
13 exhaustion discussion of this brief, Plaintiffs should be required to exhaust their
14 remedies in Tribal Court. Exhaustion of the jurisdictional challenge in Tribal
15 Court has been recently held as a prerequisite to the Federal Court's exercise of
16 its jurisdiction. *See, Grand Canyon Skywalk Development, Inc., LLC, v. SA-*
17 *NYU Wa, Inc., supra*

18
19 The second element Plaintiffs have failed to establish is that they are likely
20 to suffer irreparable harm in the absence of injunctive relief. Under the holding
21 in *Winter v. Natural Resource Defense Council, Inc.*, Plaintiffs are obligated to
22 establish that irreparable harm is likely, not just possible, in order to obtain a

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30 RESPONSE RE:
TEMPORARY RESTRAINING ORDER – 7

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1 preliminary injunction. *See, Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
2 1127, 1131 (9th Cir. 2011). The Tribe has submitted the Declaration of the Tribal
3 Police Chief indicating there is no criminal matter now pending and there was no
4 criminal investigation. Moreover, the preliminary jurisdictional challenge in
5 Federal Court dealing with whether the Plaintiffs have to exhaust Tribal Court
6 jurisdiction and presumably the challenge in Tribal Court of jurisdiction is a
7 clear vehicle and approach for Plaintiffs to deal with the Tribal Court litigation.
8
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11 The legal standard requiring Plaintiffs to exhaust in Tribal Court is: Tribal
12 Court is not colorable or plausible. *See Elliott v. White Mountain Apache*
13 *Tribal Court*, 566 F.3d 842, 848, (9th cir. 2009). The legal threshold in Federal
14 Court only requires the Tribe to prove that jurisdiction in Tribal Court is
15 plausible or colorable, which is a low standard. Plaintiffs have not shown
16 irreparable harm from failing to exhaust a jurisdictional challenge in Tribal
17 Court.
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22 The balancing of equities factor regarding injunctive relief weighs in favor
23 of the Tribe based upon the exhaustion doctrine. The Federal Indian Law policy
24 is in favor of allowing a Tribal Court the first opportunity to evaluate the
25 jurisdictional challenge. *See, National Farmers Union v. Crow Tribe of*
26 *Indians*, 471 U.S. 845, 856 (1985). A second factor under the exhaustion
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30 RESPONSE RE:
TEMPORARY RESTRAINING ORDER – 8

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1 doctrine weighing in favor of the Tribe and against Plaintiffs is that Federal
2 Court will benefit from the Tribal Court's expertise regarding defining its own
3 ordinances and its own jurisdiction. *See, Burlington N.R.R. Co. v. Crow Tribal*
4 *Council*, 940 F.2d 1239 (9th Cir. 1991).

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6
7 The last requirement of proof for the Plaintiffs in seeking injunctive relief
8 is the public interest element. *Winter v. Natural Resources Defense Council,*
9 *Inc.*, 555 U.S. 7, 20 (2008). There does not appear to be a public interest issue or
10 element in the context of Plaintiffs seeking injunctive relief. If injunctive relief is
11 granted, the legitimacy and independence of a tribal court system comes into
12 serious question and will undercut the tribal court system in contravention of the
13 requiring exhaustion in Tribal Court. The public interest in federal Indian law
14 policy weighs heavily in favor of denying the continued temporary restraining
15 order. The Tribe has on its own volition moved to stay the Tribal Court
16 proceeding knowing full well there is a jurisdictional challenge in Federal Court
17 that raises the issue of Tribal Court jurisdiction on a preliminary basis and the
18 exhaustion doctrine.

25 (3) Exhaustion

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27 The following summary discussion of exhaustion in Tribal Court is
28 submitted not as an exhaustive review of Tribal Court exhaustion but rather as a
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30 RESPONSE RE:
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1 summary basis to deny the continuance of the temporary restraining order. It is
2 noted herein, the Tribe is in the process of preparing a motion to dismiss
3 requiring the Plaintiffs to exhaust Tribal Court jurisdiction, which will be
4 submitted in the near term.
5

6
7 The doctrine of exhaustion remedies in Tribal Court requires Plaintiffs to
8 challenge the jurisdiction of Tribal Court in Tribal Court and then proceed to
9 Federal Court. *See, Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471
10 U.S. 845, 856-57 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16
11 (1987); and *Burlington N.R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239,
12 1244-47 (9th Cir. 1991). The doctrine of exhaustion of remedies in Tribal Court
13 is premised upon comity and deference to Tribal Court to permit Tribal Courts,
14 such as the Coeur d'Alene Tribe in this case, to determine its jurisdiction. That
15 is, the federal court system as a matter of law has granted comity to Indian Tribes
16 to determine jurisdiction over matters pending in Tribal Court prior to review in
17 Federal Court. Comity is the courtesy, respect and privilege granted to another
18 sovereign. *See, Wilson v. Marchington*, 123 F.3d 805, 808, *citing, Hilton v.*
19 *Guyot*, 159 U.S. 1113 (1895).
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30 RESPONSE RE:
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1 In the recent case of *Grand Canyon Skywalk Development, LLC v.*
 2 *SA-NYU Wa, Inc.*, 715 F.3d 1196, 2013 WL1777060 (9th Cir. 2013), the Court
 3 held as follows:
 4

5 We have interpreted National Farmers as determining
 6 that tribal court jurisdiction is not a jurisdictional bar,
 7 but rather a prerequisite to a federal court's exercise
 8 of its jurisdiction. (Citations omitted.) Therefore,
 9 under National Farmers, the federal courts should not
 10 even make a ruling on tribal court jurisdiction until
 11 tribal court remedies are exhausted.

12 Three additional Ninth Circuit cases have required exhaustion in Tribal
 13 Court without ever addressing the issue of injunctive relief. *See, Evans v.*
 14 *Shoshone Bannock Land Use Policy Commission*, U.S. District Court for
 15 District of Idaho, Cause No. CV-417-BLW, 212 WL6651194, a district court
 16 decision December 20, 2012, by Judge Winmill (on Appeal to Ninth Circuit);
 17 *Rincon Mushroom Corporation v. Mazzetti*, 490 F. App'x. 11, 2012
 18 WL2928605 (Court of Appeals Ninth Circuit (unpublished opinion and cited to
 19 the Court pursuant to Circuit Rule 36-3)); *Dish Network Corporation v. Tewa*,
 20 United States District Court for the District of Arizona, Cause No.
 21 CV-12-8077-PCT-JAT, November 12, 2002.
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27 Under the Tribal Court exhaustion rule, which is based upon comity and
 28 deference to a native sovereign nation, the comity and deference is reciprocal
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30 RESPONSE RE:
 TEMPORARY RESTRAINING ORDER – 11

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1 running from Federal Court to Tribal Court and from Tribal Court to Federal
2 Court. In this particular case, the Tribe on its own sought to stay the proceedings
3 in Tribal Court until the Plaintiffs' jurisdictional challenges were determined in
4 Federal Court.
5

6
7 **(4) Criminal Jurisdiction**

8 Plaintiffs have spent considerable time arguing criminal jurisdiction and
9 civil penalties without addressing the issue of Tribal Court exhaustion, much less
10 addressing the issue of the Indian Civil Rights Act, 25 U.S.C. 1301 et seq.
11 Contrary to Plaintiffs' assertions, the Tribe has not asserted criminal jurisdiction
12 and may well not assert criminal jurisdiction. Regardless, pursuant to 25 U.S.C.
13 1303, there is a remedy for alleged criminal jurisdiction, namely habeas corpus.
14 Thus, although there is no threatened or pending criminal jurisdiction, Plaintiffs'
15 challenges regarding criminal issues are misplaced in that the proper procedure
16 for challenging criminal jurisdiction is under the Indian Civil Rights Act,
17 hereinafter ICRA, and a writ of habeas corpus.
18

19 Even though the Tribe has not asserted criminal jurisdiction, the
20 exhaustion rule applies to criminal actions. *See, Jeffredo v. Macarro*, 599 F.3d
21 913 (9th Cir. 2010); *Valenzuela v. Silversmith*, 699 F.3d 1199 (10th Cir. 2012)
22 holding that exhaustion is required in Tribal Court.
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30 RESPONSE RE:
TEMPORARY RESTRAINING ORDER – 12

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1 **(5) *Ex Parte Young***

2 The Coeur d'Alene Tribe and its representatives who are allegedly named
3
4 as John Does 1-10 are immune from suit. Nothing contained in the original
5 Tribal Court suit brought by the Tribe against Plaintiffs constituted a waiver of
6
7 sovereign immunity. The Tribe's response to the temporary restraining order
8
9 does not waive the sovereign immunity. The *Ex Parte Young Doctrine*, 209
10 U.S. 123 (1908), permits Federal Court to respectfully restrain individuals that
11
12 are violating federal law when said individuals are state officials or alternatively
13
14 are tribal officials. Under *Ex Parte Young*, "tribal sovereign immunity does not
15
16 bar suit for prospective relief against tribal officers allegedly acting in violation
17
18 of federal law." *Burlington N. & Santa Fe R.R. Co. v. Vaughn*, 509 F.3d 1085,
1092 (9th Cir. 2007).

19 The difficulty with Plaintiffs' efforts in respect to the temporary restraining
20
21 order is that the order encompasses the Coeur d'Alene Tribe of Indians, a native
22
23 sovereign nation, and the *Ex Parte Young* doctrine does not apply to the Tribe
24
25 itself due to its immunity. See, *Imperial Granite Co. v. Pala Band of Mission*
26
27 *Indians*, 940 F.2d, 1269, 1271 (9th Cir. 1991) citing *Santa Clara Pueblo v.*
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29 *Martinez*, 436 U.S. 49, 58 (1978); See also, *Vann v. Dept. of Interior*, 701 F.3d
927 (DC Ct. Appeals 2012) for discussion of scope of *Ex Parte Young*.

30 RESPONSE RE:
TEMPORARY RESTRAINING ORDER – 13

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1 The Plaintiffs in their haste to race to federal court seeking injunctive
2 relief while seemingly ignoring the Tribe and its representatives' immunity by
3 not recognizing the application of *Ex Parte Young, supra*, is a clear disregard of
4 Plaintiffs' obligations to present the court with a clear basis to support a
5 temporary restraining order of a tribal official and any subsequent preliminary
6 injunction. As such, the temporary restraining order should not be continued.
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8
9

10 CONCLUSION

11 The temporary restraining order issued without notice and without the
12 required written certification should not be continued. The issue in controversy is
13 whether or not the Coeur d'Alene Tribal Court has jurisdiction, which will be
14 subject to a Motion to Dismiss for lack of exhaustion of Tribal Court remedies.
15 The United States Supreme Court and the Ninth Circuit have applied the
16 exhaustion doctrine of deference to Tribal Courts on the basis of comity. There is
17 absolutely no threat of irreparable harm to deal with the unique and complex
18 Indian law issues this case presents relating to Tribal Court jurisdiction and
19 exhaustion. The Coeur d'Alene Tribe honors the comity and deference doctrine
20 to Federal Court initially and hopes that Federal Court will acknowledge the
21 reciprocal comity and deference to permit Tribal Court to determine its
22 jurisdiction over the subject in controversy.
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30 RESPONSE RE:
TEMPORARY RESTRAINING ORDER – 14

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1 RESPECTFULLY SUBMITTED this 8th day of July, 2013.

2 EVANS, CRAVEN & LACKIE, P.S.

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12 CERTIFICATE OF SERVICE

13
14 I hereby certify that on the 8th day of July, 2013, I electronically filed the
15 foregoing with the Clerk of the Court using CM/ECF System, which will send
16 notification of such filing to the following:

17 Ausey H. Robnett, III via ausey.robnett@painehamblen.com
18 Gregg R. Smith via Gregg.smith@painehamblen.com
19 Jerry K. Boyd via jerry.boyd@painehamblen.com
20 Trevor B. Frank via trevor.frank@ecl-law.com

21 I hereby further certify that I have caused to be served a true and correct copy of
22 the foregoing document(s) on the non-CM/ECF participants as indicated:

23 *No manual recipients*

24 ☐ Hand Delivered
25 ☐ U.S. Mail
26 ☐ Overnight Mail
27 ☐ Facsimile

28 /s/ Everett B. Coulter, Jr.

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30 RESPONSE RE:
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