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Environmental Law - Attorneys' Fees - Fees Awarded under Equity to Environmental Interest Litigants for Promoting Substantial Public Interests

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North Dakota in view of the impending coal development, and its accompanying electrical generating plants, gasification plants with all of the possibilities of damage to the environment similar to the pollution of Lake Champlain in *Zahn*.

At this point, the primary method of repairing the damage done to class actions with the *Snyder* and *Zahn* decisions is by Congressional action to amend the amount in controversy clause to allow aggregation to meet the requirement or to allow ancillary jurisdiction over the unnamed class members or to amend the jurisdictional statute to give private citizens standing to sue for environmental degradation.[61] It may also be possible to bring two suits, one for injunctive relief under existing federal law, and another for damages, arguing that the suit for damages is ancillary to the suit for injunctive relief.[62] But, it is clear that some mechanism should be found to bring environmental class actions within the jurisdiction of the federal courts, to allow people who have been injured by environmental degradation to receive compensation.

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ENVIRONMENTAL LAW—ATTORNEYS' FEES—FEES AWARDED UNDER EQUITY TO ENVIRONMENTAL INTEREST LITIGANTS FOR PROMOTING SUBSTANTIAL PUBLIC INTERESTS.

Environmental Defense Fund, Inc. and Friends of the Earth instituted an action against R. C. Morton, Secretary of the Interior, in the United States District Court for the District of Columbia, to bar construction of the trans-Alaska pipeline. The controversy focused on whether the Secretary of the Interior had authority to grant special land use permits for pipeline rights-of-way in excess of statutory width specifications[1] and whether he had prepared

61. Bills such as this have been introduced. In the second session of the 92d Congress (1972), S. 1032 and H. 1049 both provided citizens with standing to bring suit for injunctive or declaratory relief for environmental degradation regardless of the amount in controversy.

62. This approach was successful in Biechele v. Norfolk & Western Ry., 309 F. Supp. 354 (N.D. Ohio 1969). The action was brought in state court and removed. Jurisdiction over the suit for injunctive relief was obtained by the Court, saying: "It appears to the Court that the right of each member of the class to live in an environment free from excessive coal dust and conversely, the right of the defendant to operate its coal loading facility are both in excess of $10,000.00." *Id.* at 355. The court then assumed jurisdiction over the suit for damages as ancillary to the suit for injunctive relief.

For a discussion of the basis for jurisdiction over suits for injunctive relief, see, Note, *The Federal Class Action in Environmental Litigation: Problems and Possibilities*, 51 N.C.L. REV. 1385, 1401 (1973).

1. The Mineral Leasing Act of 1920 § 28, 30 U.S.C. § 185 (1970), provides that "Rights-of-way through public lands . . . may be granted . . . to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same . . ."

an adequate environmental impact statement.[2] A preliminary injunction was granted to arrest the violation.[3] Three years later this decision to enforce the statutory technicality was upheld in the United States Circuit Court of Appeals.[4] Having prevailed, the appellants requested an award of expenses and attorneys' fees.[5] The Court of Appeals applied the equitable "private attorney general" exception to the traditional American rule,[6] a rule which bars recovery of attorneys' fees[7] unless there is express statutory authorization. The Court then remanded the bill of costs to the District Court for an assessment against the defendant, Alyeska Pipeline Service Company,[8] of one half the amount of the reasonable services rendered by the appellants' attorneys. The appellants, however, were forced to assume the other half since the court found that the United States cannot be taxed for fees, unless specifically

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2. The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970) [hereinafter referred to as NEPA] provides that the Secretary of the Interior must submit to the Congress an environmental impact statement outlining in detail the consequences of an approved project.

3. Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).

4. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973) *cert. denied*, 93 S. Ct. 1550 (1973). *See generally* Dominick & Brady, *The Alaska Pipeline: Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 AMER. U.L. REV. 337 (1973). In this complete outline of the factors surrounding the development of the Alaskan oil fields and problems of transportation between Prudhoe Bay and the lower forty eight states, the authors explain how the effect of the original decision was a "remand" to Congress of the issues involved. When appellants initiated the action for a violation of the width restrictions in the Mineral Leasing Act, the Interior Department, though willing to grant the violative rights-of-way, had not drafted an impact statement for the pipeline as required by NEPA. Thus Congress was forced to revise the Mineral Leasing Act rather than permitting its continued evasion. Congress therefore amended the Mineral Leasing Act of 1970, to permit construction. 87 Stat. 576. In a further amendment sponsored by Senator Gravel of Alaska, Congress provided that the actions already taken by the Department of the Interior were a sufficient compliance with NEPA. Trans-Alaska Pipeline Authorization Act, 43 U.S.C.A. § 1652 (c,d). As a result of this action by Congress, the appellants moved for a dismissal of the entire litigation on January 16, 1974.

5. A bill of costs was also submitted by the Cordova District Fisheries Union, an appellant from previous litigation. Since it was not a prevailing party on any issue in its separate suit, Cordova was not entitled to costs. Wilderness Society v. Morton, 495 F.2d 1026, 1028 (D.C. Cir. 1974).

6. Traditionally in the United States the rule has been that attorney's fees are not assessable against the losing party, either in the form of costs or as a part of the damages awarded to the prevailing party. Rather each party generally has been left to bear for himself the cost of counsel. *E.g.*, Hall v. Cole, 93 S. Ct. 1943, 1945-46 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970); Fed. R. Civ. P. 54(d); 28 U.S.C. § 2412. For a thorough historical resume on the general American rule, its operational characteristics, and a comparison with its equitable exceptions see Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1216-33 (1967).

7. *See* Clay v. Overseas Carriers Corp., 61 F.R.D. 325 (E.D. Pa. 1973). Fees are the charges a party to an action must pay to his own attorney for services rendered in the course of the case. Costs are the additional expenses of litigation which are usually awarded by statute to the prevailing party and taxed against the losing party. *Id.* at 336.

8. Although the Department of the Interior was responsible for the actual violations of the Mineral Leasing Act and NEPA, it was the Alyeska Pipeline Service Company that persuaded the government to grant the rights-of-way and who later intervened in th litigation to protect its interests. Thus J. Skelly Wright, writing for the majority, described Alyeska as, "a major and real party at interest in this case, actively participating in the litigation along with the Government, ... In recognition of the Government's role in the case, on the other hand, Alyeska should have to bear only half of the total fees. . . . In this manner the equitable principle that appellees bear their fair share of this litigation's full cost and the congressional policy that the United States not be taxable for fees can be accommodated." Wilderness Society v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974).

The state of Alaska, also, joined as a defendant with Alyeska and the United States. The court ruled, however, that it was not liable for plaintiff's fees under the private attor-

ordered under a statutory award of costs.[9] *Wilderness Society v. Morton,* 405 F.2d 1026 (1974).

The practice in English courts has always been to grant the witness the expense of his counsel fees, whereas in American courts such awards have been made only in rare circumstances.[10] The novelty of this difference is accented by the fact that almost all American practices have evolved from the English example. There are several possible reasons for the development of this anomalous American rule including a public mistrust of lawyers,[11] the American belief that every man should pay his own way as well as the expenses for defending himself,[12] and the possibility of historical accident.[13]

Accordingly, proponents of the American no-fee rule have argued that the practice encourages litigation by eliminating the threat to adversaries of their opponents' attorney fees.[14] Further, that counsel fees are too varied to be accurately ascertained and would very likely become excessive.[15] And finally, that in the growing area of environmental litigation, general fee shifting might flood the courts with environmental cases.[16] Within the last decade these arguments have been strongly criticized[17] by an increasing number of advocates of the English rule.[18]

A changing attitude is reflected by the substantial increase in the application of recognized departures from the no-fee rule. These exceptions may be divided into two general categories—those created by statute and those resulting from an exercise of the courts' inherent power of equity.

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ney general theory because it had participated voluntarily in an effort to present to the Court a different version of the public interest ramifications of the pipeline. Refer to text accompanying note 57, *infra*, on sovereign immunity.

9. Wilderness Society v. Morton, 405 F.2d 1026, 1036 (D.C. Cir. 1974).

10. Costs were not awarded to litigants in the absence of statute under early common law, but the Judicature Act of 1873, 36 & 37 Vict., c. 66; and the Judicature Act of 1875, 38 & 39 made costs available to the winning party, as a matter of course in both equity and law, unless the court determined that the conditions surrounding the case required a deviation from the rule. *See* Plater & King, *The Right to Counsel Fees in Public Interest Environmental Litigation,* 41 TENN. L. REV. 27, 31-32 (1973); Goodhart, *Costs,* 38 YALE L.J. 849, 854 (1929).

11. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society,* 54 CALIF. L. REV. 792, 798 (1966).

12. Goodhart, *supra* note 9, at 873. For a recent and comprehensive treatment of the entire area of attorneys' fees see Plater & King, *The Right to Counsel Fees in Public Interest Environmental Litigation,* 41 TENN. L. REV. 27 (1973).

13. Note, *supra* note 5, at 1220-21.

14. These speculations are discussed and criticized in Ehrenzweig, *supra* note 10, at 797.

15. The idea of remoteness in attorneys fees was discussed and rejected in McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages,* 15 MINN. L. REV. 619, 639-41 (1931); *See generally* Note, *supra* note 5.

16. Empirical studies have shown otherwise. *See, e.g.,* Sax & Conner, *Michigan's Environmental Protection Act of* 1970: *A Progress Report,* 70 MICH. L. REV. 1004 (1974).

17. *See generally* Ehrenzweig, *supra* note 10; Note *Attorney's Fees as an Element of Damages,* 15 U. CIN. L. REV. 313 (1941); Skoebuck, *Counsel Fees Included in Costs: A Logical Development,* 38 U. COLO. L. REV. 202 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75 (1963); 65 MICH. L. REV. 593 (1967); McCormick, *supra* note 14; Note, *supra* note 5; Goodhart, *supra* note 9.

18. *See* Plater & King, *supra* note 11, at 35-37.

Statutory exceptions follow two basic patterns: those requiring an automatic or mandatory transfer of fees,[19] and those giving the courts discretion to grant fees to the prevailing party.[20]

However, the federal judiciary has created the most outstanding exceptions to the American rule by exercising its general powers of equity. The Supreme Court stated that use of these exceptions is permissible whenever "overriding considerations of justice seem to compel such a result."[21] Departures from the no-fee rule have been classified as the "obdurate behavior," "common fund," and "private attorney general" exceptions.[22]

The obdurate behavior theory has been used primarily to protect the honest litigant and discourage abuse of the court system. Fees are awarded to a litigant when his opponent has pursued an unconscionable, bad faith, or vexatious action or defense.[23]

The common fund approach is based upon the desire to prevent the unjust enrichment of others who stand to benefit from a decision. The doctrine is applied when a person's successful litigation confers a substantial benefit on the property interests or legal rights of the members of an ascertainable class and when the court's jurisdiction over the subject matter makes possible an award of fees that will operate to spread that person's costs proportionately among the class members.[24]

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19. *E.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a-3b (1970); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Clayton Act, 15 U.S.C. § 15 (1970); Truth in Lending Act, 15 U.S.C. § 1640(a) (1970); Housing and Rent Act, 50 U.S.C.A. § 1895(a), (b) (1970); Interstate Commerce Act, 49 U.S.C. § 908(b) (1970); Tort Claims Act, 28 U.S.C. § 2678 (1970). For a general discussion of the statutory exceptions to the no fee rule see 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 54.71[2] at 1378-85 (1972). *See* Plater & King, *supra* note 11, at 38 & n.56.

20. *E.g.*, Patent Act, 35 U.S.C. § 285 (1970); Trust Indenture Act, 15 U.S.C. § 77ooo(e) (1970); Copyright Act, 17 U.S.C. § 116 (1970); Serviceman's Readjustment Act, 38 U.S.C. § 1822(b) (1970).

The Federal Rules of Civil Procedure also allow an award of counsel fees in certain instances. *See* FED. R. CIV. P. 26(b)(3), 30(d), 33(a), 36(a), 37(a)(4) and 37(c).

In addition there are several established common law exceptions providing for a shift in fees including divorce actions, certain admirality cases, and cases containing contractual allowances. *See* McCormick, *supra* note 14. *See* Plater & King, *supra* note 11, at 38 & n.58.

21. Fleishmann Corp. v. Maier Brewing, 386 U.S. 714, 718 (1967).

22. La Raza Unida v. Volpe, 57 F.R.D. 94, 96 (N.D. Cal. 1972). It should be emphasized that until recently the courts have used their equitable powers sparingly with the first two categories of exception accounting for the majority of instances.

23. The obdurate conduct rule was the most readily accepted equitable exception by American courts because of its long standing in the practices of the English Chancery. It has been suggested that the obdurate behavior exception conditioned the courts to a higher level of social consciousness and prepared the way for the development of the common fund approach and the private attorney general theory. *See* Plater & King, *supra* note 11, at 43. However, use of this theory is severely restricted by the inherent limitations of its form. *See generally* Guardian Trust Co. v. Kansas City Southern Ry. Co., 28 F.2d 233, 241 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930). Note, *Use of Taxable Costs to Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953); 6 J. MOORE, *supra* note 12, at 1709.

24. Prior to 1970 the fund theory required that benefits to shareholders be capable of monetary valuation. Following Mills v. Electric Auto-Light Co., 396 U.S. 375 (1970) shareholders were deemed to have received a "substantial benefit" from the mere legal therapeutics of a vindicated statutory policy. That is, the members' interests were protected and the danger to their rights corrected through plaintiffs enforcement of the statute. Thus

The third equitable departure from the American no-fee rule came as a result of the judicial efforts to expand the required limitations of the common fund theory.[25] In searching for a more direct justification for shifting fees, the Supreme Court created an unprecedented exception[26] in *Newman v. Piggie Park Enterprises*:[27]

> A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.[28]

The private attorney general approach offered a persuasive alternative because of its consideration of broad public policies.[29]

Recognizing the need to encourage private action to enforce strong legislative policy, equity courts have granted fees in other civil cases[30] brought under earlier statutes that are silent on the question of awarding such expenses.[31] However, this need cannot adequately be met under existing theories of expense awards. Recent decisions on federal class action have made it a limited basis for fee recovery.[32] Application of the *qui tam* reward system is limited

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fees may be awarded although no pecuniary benefit arises, provided a nexus can be established between the members of the subclass of shareholders and the subject matter. *See* Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658, 662-63 (1956); Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1237 (1937). The non-monetary benefits of enforced Congressional policies have been widely recognized as a basis for awarding fees to other classes including labor unions, organization members, and recently large, almost unidentifiable groups such as students, ethnic minorities and taxpayers. *See* Yablonski v. United Mine Workers of America, 466 F.2d 424 (D.C. Cir. 1972), *cert. denied*, 93 S. Ct. 2729 (1973); Hall v. Cole, 93 S. Ct. 1943 (1973); LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972).

25. Mills v. Electric Auto-Lite, 396 U.S. 375, 392-394 (1970).

26. Actually the private attorney general concept had been applied in various suits against the government as a basis for standing to sue. *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943). *See* Plater & King, *supra* note 11, at 50 and n.123.

27. 390 U.S. 400 (1968).

28. *Id.* at 401-02.

29. Thus the requirement that the benefits arise from the enforcement of statutory regulations was expanded to include benefits created from the support of broad public policies. *See, e.g.*, Brewer v. School Board, 456 F.2d 943 (4th Cir. 1972), *cert. denied*, 406 U.S. 933 (1972); Wyatt v. Strickney, 344 F. Supp. 387 (M.D. Ala. 1972). *See also* Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST. L. J. 733, 751-52 (1973).

30. *See, e.g.*, Jones v. Mayer Co., 392 U.S. 409 (1968); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Bradley v. School Board, 53 F.R.D. 28 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972); Brewer v. School Board, 456 F.2d 943 (4th Cir. 1972); Sims v. Amos, 340 F. Supp. 691 (M.D. Fla. 1972); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972); Wyatt v. Strickney, 344 F. Supp. 387 (M.D. Ala. 1972).

31. *See* discussion note 25, *supra.*

32. Snyder v. Harris, 394 U.S. 332 (1969). Subsequent cases have held that each member of the class in a diversity action must meet the requisite federal jurisdictional amount of $10,000. *See also* Fed. R. Civ. P. 23(b); Zahn v. International Paper Company, 469 F.2d 1033 (2d Cir. 1972); Potrero Hill Community Action Comm. v. Housing Authority, 410 F.2d 974 (9th Cir. 1969).

by statute to a small number of cases.[33] Consequently, the private attorney general rationale seems to provide the most useful fee recovery theory because it avoids the indirection and practical limitations of the other approaches and yet encourages private enforcement of public policy.

The private attorney general principle in many ways is still a compendious concept rather than a fixed rule of recovery. But several criteria and equitable guidelines were recently established for applying the theory.[34] The court in *La Raza Unida v. Volpe*[35] stated that:

> The rule . . . is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney general" should be awarded attorney's fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential.[36]

Thus, the court recognized four requirements—public policy, public benefit, necessity of private enforcement, and the financial burden of that enforcement.

Although it may be suggested that enforcement of any law satisfies the first requirement by serving public policy, the courts have intimated that some laws present a more compelling case than others.[37] Since it has become apparent in the last few years that environmental protection is a high-ranking public priority,[38] fee shifting is considered more justifiable. The method generally used for establishing the existence of such priorities has been to, first, con-

33. A party files a claim in such cases to recover a penalty against a violator of a statute which provides that the penalty shall be shared by any informer bringing suit. *See* Plater & King, *supra* note 11, at 50 & n.123.

34. Before the La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972) decision, however, the private attorney general principle had been applied primarily to standing questions in environmental cases, *e.g.*, Citizens Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970); Scenic Hudson Preservation Conference v. Federal Power Com'n., 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); Izaak Walton League of America v. St. Clair, 313 F. Supp. 1312 (D. Minn. 1970).

35. 57 F.R.D. 94 (N.D. Cal. 1972). This was the first case in which a federal court applied the private attorney general exception to an environmental action. Plaintiffs contended that the state and federal governments had failed to comply with federal building regulations and thereby obtained a preliminary injunction. The La Raza Court ruled that even though the regulations did not provide for such expenses petitioners were entitled to an award of fees from the state defendant under the private attorney general exception.

36. *Id.* at 98.

37. *See* Plater & King, *supra* note 11, at 65.

38. La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972). In *La Raza* the court stated that actions to save the environment are "[e]veryone's business . . .", and that "[a]lmost all of society is better off when public policies in these areas have been strengthened." *Id.* at 100. NEPA supports the court on this issue. Section 101(c) of NEPA states "Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331(c) (1970). *See* Roberts, *The Right to a Decent Environment; E=mc2: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970). The National Environmental Policy Act of 1969 states that "[e]ach person should enjoy a healthful environment." (§ 101(c), 43 U.S.C. § 4331(c) 1970).

sider the statutes relevant to the controversy,[39] and then to assess the interests being vindicated to determine if the litigation will serve to uphold a strong congressional policy and thereby justify financing the prevailing party's efforts.[40]

While the policy requirement demands that a vital public interest be involved, the benefit element requires that the litigation significantly serve that public interest. This means that the litigation must be of importance to the vital public interest involved, irrespective of the effects on the individual litigants.[41] The sufficiency of the benefit ultimately depends upon whether the cause of action raises questions that are common to other similar cases, or whether any decision would be limited to the facts of the instant case.[42]

The necessity requirement is generally satisfied[43] by the court's recognition of the inherent value in private policing of public officials and agencies who often are either incapable of executing, or ignore, their duties to protect the public.[44] In some cases private attorneys general may not be able to recover their expenses until they have demonstrated that no governmental agent would have prosecuted the violation.[45]

Finally, the purpose of the financial burden requirement is to determine whether the parties acting as private attorneys general would be unable to bring similar actions in the future if they did not recover their fee expenses.[46] This requirement discourages fee shifting in cases litigating public issues as an attempt to prosper financially.[47] However, the financial burden of instituting such suits

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39. *See* La Raza Unida v. Volpe, 57 F.R.D. 94, 99 (N.D. Cal. 1972). *Cf.* Citizens Commission for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970).

40. The policy need not be the same policy contained in the law underlying the action. *See* Plater & King, *supra* note 11, at 66. Courts, however, refuse to award fees where the environmental concern is not a part of the real cause of action but is raised only to support an argument for recovering expenses.

41. Although precise calculation of the class membership that is benefited is not required, proof of effectuation of a strong public policy is required. *See* Plater & King, *supra* note 11, at 67-69.

42. In general terms, the courts in environmental cases seem to require only that the benefits be widespread or result in a significant implementation of national policy.

43. La Raza Unida v. Volpe, 57 F.R.D. 94, 99-100 (N.D. Cal. 1972); Note, *Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 69-71 (1973).

44. The *La Raza* court stated such needs occur where, "[t]he only public entities that might have brought suit . . . are named as defendants . . . and vigorously oppose plaintiffs' contentions, . . . only private citizens can be expected to guard the guardians." 57 F.R.D. 94, 101 (N.D. Cal. 1972). Moreover Congress has recently begun inserting citizens suit provisions in statutes. *E.g.*, Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. § 1365(d), (Supp. 1974); Clean Air Act Amendments of 1970, 42 U.S.C.A. § 1857(h)-2(d)(e) (Supp. 1973); Noise Control Act, 42 U.S.C.A. § 4911(d) (Supp. 1973).

45. Some statutes provide for an award of fees only upon proof that officials are not "diligently prosecuting" violations. *E.g.*, Clean Air Act Amendments of 1970 § 304(b)(1)(B), 42 U.S.C. § 1857(h)-2(b)(1)(B) (1970). *See* Plater & King, *supra* note 11, at 71.

46. *See, e.g.*, Mills v. Electric Auto-Lite, 396 U.S. 375 (1970); Hall v. Cole, 412 U.S. 1 (1973); Dee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971). *See* Plater & King, *supra* note 11, at 72.

47. Fee awards are dependent on the facts of each case. In Lyle v. Teresi, 327 F. Supp. 683, 686 (D. Minn. 1917) the plaintiff's counsel presented an affidavit estimating his total attorneys fees at $11,280. The court, however, allowed the plaintiff's attorney only $1,000 for his counsel fees.

usually prevents even the legitimate public interest cases.[48] Consequently, the courts are inclined to support private attorney general suits through fee shifting when it appears that the litigants have no financial incentive for bringing such actions.[49]

It must be re-emphasized that these requirements are variable elements supporting an award of fees rather than fixed criteria of an established rule.[50] Comparing the requirements of the common fund concept with those of the private attorney general theory reveals the greater utility of the latter.[51] The main differences lie in the classes benefited and in the defendants taxed. In environmental actions the common fund exception provides a workable rationale for fee taxing with public defendants, but becomes useless for private defendants because the public cannot be justly taxed for the benefit accrued.[52] The private attorney general theory, however, does not differentiate between private and public defendants. And thus, because equity supports those who protect the public's interests, the defendant simply pays the plaintiff's expenses.[53] But the private attorney general exception, like the others, is subject to the defense of sovereign immunity.[54]

In *Wilderness Society v. Morton*, the court awarded attorney's fees under the private attorney general exception, holding that both the obdurate behavior and the common fund exceptions were not applicable because of plaintiff's good faith and the inability to spread costs among the beneficiaries. Following the general guildeines set forth in *La Raza*,[55] the court made several minor refinements. The court went further by recognizing that petitioners' legal efforts to improve the environment followed the express Congressional policy contained both in NEPA and the Mineral Leasing Act of

48. A significant example can be found in the case history of section 102 of NEPA 42 U.S.C. § 4332 (1973). Only about 30% of the impact statements filed under this provision are ever contested. For an excellent discussion of this see Plater & King, *supra* note 11, at 72-73.

49. Most environmental litigation depends on large privately and foundation supported groups such as the Sierra Club and the National Resource Defense Council. And it is a paramount principle of equity that courts will go much further to grant and withhold relief in the furtherance of a public interest. Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937); Wilderness Society v. Morton, 495 F.2d 1026, 1030 (D.C. Cir. 1970).

50. *See* Sierra Club v. Lynn, 364 F. Supp. 834, 850 (W.D. Tex. 1973), *rev'd*, 43 U.S.L.W. 2160 (5th Cir. Oct. 4, 1974).

51. *See* Plater & King, *supra* note 11, at 52-3.

52. *See*, Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222, 1245-46 (1973).

53. *Id.* at 1246.

54. State and federal governments are immune from actions at law or equity and can only be attacked through their individual officers or agents. If an official is sued under this fiction as an individual, he is held to be responsible for his actions as a private person, independent of his official capacity. Thus a state employee may be liable for attorney and expert witness fees if sued in his individual capacity. However, this fiction does not apply to federal officials who may only be sued for ordinary costs. 28 U.S.C. § 2413 (1970). *See*, Note, *supra* note 56 at 1246-53; Plater & King, *supra* note 11, at 85-91; Davis, *Administrative Law Text*, § 26.06 (3d ed. 1972).

55. 57 F.R.D. 94 (N.D. Cal. 1972).

1920 for protecting the public interest.[56] Even though petitioners did not obtain the ultimate relief sought,[57] the court reasoned that their efforts provided a valuable public service through the legislative changes they caused.[58] Considering the legislative changes that took place, this case would seem to offer a good example of legal therapeutics.[59] Previously, fee awards have been limited to the benefits arising from enforcement of existing laws. In *Wilderness*, however, recovery was granted for the public benefits derived from laws passed as a result of the litigation.

The most far reaching aspect of this decision to award attorney's fees was the method selected for assessing those fees. The court was unable to assess fees to the real violator, the government, because of the doctrine of sovereign immunity. Having only one possible source of payment left, the court suggested that fee shifting under the private attorney general exception is not for purposes of punishing the violators, but rather to compensate those who have acted to insure enforcement of the law.[60] As a result, even though Alyeska had committed no actual violation, it was held liable for one half the fees awarded because of its involvement in the litigation and its status as a major and real party in interest. As such, it would appear that the social utility of the appellant's efforts presented overriding considerations favoring their recovery, and thus required an extension of defendants' duty to pay.

The award of attorney fees was recently rejected in *Sierra Club v. Lynn*.[61] The *Wilderness* case, however, may be distinguished from that decision, in that petitioners sought not only to enforce important Congressional policy but also served as a catalyst to effect Congressional passage of remedial legislation. Using this distinction of whether the litigation causes corrective legislation is impractical because such a response by Congress occurs too rarely to make it a useful criteria. Thus, the Supreme Court may ultimately have to resolve the issue of whether the benefits to society are important enough to merit recovery from private parties who, although innocent, have benefitted from the government's violation.

Finally, in conjunction with assessment, the *Wilderness* court

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56. *See* notes 1-4 *supra*.

57. *See* note 40 *supra;* Sierra Club v. Lynn, 364 F. Supp. 834, 840-44 (W.D. Tex. 1973), *rev'd*, 43 U.S.L.W. 2160 (5th Cir. Oct. 4, 1974).

58. Wilderness Society v. Morton, 495 F.2d 1026, 1034 (D.C. Cir. 1974).

59. *Id.* at 1033.

60. Wilderness Society v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974); Justice Mackinnon, dissenting, severely criticized the court for this reasoning. *Id.* at 1041.

61. Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973), *rev'd*, 43 U.S.L.W. 2160 (5th Cir. Oct. 4, 1974). A request for an award of attorney's fees against a private developer in an action to protect the public interests under NEPA was denied. The court refused to follow *Wilderness*, reasoning that Congress directed NEPA environmental obligations against federal agencies alone. And the fact that the breach was committed by a federal agency immune from liability for financial redress afforded no basis for shifting fees to the private developer.

held that the amount of the award should be fixed by the district court,[62] which will allow for appeals, and that the amount in environmental cases involving the private attorney general exception should represent the reasonable value of the services rendered.[63] It was also determined that the award should go to the counsel who worked on the case, despite the absence of any obligation on the part of the parties to pay the fee.[64] Attorneys are required to repay their clients for the expenses normally included in the fee, such as legal stenographers, adjunct staffs, and supplies, but any excess belongs to consel themselves.[65]

The recent cases awarding attorneys' fees indicate that the American no-fee rule is undergoing change.[66] The emergence of the private attorney general exception to the traditional rule provides a vehicle through which private citizens may now overcome the financial barriers that have previously prevented actions designed to protect broad public interests. Perhaps it is just another political paradox of the times that government agencies frequently arguing against the proliferation of citizen enforcement actions are at the same time complaining that they lack the man power needed to prosecute such violations. Hopefully, this rising remedy, as outlined in *Wilderness*, will be uniformly adopted in time to save the vital public interests threatened with extinction for lack of an adequate means of defense.

DEAN HOISTAD

62. Perkins v. Standard Oil Co. of California, 399 U.S. 222 (1970); United Pacific Insurance Co. v. Idaho First National Bank, 378 F.2d 62, 69 (9th Cir. 1967); Wilderness Society v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974).

63. Angoff v. Gotfine, 270 F.2d 185, 188-89 (1st Cir. 1955); Wilderness Society v. Morton, 495 F.2d 1026, 1036 (D.C. Cir. 1974).

64. "Litigation of this sort should not have to rely on the charity of parties volunteering to serve as private attorneys general. The attorney who worked on this case should be reimbursed the reasonable value of their services, despite the absence of any obligation on the part of appellants to pay attorneys' fees." Wilderness Society v. Morton, 495 F.2d 1026, 1037 (D.C. Cir. 1974).

65. This avoids the problem of being accused of an unauthorized practice of law and still provides a way of paying expenses with counsel becoming a sort of cashier for the fees awarded to plaintiff in his action. *Id.* at 1037.

66. La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972); Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973); Cole v. Hall, 462 F.2d 777 (2d Cir. 1972); Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974).