
I. INTRODUCTION

Since the early years of our nation, the “American rule” that each party to litigation must pay his or her own attorney’s fees has been applied in the federal courts. This “rule” has, however, been increasingly subject to exceptions. One major source of exceptions has been the passage of a growing number of federal statutes which provide for the award of attorneys’ fees as part of costs. Another source has been the exercise by federal courts of their equitable powers to award attorneys’ fees.

Although the federal courts are not limited in the kinds of situations in which they can assert their equitable powers to shift attorneys’ fees from one party to another, many fee shifting cases have been placed into one of three categories—the “obdurate behavior,” “common fund,” and “private attorney general” exceptions to the “American rule.”


2 See 6 J. Moore, Federal Practice ¶ 54.77(2) (2d ed. 1974); 20 Am. Jur. 2D Costs § 74 (1965) and cases therein cited.


5 Plainly the foundation of the historic practice of granting reimbursement for the cost of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939).

6 See also La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972); King and Plater, supra note 4; Note, Awarding Attorneys’ Fees to the “Private Attorney General”: Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L.J. 733 (1973).

7 Based on “fraudulent, groundless, oppressive or vexatious conduct” on the part of the opposing party. 20 Am. Jur. 2D Costs § 74 (1965). See Fairley v. Patterson, 493 F.2d 598 (5th Cir. 1974).

8 This term is applied in situations in which the claimant has protected or created a fund in which others are entitled to share, and has thereby conferred a substantial benefit on the members of an ascertainable class. See Mills v. Electric Auto-Lite, 396 U.S. 375 (1970). The doctrine has been “. . . employed to realize the broadly defined purpose of recapturing unjust enrichment.” Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597 (1974).

The last-named theory is "based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies." Although the "private attorney general" theory has been in use for at least three decades, it has been utilized only within the past decade as a basis for the recovery of attorneys' fees, having been first applied in civil rights cases and, more recently, in environmental suits.

A recent example of the latter is *Wilderness Society v. Morton,* in which the United States Court of Appeals for the District of Columbia Circuit, in a 4 to 3 decision, ordered payment of attorneys' fees by a corporate intervenor-defendant to three environmental groups that had challenged the construction of the Alaska Pipeline. The decision, if widely followed, promises to expand further the application of the private attorney general doctrine as a basis for fee shifting. This would hasten the arrival of the day in which the "American rule" itself becomes the exception, at least with respect to litigation involving issues of broad public concern. On the other hand, the *Wilderness Society* result, as well as some of the underlying rationale expressed by the majority, are in conflict with other recent decisions which tend to limit the award of attorneys' fees in environmental actions.

This case note will examine the *Wilderness Society* opinion in light of the environmental and, to a lesser extent, nonenvironmental cases in which federal courts have considered and have either applied

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10 See Associated Indus. v. Ickes, 134 F.2d 244 (2d Cir. 1943).
13 495 F.2d 1026 (D.C. Cir. 1974).
14 Separate dissenting opinions were written by Judges MacKinnon and Wilkey. The majority opinion for the court, which was sitting en banc, was written by Judge J. Skelly Wright.
15 Cf. Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974), in which the court specifically declined to follow *Wilderness Society.* See discussion with notes 106 to 109, infra.
17 See, e.g., Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974); Committee to Stop Route 7 v. Volpe, 4 E.R.C. 1681 (D.Conn. 1972). See also Greene County Planning Board v. Federal Power Commission, 455 F.2d 412 (2d Cir. 1972), a non-private attorney general case in which attorneys' fees were denied.
or rejected the private attorney general doctrine to the awarding of attorneys' fees. It will analyze the several prerequisites which have evolved for qualification as a private attorney general. Finally, this case note will consider some of the implications of the developing doctrine for plaintiffs, defendants, the courts and the general public.

II. THE ALASKA PIPELINE DECISIONS

Shortly after the Secretary of Interior, in March, 1970, indicated that approval for an oil pipeline right-of-way across Alaska would be forthcoming, the three environmental groups—The Wilderness Society, Friends of the Earth and Environmental Defense Fund, Inc.—filed suit in the United States District Court for the District of Columbia, against the then Secretary of Interior Walter Hickel, to enjoin construction of the pipeline. In April, 1970, the court granted a preliminary injunction on the grounds that the requested pipeline right-of-way was in excess of the limits specified by the Mineral Lands Leasing Act of 1920 (MLLA), and that the Department of Interior had not fully complied with all of the procedural requirements of the National Environmental Policy Act of 1969 (NEPA).

The Alyeska Pipeline Service Company (Alyeska) and the State of Alaska intervened as defendants in September, 1971. After further study, the Department of Interior, in May, 1972, announced its decision to approve the pipeline. Three months later, the district court dissolved the preliminary injunction, denied a permanent injunction, and dismissed the complaint. However, in February, 1973,
the court of appeals reversed on the ground that the proposed pipeline permit would violate the width provisions of the MLLA. The court held that certain other proposed permits and leases were valid, and did not rule on the NEPA issues. The plaintiffs subsequently filed their bill of costs, which included only attorneys' time expended in connection with the appeal, directly with the court of appeals.

The court of appeals specifically based its decision to award counsel fees, taxed against defendant Alyeska but against neither the Department of Interior nor the State of Alaska, on the private attorney general doctrine.

III. THE PRIVATE ATTORNEY GENERAL DOCTRINE

The "private attorney general" doctrine has emerged since 1972 as the major nonstatutory theory for fee shifting in connection with suits seeking injunctive relief to protect the environment. However, the doctrine as applied to the awarding of attorneys' fees—whether in an environmental, civil rights or other context—has not been given the explicit blessing of the United States Supreme Court. Although some commentators have concluded that the Court is receptive to the

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26 The United States Supreme Court denied certiorari. Morton v. Wilderness Society, 411 U.S. 917 (1973). Subsequently, legislation was enacted which amended the MLLA so as to authorize the leasing of the land required for the pipeline, and which in effect declared that the requirements of NEPA had been met, thus clearing the way for construction of the pipeline. Trans-Alaska Pipeline Authorization Act, 87 Stat. 576 (1973).
27 Plaintiffs' briefs give no indication of the reason why the bill was restricted only to the appeal. Although both plaintiffs and defendants addressed at some length in their briefs the question of the court of appeals' authority to consider the bill of costs directly instead of on appeal, the court's opinion does not mention the matter. Plaintiffs' memorandum in Support of Award of Expenses and Attorneys' Fees; Defendants' Brief.
28 Neither the MLLA nor NEPA contain provisions authorizing the granting of attorneys' fees. Plaintiffs alleged obduracy on the part of defendants, on the basis that the defendants objected to the court's consideration of plaintiffs' motion for summary judgment on the MLLA issue, thus forcing the plaintiffs to brief and argue the NEPA issue—which was ultimately not decided. Plaintiffs' Memorandum in Support of Award of Expenses and Attorneys' Fees. The court rejected this argument. Wilderness Society v. Morton, 495 F.2d 1026, 1029 (D.C. Cir. 1973).
29 The private attorney general theory has not been the exclusive basis, however, In addition to the use of available statutory provisions, e.g., Clean Air Amendments of 1970, § 304(d), 42 U.S.C. § 1857(h)-2(d) (1970) and Federal Water Pollution Control Act Amendments of 1972, § 505(d), 33 U.S.C. § 1365(d)(Supp. II, 1972), other bases have been utilized, including the "common fund" exception, supra, note 7. The lower court in Sierra Club v. Lynn, 364 F. Supp. 834 (W.D. Tex. 1973), in awarding fees to plaintiffs who acted in a private attorney general-like manner (see note 15 supra), indicated its disagreement with the "hard-and-fast approach" of requiring equitable exceptions to fall within one of the three categories which have been widely identified. See also Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (1st Cir. 1973).
concept, the Court stated in a recent opinion that the private attorney general rationale "has not been squarely before this court and it is not so now; nor do we intend to imply any view either on the validity or scope of the doctrine." The Court now has the doctrine, as it relates to fee shifting, squarely before it, since it has granted Alyeska's petition for certiorari. If it approves the use of the doctrine in the fee shifting context, the Court will have an opportunity to clarify the criteria which are to be applied in its use, thus helping to resolve certain conflicts which have emerged.

A. Criteria for Qualification for Attorneys' Fees

1. Relevance of the "Prevailing Party" Requirement

Traditionally, it has been necessary for a party to prevail in the suit as a condition precedent to the award of attorneys' fees. Except for Wilderness Society, decisions in the environmental private attorney general cases have been consistent with this guideline.

In the widely-cited case of La Raza Unida v. Volpe, the court awarded attorneys' fees to plaintiffs who, acting as private attorneys general, were successful in obtaining an injunction halting the construction of a state highway through parklands.

In two other environmental cases, however, plaintiffs who did not prevail were denied attorneys' fees. In Sierra Club v. Lynn, the Fifth Circuit court of appeals reversed a district court decision which had awarded fees to plaintiffs who were unsuccessful in their efforts to require the United States Department of Housing and Urban Development to examine alternative sites for a new community to be developed with federal support, and in their attempt to challenge the adequacy of the environmental impact statement prepared by HUD as required by NEPA.

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30 See, e.g., Nussbaum, Attorneys' Fees in Public Interest Litigation, 48 N.Y.U.L.Rev. 301 (1973); King and Plater, supra note 4; Note, Hastings L.J., supra note 5.
31 F.D. Rich Co. v. United States ex. rel. Indus. Lumber Co., 94 S.Ct. 2157, 2165 (1974). Rich expressly recognizes that the Court has approved the other two exceptions, "obdurate behavior" and "common fund," Id. at 2165.
33 See Mills v. Electric Auto-Lite, 396 U.S. 375, 396 (1970); Delaware Citizens v. Staufer Chemical, 6 E.R.C. 1541, 1542 (D.Del. 1974). See also King and Plater, supra note 4, at 77. It has been suggested that the "prevailing" requirement is nearly always a "creature of statutory origin," King and Plater, supra note 4, at 78, and therefore does not bind a court in the exercise of its equitable powers. With respect to the assessment of costs in general, "... the identification of the prevailing party may become so unimportant as to be almost immaterial." 6 J. Moore, Federal Practice, ¶ 54.70(4) (2d ed. 1974).
35 502 F.2d 43 (5th Cir. 1974).
36 Id.
In *Colorado Public Interest Research Group v. Train*, the plaintiffs, alleging incompetence on the part of the Atomic Energy Commission, sought to have control of wastes discharged from a Colorado nuclear power plant transferred from the AEC to the Environmental Protection Agency. The court denied the motion as well as plaintiffs’ request for attorneys’ fees, noting that while a statute gave the court discretion to award fees even to the loser, it was not appropriate that the plaintiffs “. . . be subsidized with taxpayers’ money in this case.”

A slight deviation from the principle of the “prevailing” requirement was made by the court in *Natural Resources Defense Council v. Environmental Protection Agency*, which held that the fact that some issues were decided adversely to the claimant did not preclude the awarding of fees for work done with respect to all the issues in the case. In that case, which involved a requested review of EPA decisions approving portions of the Rhode Island and Massachusetts air pollution implementation plans, the court entered orders favorable to the plaintiffs with regard to the majority of the issues, ruling for the administrator only in certain areas in which he was, by law, given discretionary powers.

The *Wilderness Society* majority went considerably further in that it awarded fees for the entire appeal effort even though the plaintiffs prevailed only on one of two major issues, the pipeline right-of-way issue. Of more significance, however, is the fact that the majority based its award on something other than the “prevailing” requirement:

The advancement of important legislative policy justifying an award of attorneys’ fees can be accomplished even where the plaintiff does not obtain the ultimate relief sought by the filing and prosecution of his suit. Where litigation serves as a catalyst to effect change and thereby achieves a valuable public service, an award of fees may be appropriate even though the suit never proceeds to a successful conclusion on the merits.

Thus, the private attorney general doctrine, by its very nature,
provides a rationale for the awarding of fees where the plaintiff is only partially successful, or even completely unsuccessful, in the sense of obtaining a favorable judgment. What seems to be more important is that the claimant has acted in the public interest in such a way as to benefit a significant number of people.

2. Public Interest and Public Benefit

An essential rationale for shifting fees from the private attorney general to the defendant is the notion of furthering the public interest. However, since "[t]he public interest is not self-defining . . .," the challenge is to define it in a way that provides a meaningful basis for determining whether counsel fees should be assessed. In view of the widespread interest in environmental quality during the past decade among legislatures and executive agencies, and among the general public, any given piece of environmental litigation potentially qualifies as having a high level of public interest.

In many instances, resolution of the question of whether there is sufficient public interest involved to merit consideration of fee shifting lies in the determination of whose views are to be given greater weight. Some plaintiffs who have brought environmental actions have disclaimed having any special ability to determine what is in the public interest. But there is an equal certainty that administrative agencies and private business and industry cannot be trusted with this responsibility. Others have argued that the courts are uniquely qualified to determine what is in the public interest. However, courts are often required, if they do not so elect, to defer to the judgments of administrative agencies on policy matters, making decisions on fairly narrow legal grounds. Furthermore, courts typically lack the investigative machinery required to make extensive public policy determinations.

Nevertheless, courts that are called upon to decide whether fees

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44 Cahn and Cahn, Power to the People or the Profession?—The Public Interest in Public Interest Law, 79 YALE L.J. 1005, 1006 (1970).
45 See note 58, infra.
46 The district court opinion in Sierra Club v. Lynn compared the level of public interest in environmental causes with that in civil rights cases, which have been held in a number of instances to justify fee shifting, 364 F. Supp. 834 (W.D. Tex. 1973).
49 See, e.g., Sive, supra note 48, at 629; SAX, supra note 48, chapter 4.
50 See generally Sive, supra note 48.
are to be awarded to those who would be classed as private attorneys general can hardly escape responsibility for a more than cursory determination of what is a matter of significant public interest, as they carry out their proper function of final arbiter. Courts which have done so have typically looked to the intent of Congress, as expressed in the plain wording of the statutes, and in the legislative history. In fact, "vindication of congressional policy" is a cornerstone of the private attorney general theory of fee awards. Congressional intent is often seen as the clearest and most compelling expression of the public interest.

Although the dictates of Congress provide useful guidance, Congress has not spoken clearly on some important issues, and some laws that are passed meet only private needs. Furthermore, it seems well established that not all laws that are truly "public" provide sufficient justification for an attorneys' fees exception; some laws are thought not to be important enough to warrant encouragement of private attorney general action. The Wilderness Society court had the opportunity to make some clarification by addressing the question of whether the precise width limitation of the MLLA reflects important congressional policy. It chose not to do so.

However, the strong public policy providing a rationale for fee shifting "need not be the same as that underlying the cause of action." Wilderness Society illustrates the point that a law which is arguably a minor one can be used as a springboard leading to consideration of prominent issues—in this case, the environmental impact of projects such as the Alaska Pipeline. That Congress has placed high priority on environmental values is reflected not only in the number of acts devoted specifically to environmental quality, but

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54 Sax, supra note 48, at 156.
55 King and Plater, supra note 4, at 65.
56 While the legislative history of the MLLA shows that Congress did give explicit consideration to the width limitations to be established, and that Congress has, since 1970, given further attention to pipeline issues, it is perhaps appropriate to say that the act was a mere "vehicle . . . used . . . to present to the Congress the real issue—whether the pipeline should be constructed." Dominick and Brody, supra note 18, at 386.
57 King and Plater, supra note 4, at 66. But see Fleischmann Distillery Corp. v. Maier Brewing Co., 386 U.S. 714, 720 (1967).
also in the inclusion in legislation in other areas of measures designed to assure consideration of environmental implications.\textsuperscript{59}

Litigation which qualifies for fee shifting consideration should not only vindicate significant public policy, but should also create a widespread benefit.\textsuperscript{60} Although it is difficult to separate these requirements, the latter focuses on determining whether the result of the litigation involves benefit to "significant numbers."\textsuperscript{61} As such, it relates in a sense to the "common fund" basis for fee shifting,\textsuperscript{62} in that the benefits accruing could be capitalized, thus creating a "fund" from which attorneys' fees could be drawn.

Environmental causes, by their very nature, frequently have an impact on large numbers of people. As the court in \textit{Natural Resources Defense Council} pointed out, "[p]resumptively the public has benefited—not only in Rhode Island and Massachusetts but nationally, as neither air pollution nor the movement of citizenry respect state boundaries. . . ."\textsuperscript{63}

The court in \textit{La Raza} made an admirable attempt to quantify public benefit by identifying as beneficiaries of the litigation the 5,000 individuals living in the immediate area whose lives would not be interrupted needlessly by the proposed highway, the 200,000 residents of the community who would be assured of not losing a park unless that result were dictated by a thorough consideration of the issues, and all residents of California, who would benefit from more careful evaluation of the environmental impact of highway projects in the future.\textsuperscript{64}

In \textit{Wilderness Society}, however, the majority made only the bland assertion that "... this litigation may well have provided substantial benefits to particular individuals . . ."\textsuperscript{65} In his dissent Judge Wilkey asserted that "... we are at a loss to know who those 'particular individuals' enjoying 'substantial benefits' may be."\textsuperscript{66} While playing the numbers game, as the \textit{La Raza} court did, can be misleading,\textsuperscript{67} more specificity than that provided by the \textit{Wilderness}


\textsuperscript{60} Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331, 1333 (1st Cir. 1973).

\textsuperscript{61} See, e.g., Nussbaum, supra note 30, at 304.

\textsuperscript{62} See note 7, supra.

\textsuperscript{63} 484 F.2d at 1334.

\textsuperscript{64} 57 F.R.D. at 100.

\textsuperscript{65} 495 F.2d at 1029.

\textsuperscript{66} Id. at 1042.

\textsuperscript{67} King and Plater, supra note 4, at 67.
Society decision seems highly desirable.

In the final analysis, however, a court must have discretion to determine the "critical mass" as well as the importance of the issues involved, as it decides whether to award attorneys' fees to the private attorney general in any particular case. In doing so, a court might be able to utilize one or more of the three bases upon which to determine the public benefit suggested by the decided cases.

The first such basis is present if the litigation has forced or persuaded the adversary to act in some way which benefits the public. This standard was suggested in Delaware Citizens v. Stauffer Chemical, a recent case in which a fee award was denied although a statute authorized such an award even to a losing party. The suit charged violation of the Clean Air Act's emission limitation, but the court denied relief on the ground that the defendant had sought in good faith to obtain a variance. Noting that ultimate success was not intended by Congress to be a prerequisite to an award of fees, the court said that "... an award of counsel fees to a losing party should be reserved for those cases in which ... the litigation ... serves the objectives of the Act in some substantial way ..." In this case, the court pointed out, the defendant "... acted no differently after the filing of the suit than it would have otherwise acted." In Wilderness Society, on the other hand, the plaintiffs' suit brought about extensive environmental impact studies by the defendants. Furthermore, the legislation that gave ultimate approval to the pipeline required additional action on the part of the defendants.

A second basis for a fee award rests in the concept that bringing about public debate can be, in itself, a public benefit. Although this theory received only passing attention from the Wilderness Society court, and was rejected by the Fifth Circuit court of appeals in Sierra Club, it was the major thesis upon which the district court in Sierra Club rested its decision:

At the commencement of this suit ... comparatively little of the information subsequently made public had been made available to the general citizenry. In light of the reams of material published after this court's order ... it is difficult to conclude that the filing of the suit did not help to insure that adequate precautions would

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69 Id. at 355.
70 Id.
71 495 F.2d at 1033.
72 The majority referred briefly to the suit's role in focusing the attention of Congress on the pipeline. 495 F.2d at 1035.
73 502 F.2d 43 (5th Cir. 1974).
be taken to protect South Texas' very valuable water resource and
that the measures taken would be made available to the scrutiny of
the public eye.\textsuperscript{74}

A third basis depends upon the plaintiffs' success in assuring that
environmental values are given sufficient weight in relation to other
values inherent in the project challenged. This is an important impli-
cation of certain legislation\textsuperscript{75} and of the several environmental cases
in which attorneys' fees have been awarded.\textsuperscript{76} The objective, however,
is to place environmental goals in proper perspective, not to overem-
phasize such values:

Congress did not establish environmental protection as an exclusive
goal; rather, it desired a reordering of priorities, so that environ-
mental costs and benefits will assume their proper place along with
other considerations.\textsuperscript{77}

This third basis raises the question of whether, in determining if
fees should be awarded, the court should balance public benefits
conferred against any public detriment resulting from the litigation.
Although one commentator has flatly stated that "... a court
should not in any circumstances attempt to discount the presence of
strong environmental policy in the light of other countervailing poli-
cies,"\textsuperscript{78} Judge Wilkey's dissenting opinion in \textit{Wilderness Society} sug-
gested just such a balancing:

This stands as plaintiffs' net achievement: the amendment of the
1920 Mineral Lands Leasing Act to authorize a wider right of way,
quite the opposite of the plaintiffs' objective to limit the right of way
to 25 feet on each side. Against this public service must be weighed
the public disservice in blocking access to the much needed oil at a
critical time in our history, and the enormously higher cost we must
all pay.\textsuperscript{79}

Not only monetary but also social costs have resulted from some
environmental litigation, which has delayed the implementation of
projects having nonenvironmental values, such as low-income hous-
ing\textsuperscript{80} and highways\textsuperscript{81} in addition to energy-related projects.\textsuperscript{82} One can

\textsuperscript{74} 364 F. Supp. at 848-49.
\textsuperscript{75} See note 59, supra.
\textsuperscript{76} \textit{E.g., La Raza Unida, Natural Resources Defense Council, Wilderness Society.}
\textsuperscript{77} Calvert Cliffs' Coordinating Comm. v. Atomic Energy Commission, 449 F.2d 1109,
1112 (D.C. Cir. 1971).
\textsuperscript{78} King and Plater, supra note 5, at 66.
\textsuperscript{79} 495 F.2d at 1043.
\textsuperscript{80} In \textit{Sierra Club}, the proposed San Antonio Ranch New Town will involve housing for
more than 20,000 low-income individuals. 364 F. Supp. at 837.
\textsuperscript{81} In \textit{San Antonio Conservation Society}, the highway at issue had been projected since
hardly escape the conclusion that environmental litigation typically impinges on other goals which the public has indicated are worthwhile. Thus, it would seem that a court should include as one of its criteria the "net benefit achieved" in determining whether to shift fees. Consideration of such a criterion was completely omitted by the Wilderness Society majority.

3. The Necessity of Private Enforcement

Congress and the courts have made it clear that the vindication of congressional priorities often rests in the hands of private individuals and organizations. The Wilderness Society majority suggested that

... effective pursuit of congressional policy under NEPA, as with much legislation in the environmental area, depends on the diligence of private attorneys general and their willingness to bring suit to further broad public interests.

"[O]nly private citizens can be expected to 'guard the guardians,'" the La Raza court declared. The theory is that "... public officials do not and perhaps are not capable of policing the system adequately." In La Raza, "[t]he only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs' contentions." Even if the administrative agency is not already a party to the suit, a problem may exist if the agency fails in its duty, as the court in Natural Resources Defense Council noted: "... only the public—certainly not the polluter—has the incentive to complain if the EPA falls short in one or another respect."

Thus, the necessity of private enforcement, which was a factor in the Wilderness Society decision, has been frequently stated as a criterion to be considered when fee shifting is requested.

1959: "Its proponents stress the imperative need to solve serious traffic problems of the city ... ." 496 F.2d at 1020. In Citizens to Preserve Overton Park, litigation (reported in 6 E.R.C. 1573 (6th Cir. 1974)) began in 1969.

82 In addition to Wilderness Society, which involved a delay of nearly four years, several other energy-related projects are among a large number of delayed projects listed in Dominick and Brody, supra note 18, at 361 n.100.


495 F.2d at 1034.

85 57 F.R.D. at 101.

86 King and Plater, supra note 4, at 69.

87 57 F.R.D. at 101.

88 484 F.2d at 1334.
B. Implications of the Private Attorney General Doctrine

1. Problems Faced by Plaintiffs

In acting as a private attorney general, private parties often face a financial hurdle. The *La Raza* court pointed out that only a private party could have been expected to bring this litigation, and yet a private party is least able to bear the tremendous economic burdens. To force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following Congressional mandates.

Although the proliferation of groups interested in environmental conservation, and the onset of public interest law firms, have in recent years helped substantially in overcoming the financial restrictions, the United States Supreme Court's admonition in 1968 that "if successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts" is still worth noting.

A major problem is that money damages, from which attorneys' fees might be drawn, are usually not involved in most cases where the private attorney general doctrine is appropriate, since the injunction is the form of relief typically sought. When an assessment of the financial risks and potential financial benefits is made in light of *Wilderness Society*, however, the prospects for the would-be plaintiff appear to be brighter. Consistent with the theory of the "American rule," a private attorney general usually does not risk the chance of being taxed attorneys' fees merely for prosecuting a case, even if he or she loses, unless a statute indicates otherwise.

Furthermore, the *Wilderness Society* decision indicates that the attorney who prosecutes a suit stands a chance of being made more than whole. In *Wilderness Society*, the plaintiff organizations ac-
tually paid for only a small fraction of the attorneys' services; the attorneys' time was donated by the Center for Law and Social Policy. The majority, in determining that the plaintiffs should be reimbursed for actual expenditures but that the balance of the award should go directly to the attorneys who handled the case (and who were employed on a full time salaried basis by the Center), took the position that the first purpose is to make the client whole, but the award need not be limited to this consideration.

As for the fact that nearly all of the legal services were provided without charge to the Wilderness Society and to the other plaintiffs, it has been said that the prospect of having to pay attorneys' fees "does not discourage the litigant from bringing suit when legal representation is provided without charge. But the entity providing the free legal services will be so discouraged. . ." One might take an additional step back and inquire whether those who contribute to the donating organizations, such as the Center for Law and Social Policy—typically on a tax-exempt basis—would be similarly inhibited. In any event, the Wilderness Society decision would seem to lessen any inhibitions that organizations such as the Center for Law and Social Policy would have with respect to providing free legal services to potential private attorneys general.

2. Effects on Private Defendants

Another basis for the "American rule" is that fee shifting will discourage parties from defending themselves in court. Noting this, the majority in Wilderness Society declared that "[w]hatever force this argument concededly has in the great run of civil litigation, we think it plainly inapposite to the circumstances of the present case." The majority's reasoning was that any award of fees "... will be paltry in comparison with the interest Alyeska had in defending this appeal." In this sense, then, the court held that the award of fees to the private attorney general is not incompatible with the "American rule," in that the defendant was not discouraged from defending.

The Wilderness Society opinion raises a significant related question: should fees be assessed against a party which is merely an

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96 495 F.2d at 1044.
97 Id. at 1037.
98 Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974).
99 See Halpern, supra note 47.
101 495 F.2d at 1032.
102 Id.
103 495 F.2d at 1031.
intervenor, especially when the intervenor is not the alleged violator? The Department of Interior, not Alyeska, was charged with not complying with the requirements of the MLLA and NEPA.104 But the majority asserted that "[s]ince Alyeska unquestionably was a major and real party at interest in this case . . . we think it fair that it should bear part of the attorneys' fees."105

Faced with a similar question, the courts in Sierra Club v. Lynn106 and in Committee to Stop Route 7 v. Volpe107 reached opposite conclusions. In Sierra Club, the court of appeals focused on the facts that the private developer was not at fault, and that the federal government is immune, in absence of an express statute to the contrary, from the assessment of attorneys' fees:108

This circuit has never assessed attorneys' fees against a party innocent of any wrongdoing. Congress directed NEPA's environmental obligations against federal agencies alone. . . . The fact that the breach of duty was committed by a federal agency immune from liability for financial redress affords no basis for a shifting of fees to the developer.109

In Committee to Stop Route 7, the court declined to award attorneys' fees against the state co-defendant, where a federally funded state project was enjoined because of the failure of the United States Department of Transportation to comply with NEPA requirements. In this situation, also, the federal government could not be assessed attorneys' fees. The court pointed out that NEPA is a mandate for federal agencies. The state simply relied upon a federal regulation which attempted to postpone the effective date of the Act. In these circumstances it would not be appropriate to impose attorney's fees as a cost upon the state, when the federal agency made the erroneous decision which led to the plaintiffs' judgement.110

It has also been held that fees should not be assessed where there is "substantial doubt as to . . . the legal obligation" of the defendant.111

Considering that Alyeska, in applying for its permit, was relying on a fifty-year-old history of practice of granting permits for rights-
of-way in excess of the prescribed limits, this aspect of Wilderness Society seems to be wrongly decided. The majority's plea that "[f]ee shifting under the private attorney general theory . . . is not intended to punish law violators, but rather to ensure that those who have acted to protect the public interest will not be forced to shoulder the entire cost of litigation," has an appealing ring, but merely provides one-half of the justification for fee shifting—the "shifting from" part. There must be a sound basis for "shifting to," such as obduracy, or culpability. There must be something more than the fact that Alyeska was able to pay and could not hide behind sovereign immunity. Otherwise, there may well be a taking of private property for public use without just compensation, in violation of the fifth amendment of the United States Constitution or its state counterparts.

In some circumstances, this particular aspect of the Wilderness Society decision could well inhibit parties from intervening to protect their interests, thereby negating one of the major purposes of the "American rule." Of course, such parties will, in some instances, be joined initially as defendants, and it seems less likely that they will be discouraged from defending in such circumstances.

3. Implications for Federal Defendants

The concern about discouraging the defense of a lawsuit, by the taxing of attorneys' fees, takes on a new caste when the defendant is a federal government agency. The general rule is that there is federal immunity with regard to attorneys' fees, except when waived by statute. In Wilderness Society, for example, the court taxed only one-half of the fees to Alyeska, stating that, but for the immunity barrier, the other half would have been assessed against the federal government. There have been a growing number of criticisms of the rule, and note has been taken of the inconsistency inherent in the waiver of immunity to be sued, but not for the assessment of fees.

Federal immunity is of particular concern in the environmental area because of the frequency with which federal agencies appear as defendants. If the private attorney general theory operates for the public benefit—and that, after all, is a basic part of its underlying

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113 495 F.2d at 1036.
114 See note 6, supra.
116 King and Plater, supra note 4, at 85 et. seq., and cases therein cited.
117 495 F.2d at 1036.
118 See supra note 4, at 85 n.260.
119 Id. at 87.
rationale—then it would seem essential that, if fees are to be shifted, there should be an unfettered opportunity to shift them in such a way that the public pays the costs of litigation. In this way, the "common fund" doctrine would provide the rationale for "shifting to" the public, and the "private attorney general" theory would supply the basis for "shifting from" the plaintiff. Federal immunity stands squarely in the way of such a goal.

4. Implications for the Courts

Judge Wilkey, in his dissent in Wilderness Society, raised the perennial question of whether a policy which tends to encourage litigation will have the effect of swamping already-busy courts.

The hope of attorneys' fees spawned by this ill-advised decision may be just the stimulus needed to launch [other attorneys and potential plaintiffs] in the direction of the courthouse, unembarrassed by any humility as to their knowledge of where the "public interest" lies. The flood of "public interest" litigation, particularly in the environmental field, is given a new impetus...

This question has special significance in the environmental area, since the number of potential environmental cases is so great that there are more than enough for everyone who wants to prosecute. On the other hand, as Chief Justice Burger has declared, "fears of inundation are rarely borne out."

Furthermore,

The fear of a flood of litigation was commonly raised in opposition to the statutory and judicial liberalizations of the standing requirements for environmental actions that occurred in the late 1960's and thereafter. In practice, however, although in absolute numbers environmental cases have increased dramatically, the relative growth of the courts' environmental case load has not.

It is possible, of course, that widespread fee shifting could change this picture. In the final analysis, however, the exercise of

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120 See note 7, supra.
121 State immunity, not an issue in Wilderness Society, is not discussed in this case note. Although the state of Alaska intervened as a defendant, the court's decision not to assess fees against the state was not based on immunity grounds. But see Named Individual Members, San Antonio Conservation Society v. Texas Highway Department, 496 F.2d 1017 (5th Cir. 1974), in which the court denied fees on eleventh amendment grounds, citing Edelman v. Jordan, 415 U.S. 651 (1974) as authority.
122 See also Cahn and Cahn, supra note 44, at 1008.
123 495 F.2d at 1043.
124 King and Plater, supra note 4, at 71.
126 King and Plater, supra note 4, at 82.
judgment by the courts in weeding out non-meritorious cases at the outset, and in assessing fees only where there is a sound basis to do so, will do much to avoid overloading the courts. On the other hand, since environmental cases are among the most complex in terms of data which must be assimilated, the "weeding out" process may itself be time-consuming.

IV. CONCLUSION

Until recently, the "American rule" has dictated that payment of one's own attorney's fees is to be considered the norm, and that exceptions are to be granted only rarely. With the application of the private attorney general concept to attorneys' fees cases, a rationale has developed—albeit without explicit approval by the United States Supreme Court—by which the norm can be reversed in federal courts. A party who qualifies as a private attorney general can now expect to receive fees unless the court finds specific reasons for a denial. Although the majority of environmental cases involving attorneys' fees have not gone this far, such a result is suggested by Wilderness Society, La Raza, and in certain civil rights cases.127

There are important reasons why this development should be greeted with delight by those who are interested in the preservation and enhancement of the environment. The Supreme Court's admonition, in a civil rights context, that "[u]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances,"128 applies as well to the environmental field, and may, in fact, be the only practical avenue open to the majority.

On the other hand, indiscriminate fee shifting could well inhibit a private individual, corporation or other organization from defending, intervening or even engaging in activities over which an environmentally-based objection could be raised. The concept of fairness is not undermined when one who violates the law is made to pay attorneys' fees incurred by the private attorney general who brought him or her to court. But when such culpability is absent, it makes little sense to tax a defendant for the cost of a benefit enjoyed by the

127 The Wilderness Society majority said that "[w]hen violation of a congressional enactment has caused . . . great harm to important public interests when viewed from the perspective of the broad class intended to be protected by that statute, not to award counsel fees can seriously frustrate the purpose of Congress." 495 F.2d at 1030. See also Brewer v. School Board, 456 F.2d 943 (4th Cir.), cert. denied 406 U.S. 933 (1972); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972).

public-at-large. In that case, the public-at-large should pay.

Furthermore, if fees are to be shifted onto those who violate the law, then ways should be found by which federal government agencies (and immune state agencies) should be required, more often than at present, to pay their share. This would be a direct and practical means of rewarding deserving private attorneys general while at the same time ultimately spreading the costs of counsel among the tax-paying public which receives the benefits of the litigation.

Finally, two matters to be considered when a decision is made as to whether to shift fees to a particular defendant deserve further discussion. First, the merits of litigation as a means of stimulating public debate, as mentioned in *Wilderness Society* and as stressed in the lower court’s opinion in *Sierra Club*, should be weighed against the nonjudicial means of accomplishing the same end. Certainly in instances where the project to be questioned has begun with little public awareness, and there the injunction is the only means of delaying the project so that the public will have a chance to consider its merits, any significant post-injunction public debate that might ensue provides a basis for fee shifting. But if public information campaigns and legislative activity will, without judicial intervention, serve the purpose of informing the public, then rewarding a private attorney general for utilizing the courts seems to be inappropriate.

Second, if public funds are to be expended, then the importance of balancing the benefits claimed to have been achieved by the private attorney general against any detriment that might have resulted looms even more important. Although environmental enhancement is to be prized, actions taken toward this end are not taken in a vacuum. The environmentally-minded private attorney general should not be encouraged, through the award of attorneys’ fees, to undertake action that ignores other legitimate and often competing needs of society.

*Richard E. Geyer*

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129 See discussion with notes 72 to 82, *supra.*
130 See note 72, *supra.*
131 See discussion with note 74, *supra.*
132 See *Note, The New Public Interest Lawyers, 79 Yale L.J.* 1069, 1097, for a description of public education campaigns carried on by environmental groups.