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Docket Entry 183 - Filed Memorandum in support of motions to compel

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA et al, Plaintiffs, vs. STATE OF WASHINGTON, et al, Defendants.	CIV. NO. 9213 MEMORANDUM IN SUPPORT OF MOTIONS TO COMPEL ANSWERS TO INTERROGATORIES AND FOR EXPENSES

I. INTRODUCTION

The attempt of plaintiffs in this case to initiate basic discovery approximately seven months ago has met only with minimal success. Interrogatories were propounded to the defendants Carl Crouse and the Washington State Game Commission in August of 1972. No response was made for over four months. Finally, on November 30, 1972, plaintiffs through their liaison counsel filed a motion to compel answers to the interrogatories and for expenses pursuant to Rule 37. On December 8, 1972, the matter came on for hearing and the defendants failing to respond to the interrogatories filed nothing in opposition to the motion. No explanation was offered for their failure to answer, object, or seek additional time to do so. The court ruled from the bench at this hearing that the Department of Game would have

(183)

until March 8, 1973 in order to answer or object to the interrogatories. Thus, the defendants were given an additional ninety days to respond -- a total of six and one-half months.

On December 30, 1972, plaintiffs Muckleshoot Indian Tribe, Squaxin Island Tribe of Indians, Sauk-Suiattle Indian Tribe, Skokomish Indian Tribe, and Stillaguamish Tribe of Indians filed a motion to reconsider plaintiffs' motion to compel answers to interrogatories and for expenses including attorney's fees on the grounds that the court's order affording the defendants additional time in which to answer or object to the interrogatories and failure to award expenses and attorney's fees was improper without a finding of substantial justification for defendants' failure to respond. The matter was heard on January 5, 1973 and the court denied the motion. This denial was embodied in the court's order of January 9, 1973.

The question of defendants' response to the interrogatories propounded on behalf of the plaintiffs in this case is again before the court. This time the matter is here because of defendants' failure to answer or object to the interrogatories as ordered by the court. The answers filed included many responses which were incomplete or evasive, others stated the word "objection" without any specification of the grounds for objecting. The "answers" were not even made under oath or signed by any of the parties to which they were propounded.

This case has languished the Federal District Court since September 1970. Part of the reason for the pitifully slow progress of the matter has been the dilatory approach of the defendants Washington State Game Commission and Carl Crouse. As the lawfullness of these defendants' activities in attempting to impose state fishing regulations upon the plaintiff tribes is challenged, their questionable activities continue. These defendants have little to gain by a rapid ad-

judication of the matter, while on the other hand, it is in the plaintiffs' interest to have the case adjudicated as rapidly as possible. Under these circumstances, plaintiffs must prevail upon the court to expedite the case.

II. DEFENDANTS SHOULD BE COMPELLED TO ANSWER THOSE INTERROGATORIES WHICH THEY FAILED TO ANSWER

The failure of defendants Carl Crouse and the Washington State Game Commission to answer interrogatories to which answers are sought by this motion fall into four categories. (1) Those to which an unspecified "objection" was made, (2) those to which the objection made is not well taken, (3) those to which the answer was evasive or incomplete and (4) those which improperly refer the plaintiffs to the records of the Washington State Game Department. To simplify the consideration of this motion, this memorandum deals with interrogatories to which answers are sought by the category into which the failure to answer falls.

A. Unspecified "Objections" In Response To An Interrogatory Are Treated As No Answer At All

In response to numerous interrogatories defendants offer no basis for objection but merely state the "objections". This is the case with interrogatories 2(b), 2(c), 2(d), 2(e), 2(f), 3(b), 3(c), 3(d), 3(e), 8(b), 8(c), 8(d), 8(e), 8(f), 8(g), 9(b), 9(c), 9(d), 9(e), 9(f), 18, 19, 20, 21, 29, 30, 31, 41, 42, 45, 46, 47, 78, 79, 84, 85, 89, 90, 91, 92, 201, 208, 239, 240, and 241.

Rule 33 of the Federal Rules of Civil Procedure requires that "Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer." [Emphasis supplied]. It is well settled that since the 1970 amendments to Rule 33 answers and objections are to be served

together. Wright & Miller, Federal Practice and Procedure: Civil §2173 (1970); 4A Moore's Federal Practice ¶33.27 (1972). The failure to specify any grounds for the objection is tantamount to no objection at all and thus no response to the interrogatories. Objections must be specific and be supported by a detailed explanation of why an interrogatory or class of interrogatories is objectionable. Apco Oil Corp. v. Certified Transp. Inc., 46 F.R.D. 428, 430-31 (W.D. Mo. 1969); Erone Corp. v. Kouras Theatres Corp., 22 F.R.D. 494 497-98 (S.D. N.Y. 1958); Pappas v. Lowe's Inc., 13 F.R.D. 471, 474 (M.D. Pa. 1953); Shrader v. Reed, 11 F.R.D. 367, 369 (D. Neb. 1951); Mall Tool Co. v. Sterling Varnish Co., 11 F.R.D. 576, 579 (W.D. Pa. 1951); Rupp v. Vock & Weiderhold, Inc., 52 F.R.D. 111 (N.D. Ohio 1971); White v. Beloginis, 53 F.R.D. 480 (S.D. N.Y. 1971); Powerlock Systems, Inc. v. Duo-Lok, Inc., 54 F.R.D. 578, 579 (E.D. Wisc. 1972).

Further, it is has been held that merely stating that the person from whom discovery is sought objects to the interrogatory without specifying the grounds for the objection will be treated as a waiver of objection. Cardox Corp. v. Olin Matheson Chemical Corp., 23 F.R.D. 27, 31 (S.D. Ill. 1958). Consequently, the failure by the Department of Game to make objections in the manner contemplated by Fed. R. Civ. P. 33(a) constitutes a waiver of those objections. The promise of a "separate memorandum" made on page 2 of defendants' answer does not alter this result. If the separate memorandum had been filed within the period allowed for answering, perhaps it would. That time, however, has long since passed and the promise of a later filed objection is unacceptable.

Under the circumstances, the court should enter an order requiring the defendants to answer immediately each of the interrogatories which was not answered but to which an unspecified "objection" was made. These interrogatories are listed

above. In addition, every other interrogatory the answer to which depended upon or refers to such interrogatories should be answered.

B. Defendants Should be Compelled To Answer Interrogatories To Which Improper Objections Were Made

Specific objections were made to only two interrogatories. The objection to one of these interrogatories especially is not well taken. Interrogatory 200 asks "Has the Game Department ever concluded, sponsored or utilized any studies or reports which address the question of [nine specific topics]?" In answer, defendants state "Objection. Question too broad and goes to ultimate legal conclusions in suit." First, it no ground for an objection to discovery that it goes to the ultimate legal conclusions in the case. Second, it is difficult to understand how a question about studies and reports could go to the ultimate conclusions in this case.

Under Rule 33(b) interrogatories may relate to any matters which can be the subject of discovery as provided in Rule 26(b), that is, "any matter, not privileged, which is relevant to the subject matter involved in the pending action...." That a question is "too broad and goes to the ultimate legal conclusions in suit" is not such an objection. Interrogatory 200 relating to the conduct of any studies or report on various questions would seem to be well within the intentions of the draftsman of the Federal Rules of Civil Procedure when they stated that "the existence, description, nature, custody, condition and location of any books, documents, may be discovered." Defendants should be ordered to answer interrogatory 200 without further delay.

C. Defendants Should Be Compelled To Answer Interrogatories To Which An Incomplete Or Evasive Answer Was Given

Rule 27(a)(3) states "for purposes of this subdivision any evasive or incomplete answers are to be treated as a failure to answer." Responses to numerous interrogatories by the defendants were evasive or incomplete. Each such answer is considered briefly below. For simplicity, the complete interrogatories and purported answers are not set out here in full and reference should be made to defendants' answers in considering this motion. The interrogatories to which incomplete or evasive answers have been made are interrogatories 2(a), 3(a), 4, 8(a), 9(a), 10, 43, 49(b), 49(c), 52, 54(a), 55, 56, 57, 58, 59, 60, 66, 73, 102, 115, 116, 135, 139, 150(a), 160(b), 165, 173, 176, 179, 183, 202(b), 209, 217, 224, 236(a), 236(c), 244(b), 246 and 259.

Interrogatories 2(a), 3(a), 8(a), and 9(a) each ask for an explanation of the Game Department's opinion of the meaning of various parts of treaty language to the treaty Indians and to the non-Indians who treated with the Indians circa 1840-1860. Although in answer to interrogatories 1(a) and 1(b) the defendants indicate they have formed such opinions, their answers to interrogatories 2(a) and 3(a) merely quote from a United States Supreme Court decision in 1968. The language is not directly responsive to the question. Further, the interrogatory seeks the opinion of the Game Department, not of the United States Supreme Court. Presumably, the court was giving its present interpretation of the treaty language, not expressing what the treaty party understood it to mean. If the Game Department has interpreted the treaty phrase, as the persons answering the interrogatories indicate they have done, it is important to discover the meanings which they believe were in the minds of each of the treaty parties. The Supreme Court treatment

of the treaty language in 1968 in the context of a specific case is not what is sought. The same problems exist with the answer to interrogatory 4 in which all bases for the Department of Game opinions relating to interrogatories 2, 3, and 10 are indicated as the Puyallup Tribe v. Department of Game case and the decisions cited therein.

Interrogatory 43 asks for detailed information about the process followed by the Game Department in issuing regulations and orders governing the taking of fish such as the type of data upon which the regulation order is based, whose recommendations are considered, who makes the final determination, what proceedings are conducted, etc. Instead of answering these questions, the defendants merely cite the section in the Revised Code of Washington which gives the state Game Commission its authority.

Interrogatory 49 asks for information about the facts behind the decision of the state to allow fishing on spawning beds and holding pools immediately preceding the spawning period. To the extent that "unlimited information" would be necessary to answer the questions, plaintiffs do not ask the court to order an answer, although it is suggested that "unlimited" information would not be required to answer the questions. However, the answers which are given are incomplete. Specifically, parts b and c are not specific enough. Part b asks upon what data permission to fish on spawning beds and holding pools is granted. The portion of the answer to that section of the question concerning data states "The data relied upon consists of records of observed steelhead beds and major steelhead spawning areas." No data is specified and the answer itself is uncomprehensible. Part c of the question asks upon whose recommendation the permission is granted. The answer, at best, refers merely to "staff recommendation". In order to complete discovery, including the taking of depositions it will be necessary to

know specifically, by name, the individuals who made the recommendations.

Interrogatory 52 asks whether the state has ever permitted the taking by hook and line of steelhead from spawning beds or holding pools of other anadromous fish immediately preceding spawning periods for such other fish. The answer is totally unresponsive. It is "No. The Game Department does not possess legal authority to permit the taking of food fish by hook and line." The interrogatory asks about the taking of steelhead not of so called "food fish". Further, no explanation of the apparent definition of "food fish" is given.

Interrogatory 54(a) asks for the Game Department description of the operation of a fish trap. The answer given is "a device which is capable of trapping fish". The answer is inadequate in that the definition would fit nearly any method of fishing such as netting, seining, etc.

Interrogatory 55 asks whether the Game Department has ever considered permitting the taking of steelhead by various techniques. A very brief explanation of the types of fishing that have actually been allowed is given but no answer to the question of whether there has been consideration of any other methods is given. The answer seems to be in the affirmative but is not directly stated. If the answer is in the affirmative, it would be necessary for interrogatory 56 and either 57 or 58 to be answered as well.

The answer to interrogatory 58 begs the question. The question is upon what grounds permission to use various methods of fishing was rejected. Although it is not anywhere stated that permission was in fact rejected, the answer given is "commercial fishing methods for the taking of game fish have never been authorized by the legislature or the Game Commission." What are "commercial fishing methods"? Even if there was a

definition given, the fact that they have never been authorized certainly does not answer upon what grounds permission is rejected Likewise, the answer to interrogatory 59 which asks the grounds or reasons for failure to consider taking fish by other methods than hook and line merely states "the law does not permit it". And the response to part b of interrogatory 59 fails to specify the facts which support a choice of hook and line methods of fishing and is not responsive. The answer states merely "facts which were before the legislature when, in the exercise of its discretion under the state's police power, it prohibited commercialization of game fish."

Interrogatory 60 asks for the specifically identified sources setting forth facts which support a hook and line fishery. Instead of answering the question, the defendants state merely "The Game Department cannot substitute its judgment for that of the legislature of the State of Washington. See: R.C.W. Title 77."

Interrogatory 66 asks for the Game Department's "best estimate" of the number of sport fishermen without licenses who lawfully fished during the last ten years. The answer given by the defendants is that no license data is available for such persons. Of course, license data is not available if the persons are not licensed. The question is what is the best estimate of the department as to the number of such persons.

Interrogatory 73 asks for information concerning organizations which purport to protect or represent the interests of Washington State sport fishermen. Defendants refer in parts a and b of this question to a list of persons receiving notice of proposed rule making, etc., given in answer to interrogatory 71. This answer is evasive and patently inaccurate. Most of the persons listed are representatives of newspapers and various periodicals. In addition, even counsel for the government and one of the

attorneys for plaintiffs is listed. Unless the Game Department does not have the information necessary to answer interrogatory 73 and all of its sub-parts, it should be required to do so.

Interrogatory 102 asks when artificial production techniques for steelhead began. The question is evasively answered saying that Game has utilized artificial propagation since its formation but that it is "not legally responsible" for the activities of its predecessor." Regardless of "legal responsibility" the question must be answered if the party from whom discovery is sought has the information.

Interrogatory 115 asks about the beneficial conservation aspects of taking steelhead by certain fishing techniques. The answer given is "Taking of game fish via commercial gear for commercial purposes is not permitted by state law. Game will not look behind duly enacted state laws." If the defendants do not know the beneficial conservation aspects of such fishing, they should say so. Instead, they are saying, in effect, "we will not tell what the beneficial conservation aspects are." In interrogatory 116, the bad conservation aspects of taking steelhead by the same fishing techniques referred to in interrogatory 115 are inquired about. The answer given is inadequate and nonresponsive in that it states "the number of steelhead will not sustain commercial fisheries ... " The question simply does not ask about "commercial" fisheries but about fishing techniques. It is telling, however, that the Game Department has purported to answer the question at all in that enumerating any bad aspects of fishing by techniques other than hook and line would tend to "look behind duly enacted state laws."

In interrogatory 135, information concerning over-escapement is sought. Although the answer to interrogatory 134 indicates that observation of incidents of over-escapement has been made, the answer given to interrogatory 135 is merely that "no precise

data is available." Certainly if there have been observations of the occurrence of over-escapement, questions such as 135(a) as to when the over-escapement occurred can be answered as can the other sub-sections of interrogatory 135. Certainly 135(g) asking what regulations permitting treaty Indian fishing were issued for each one having an over-escapement can be answered. If answers cannot be made with precision it will be revealed in the answer to interrogatory 136 which asks for the sources of the information given in 135.

The inquiry in interrogatory 139 concerns the opinion of the Department of Game concerning purposes for fishing. Rather than answering the question, defendants dodge the issue and state that the legislature determines the purpose for which game and fish may be taken. The same defendants refer to "commercial" types and methods of fishing in the answers to other interrogatories but refuse to answer this interrogatory concerning the significance that the Department places on various fishing purposes. If interrogatory 139 is answered, interrogatories 140-142 also should be answered.

Interrogatory 150(a) asks what procedures have been enacted pursuant to R.C.W. 34.04 relating to making provision for an Indian net fishery for steelhead. Instead of answering the question, the answer "R.C.W. 34.04" is given.

In answer to interrogatory 160(b) concerning the process by which the purposes, policies and objectives of the Game Department are determined, the answer "the legislature and staff review" is given. The question is by what process they are determined. The answer is not responsive.

Interrogatory 165 asks about the effect on the number of harvestable steelhead by certain specified actions. The answer to all sections of that question is "it would reduce the catch if each of the assumption were true." The answer

is simply not responsive to the question which relate to harvestable steelhead; the answer concerns size of catch. Presumably the Game Department is in a position to give its opinion and on each individual sub-section with some specificity.

An extremely evasive answer is given to interrogatory 173 which inquires about the topographical, chemical and environmental conditions of a body of water necessary to sustain steelhead runs and spawning. The answer given is "the natural conditions that exist in the accessible watersheds of Washington support steelhead populations." Part b of the question asks for the specifically identified sources supporting the answer. The answer to the question given by defendants is "the steelhead catch data referred to in previous answers." The answers to both parts of this question are not helpful at all. Certainly the answers are available within the department and the sources can be specified with little difficulty.

Interrogatory 176 asks what types of food on which steelhead subsist. The answer given is "natural aquatic and terrestrial organisms. Data will be made available upon request." The interrogatory, of course, is a request for the information and it is simply not sufficient to state that data will be made available.

The answer to interrogatory 179 is unintelligible. The question is in what ways is the statement made in 178 inaccurate. The answer is "there is a relationship between wetted perimeter and spawning and rearing of steelhead in streams." Whether in context of interrogatory 178 or not, the answer makes no sense.

Interrogatory 183 asks for specifically identified sources supporting the answer to interrogatory 180. The answer is "escapement data for various watersheds." This answer is evasive and not responsive to the question. It seems calculated to

frustrate the purposes of discovery rather than to satisfy them.

Interrogatory 202(b) asks whether the State of Washington separates fishery data between commercial and non-commercial take. The defendants do not answer the question but merely state it is unlawful to commercially deal in steelhead."

Interrogatory 209 asks which organizations have favored the classification of steelhead as a game fish. The only answer given is "the legislature of the State of Washington since 1933." The legislature is not an organization. Are we to assume that no organizations have favored the classification of steelhead as a game fish so far as the Game Department knows?

Interrogatory 217 asks for details expanding on the answer to interrogatory 216. Although the answer to 216 indicates that a study was done, the answer to 217 is "no data available." And interrogatory 218 asks for the sources for the answers to the preceding questions but the answer "not applicable" is given.

In interrogatory 224 information is sought concerning seizures of Indian fishing equipment or property. The question is purportedly answered by reference to Department files. The question of whether that reference is adequate is treated in part d below. However, even if reference to the files is an adequate way to answer most of the questions, at least parts n and o could not be answered by the files. These sections ask about the authority under which the items are held by the Department and the procedures there are for handling them.

The answers to parts a and c of interrogatory 236 are inadequate. Part a asks why steelhead were transported to other states by the Department of Game and the answer is "data is available at the Department of Game headquarters." Although reference to data on file with the Department may be proper

under some circumstances, it is not proper when the question asked is "why." Part c asks what money or property was exchanged for transported steelhead. The answer given is "will check to see if data is available." This type of answer loses sight of the fact that these interrogatories are directed at the Director of the Department and all of his agents and employees as well as the Commission itself. Certainly in the files and records of the Department and in the knowledge of the Director or some of his employees this information is present. In any event, it is not proper to state merely that the party answering the interrogatories "will check" to see if he can obtain the information.

Interrogatory 244(b) seeks the identity of sources upon which the answer to interrogatory 243 is based. The answer "returns of marked fish in departmental records" is given. This hardly satisfies the request for "specifically identified sources." Of course, the records of the Department contain the sources; it is the identity of them that is sought by the interrogatory and it is only through such identification that discovery of the sources themselves and examination of such sources can be made.

Likewise, interrogatory 246 requests information about reports and studies, but the defendants answer simply that they are available at the Department of Game headquarters upon request. Without further information they cannot be requested.

Interrogatory 259 asks whether, in the opinion of the Game Department, Indians must utilize the same materials used by their predecessors in order to exercise present day treaty fishing claimed by them. The answer give completely begs the question. It states "Game believes that a court of competent jurisdiction will decide this question of claimed treaty rights and implementation thereof, if any." Plaintiffs already know

this. They are asking what the Department of Game's opinion of the subject is.

D. Reference To The Files And Records Of The Department of Game In Answer To A Number Of Interrogatories Was Improperly Made.

The discovery rules are not designed to put more burden on one party than another and, as stated by Rule 33(c) where "the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served...and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine...such records...." The use of the option provided by Rule 33(c) has been set out in some detail.

> *** The option provided by Rule 33(c) is available only if the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatories as for the party served. Whether this is the case will be for the party to whom the interrogatories is directed to resolve in the first instance. If he believes that he is entitled to avail himself of this provision and desires to do so, he will respond to the interrogatory by specifying the records from which the answer may be found... (Emphasis supplied) 8 Wright & Miller, Federal Practice and Procedure, Civil §2178 at 570 (1970).

In the interrogatories propounded by plaintiffs to the defendants Carl Crouse and the Washington State Game Commission there are numerous responses indicating that data sufficient to answer the question are available in the records of the Washington State Department of Game in Olympia. The question is not whether the material exists in the files of the Department of Game, but rather whether it is more burdensome for defendants

to produce the information in response to the interrogatories than it is for plaintiffs to travel to Olympia, search the files, and derive the information. Besides making no indication that the burden is the same or greater for the Department of Game than it would be for plaintiffs, there is no indication of exactly where in the records the information can be found or how one would go about obtaining it if they were to travel to Olympia. In a number of answers the identity of specific reports or files is omitted. In an Advisory Committee Note to the 1970 amendment to Rule 33(c) a statement, applicable here, was made: "The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer must be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records." 48 F.R.D. at 524-25.

The interrogatory answers in which reference is made to Game Department records includes interrogatories 64, 65, 69(a), 74, 75, 76, 81, 82(c), 99, 100, 101, 108, 195, 213, 216, 224, 227, 229, 231, 235, 236(a), 236(b), and 246. It is plaintiffs' belief that at least some of the information sought must already be compiled making it considerably easier for defendants to furnish the information from their records than to have them searched by plaintiffs in an attempt to discover the information that is sought. Other references to Department or Commission records is made in instances in which plaintiff has a serious doubt that the information can be found in the records. For instance, inquiries relating to the Commission's dealings with organizations concerned with sports fishing may not all be in the Commission minutes. The dealings of such organizations with the Department (as opposed to the Commission)

will probably not be found in any minutes, but may be most completely in the memories and knowledge of Department personnel. (Interrogatory 74-75).

III. THE INTERROGATORY ANSWERS ARE ALL INEFFECTUAL IN THAT THEY ARE NOT SIGNED BY THE PARTY ANSWERING THEM.

Rule 33(a) of the Federal Rules of Civil Procedure states that "each interrogatory shall be answered separately and fully in writing under oath.... The answers are to be signed by the person making them, and the objections signed by the attorney making them." No party to this case has signed the answers. The interrogatories were propounded to defendants Carl Crouse and the Washington State Game Commission, however, they bear the signature of defendants' attorney, Joseph L. Coniff, Jr. It is clear from the face of the Rule that the interrogatories must be answered and signed by the party to whom they are addressed. 8 Wright & Miller, Federal Practice and Procedure, Civil §2172 at 535 (1970); Jones v. Goldstein, 41 F.R.D. 271, 274 (D. Md. 1966) and the party to whom the interrogatories are served must sign them even though his attorney has also signed them. Jones v. Goldstein, supra, at 274. Furthermore, it is improper for the party's attorney to answer the interrogatories. 8 Wright & Miller, Federal Practice and Procedure, Civil §2172 at 535 (1970). Also, there is no purported oath attesting to the truthfulness of the interrogatory answers. Without this, they are worthless. An unsigned and unverified writing does not qualify as an answer to interrogatories. Cabales v. United States, 51 F.R.D. 498, 499 (S.D. N.Y. 1970).

IV. PLAINTIFFS ARE ENTITLED TO EXPENSES INCLUDING ATTORNEYS' FEES

Whenever a motion compelling discovery is permitted, Rule 37(a)(4) requires that:

> *** ... the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified and that other circumstances make an award of expenses unjust.

In this case, if the court grants plaintiffs' motion to compel answers to the unanswered interrogatories or those which are not properly and completely answered, it should make an award of the expenses incurred in obtaining the order including attorneys' fees. Parrett v. Ford Motor Co., 52 F.R.D. 120 (W.D. Mo. 1969).

A second basis for obtaining expenses and attorneys' fees is found in Rule 37(b)(2) which provides for sanctions against the party who violates the court order to answer interrogatories. In this case, the court ordered responses to be made to interrogatories propounded to defendants by March 8, 1973, as indicated above. Many of the interrogatories simply were not responded to. Although there may be some debate about the type of answer given to many of the interrogatories, there can be no debate about the total failure of the defendants to respond to several of the interrogatories, such as those which they answered with the word "objection." Thus, it is clear that the court's order requiring discovery is subject to the sanctions provided in Rule 37(b)(2). These sanctions include rather drastic measures going to the substance of the case.[1]

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[1] The sanctions provided by Rule 37(b)(2) are:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be

(Footnote continued next page)

In lieu of the rather sweeping measures which the court may take, or in additon to them, the court is bound to "require the party failing to obey or the attorney advising him or both to pay the reasonable expenses including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." R. De. Bovard & Cie v. S.S. Ionic Coast, 46 F.R.D. 1 (S.D. Texas 1969); Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 22 F.R.D. 302, 304 (S.D. N.Y. 1958).

Finally, sanctions are available under Rule 37(d) which is applicable when a party fails to respond to discovery. Again, the failure to answer or properly object to many of the interrogatories in this case is a basis for imposing the sanctions under Rule 37(d). The Rule requires the court to order "the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the court finds the failure

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[1](footnote continued)

established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

was substantially justified or that other circumstances make an award of expenses unjust." Allied Artists Pictures Corp. v. Giroux, 50 F.R.D. 151 (S.D. N.Y. 1970).

Under any of the provisions of Rule 37 allowing expenses and attorneys' fees plaintiffs are entitled to an order requiring defendants Carl Crouse of the Washington State Game Commission or the attorney advising them or all of them to pay substantial expenses including the attorneys' fees which have been incurred and as a result of this failure.

CONCLUSION

This court should order defendants Carl Crouse and the Washington State Game Commission to answer all interrogatories as specified above which have not been answered, which have been improperly objected to, or which have been inadequately or evasively answered. Further, an award of expenses including attorneys' fees must be made.

Respectfully submitted,

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