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A Setback for Environmental and Other Public Interest Plaintiffs: *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975)

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Note

A Setback for Environmental and Other Public Interest Plaintiffs

Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975).

I. INTRODUCTION

In *Alyeska Pipeline Service Co. v. The Wilderness Society*,[1] the United States Supreme Court struck a severe blow to public interest litigation, particularly in the area of environmental law, by eliminating the "private attorney general" exception to the American rule. Although the American rule required parties in judicial proceedings to pay their own attorneys' fees, this exception had arisen which permitted public interest claimants to be awarded attorneys' fees. This article will discuss the holding in *Alyeska* and will examine the legal precedents and policy considerations of the private attorney general concept in order to demonstrate that the Supreme Court should not have eliminated the private attorney general exception to the American rule.

II. BACKGROUND

The Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth brought suit in the District Court for the District of Columbia in 1970 to enjoin the issuance of right-of-way permits by the Secretary of Interior for construction of the Trans-Alaska Pipeline.[2] The district court granted a preliminary injunction because the issuance of such permits would violate both the Mineral Leasing Act[3] and the National Environmental Policy Act of 1969 ("NEPA").[4] The State of Alaska and Alyeska intervened in September, 1971, and in March, 1972, the Interior Department

1. 421 U.S. 240 (1975).
2. Wilderness Society v. Hickel, 325 F. Supp. 422 (D.D.C. 1970).
3. 30 U.S.C. §§ 4321 *et seq.* (1970).
4. 42 U.S.C. §§ 4321 *et seq.* (1970).

released a new Environmental Impact Statement.[5] Subsequently, the Secretary of Interior announced that the requested permits would be granted. The district court then dissolved the preliminary injunction and dismissed the complaint.[6]

The United States Court of Appeals for the District of Columbia reversed the district court,[7] on the basis of the Mineral Leasing Act.[8] Congress then effectively negated the court's decision by amending the Mineral Leasing Act to allow the Interior Department to grant permits to Alyeska.[9] The amendment also declared that the construction of the pipeline could proceed without any further action under NEPA.[10] The court of appeals was then faced with the question of whether the plaintiffs should be awarded attorneys' fees. It awarded the fees to them on the theory that they had acted as private attorneys general and had "advanced and protected in a very concrete manner substantial public interest."[11] In utilizing the private attorney general concept, the court was following a long line of federal cases, many in the environmental area, which had recently been decided, using the private attorney general rule.[12]

Alyeska appealed to the Supreme Court,[13] and in a 5-2 decision, with Justices Marshall and Brennan dissenting separately, it reversed the court of appeals. In an opinion by Mr. Justice White, the Court held that the federal courts did not have the authority to create a private attorney general exception to the American rule; only Congress could do so.[14]

This opinion relied on the historical background of the American rule[15] which was adopted by the Supreme Court in 1796.[16] This rule required that each party to a judicial proceeding pay its own attorneys' fees.[17] However, because courts sometimes awarded

5. 421 U.S. at 244.
6. *Id.*
7. Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973).
8. The court found that the NEPA issues were very complex and did not need to be decided.
9. Act of Nov. 16, 1973, Pub. L. No. 93-153.
10. *Id.*
11. Wilderness Society v. Morton, 495 F.2d 1026 (D.C. Cir. 1974).
12. *See* 421 U.S. at 270 n.46.
13. 421 U.S. 240.
14. "[I]t is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Id.* at 262.
15. *Id.* at 251.
16. Acrambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).
17. However, the Court adopted the American rule in very weak language. *Id.*

attorneys' fees anyway, in 1853 Congress passed a statute severely limiting the amount of attorneys' fees which could be awarded to the winning party.[18] By referring to this historical information, the Supreme Court in *Alyeska* appeared to hold that the American rule was statutorily adopted in the 1853 legislation. As a result of this interpretation of that legislation, the Court reasoned that the federal courts have no power to create exceptions to the American rule. However, curiously, the Court did acknowledge the "bad faith"[19] and the "common fund"[20] exceptions to the American rule, but stated that the private attorney general concept did not fall under either of these exceptions.[21] It also noted that it would be very difficult for the courts to apply the private attorney general concept since there would be no standards for them to utilize in determining which statutes were significant enough to warrant use of the exception[22] and permit an award to plaintiffs who brought successful actions under these statutes.

A study of the legal precedents and policy considerations of the private attorney general concept will show that the Supreme Court erred in its interpretation of the concept.

III. LEGAL PRECEDENTS

In the 1796 case of *Acrambel v. Wiseman*,[23] the Supreme Court apparently adopted the American rule,[24] although the language

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18. 10 Stat. 161 (1853) provides:
> That in lieu of the compensation now allowed by law to attorneys . . . the following and no other compensation shall be taxed and allowed . . . In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars . . . In cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.

19. *See* p. 287 *infra*.
20. *See* p. 287-88 *infra*.
21. 421 U.S. at 259.
22. "But it would be difficult, indeed, for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former." 421 U.S. at 263-64.
23. 3 U.S. (3 Dall.) 306 (1796).
24. At the time of the American Revolution, both the common law and equity courts in England awarded attorneys' fees to the winning party. This practice became known as the English rule. The rule was not adopted in the United States because the colonists distrusted lawyers. It is beyond the scope of this article to analyze in detail the arguments for the English rule or the American rule; however, the arguments in favor of each will be briefly set out.

    Proponents of the American rule argue that: (1) if attorneys' fees were awarded to the winning party it would raise the stakes of litiga-

used did not exhibit a strong commitment to it.[25] Despite this lack of strong affirmance, the American rule should be considered to have been created originally by the judiciary, not the legislature.

The Supreme Court in *Alyeska* placed great weight on the Act of 1853 in which Congress attempted to standardize the costs of federal litigation,[26] and also acknowledged that this legislation was intended to stop the exorbitant awards with which the losing parties were being unfairly saddled.[27] It does not follow from this latter conclusion, however, that the purpose of the 1853 legislation was to forbid entirely the awarding of attorneys' fees to the winning party, rather it should be inferred that the legislation was intended to insure that these awards would be reasonable. Due to the inflation of the past 120 years and the radical changes that have occurred in modern litigation, the award limits in the 1853 statute are unreasonable today. When the purpose behind the 1853 legislation is considered, it appears that the *Alyeska* Court was incorrect in holding that the 1853 Act was a statutory embodiment of the American rule which is still binding today.

Regardless of its interpretation of the Act of 1853 and its supposed limits on the Court's power, the Supreme Court in *Alyeska*

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tion and scare some plaintiffs out of court and at the same time would force some defendants to settle their claims unnecessarily; (2) economic self-interest would force a party to avoid taking unnecessary steps and incurring additional expenses; and (3) it avoids the problem of determining what a reasonable attorney's fee is.

The basic arguments for the English rule are that: (1) the higher stakes involved in litigation increase the pressure for a settlement, thereby relieving congestion in the courts; (2) the winning parties are placed back in a position as good as before the dispute arose; (3) plaintiffs will be less hesitant to bring a suit to vindicate their rights since it will cost them nothing if they win; (4) plaintiffs will be less likely to bring frivolous suits since they will be forced to pay the defendant's attorneys' fees. Parenthetically it should be noted that the United States is apparently the only western country to require each party to bear his own attorneys' fees. *See* Nussbaum, *Attorneys' Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301, 312 (1973).

25. The general practice in the United States is in opposition to it [English rule]; and even if that practice [American rule] were not strictly correct in principle, it is entitled to the respect of the court, until it is changed or modified by statute.

3 U.S. (3 Dall.) at 306.

26. The statute as it now reads (28 U.S.C. § 1923) does not contain the language of the 1853 Act which provided that "no other compensation shall be taxed and allowed." This language was dropped in the 1948 Code Revision. However, the Court believed that there was no indication of a congressional intent to change the statute. *See* 421 U.S. at 255 n.29.

27. *Id.* at 251.

failed to acknowledge that under past decisions it had already recognized the inherent equitable power of the federal courts to fashion exceptions to the American rule where justice so demanded. This failure is puzzling in that the Court did recognize that there are two clear equitable exceptions to the American rule.[28]

The first exception is referred to as the "bad faith," or sometimes, the "obdurate behavior," exception.[29] Under it, a successful plaintiff was awarded attorneys' fees when a defendant had engaged in oppressive conduct, such as unreasonable delay. Usually the defendant's obdurate behavior must be of gross nature before a federal court will apply the bad faith exception. The reason for this provision is obvious—to punish the losing defendant for his harrassing behavior and to reimburse the plaintiff for the costs he incurred as a result of the defendant's unreasonable actions.

The second recognized exception to the American rule is the "common fund" exception. The first case to utilize it was *Trustees v. Greenough*,[30] in which a plaintiff successfully maintained an action on behalf of a group of bondholders. Since all the bondholders benefited equally from the suit, but incurred no legal costs whatsoever, the Court held that fairness dictated that the plaintiff should be reimbursed from the fund he had protected. The effect of reimbursing the plaintiff out of this common fund was that the other bondholders each paid their proportional share of the attorneys' fees.

The "common fund" exception was further expanded in *Sprague v. Ticonic National Bank*,[31] a case in which the plaintiff had given money in the form of a trust to the defendant bank which subsequently became insolvent. In an earlier proceeding, the plaintiff

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28. *Id.* at 257.
29. *See* Vaughan v. Atkinson, 369 U.S. 527 (1962); Universal Prod. Co. v. Root Refining Co., 328 U.S. 575, 580 (1946); Kinnear-Weed Corp. v. Humble Oil & Refining Co., 441 F.2d 631, 637 (5th Cir. 1971); City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367 (1st Cir. 1971); Undersea Eng'r & Constr. Co. v. International Tel. & Tel. Corp., 429 F.2d 543 (9th Cir. 1970); Dyer v. Love, 307 F. Supp. 974, 984-88 (N.D. Miss. 1969).

    This exception has been used in many school desegregation cases where the court found that the defendant school board did not make a good faith attempt to desegregate the school system. *See* Nesbit v. Statesville City Bd. of Educ., 418 F.2d 1040 (4th Cir. 1969); Rolfe v. County Bd. of Educ., 390 F.2d 583 (6th Cir. 1968); Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963).
30. 105 U.S. 527 (1881).
31. 307 U.S. 161 (1939).

was held to be entitled to a lien on the trust funds given to the bank.[32] The plaintiff then sought reimbursement for attorneys' fees because, by a combination of her action and the operation of the principle of stare decisis, fourteen other trust claims had also been established. Although the plaintiff did not purport to represent anyone else, the Supreme Court applied the "common fund" exception, finding that "for all practical purposes [a fund was] created for the benefit of others."[33]

A final step in the evolution of this exception occurred in *Mills v. Electric Auto-Lite Co.*[34] and *Hall v. Cole*,[35] when the Supreme Court applied the "common fund" exception in situations where there was no common fund, but rather a common benefit. In *Mills*, the plaintiffs, minority shareholders in the defendant corporation, brought a class action to set aside a corporate merger, alleging that proxy statements issued by the defendant were materially misleading and violated section 14A of the Securities Exchange Act of 1934. The Court found for the plaintiffs and awarded attorneys' fees to them. The fact that there was no fund created from which the fees could be paid was not important; instead the Court focused on the presumption that the corporation and the other shareholders benefited from the litigation. To allow them both to obtain the full benefit of the plaintiffs' efforts, without contributing equally to the litigation expenses, would be to enrich unjustly the others at the plaintiffs' expense. It should be noted that the Court believed that the corporation had received a substantial benefit from the plaintiffs' litigation in that it was forced to comply with federal law.[36] Thus, in applying the common fund exception, it was not necessary for a beneficiary of the litigation to have received a monetary benefit. This point was illustrated further in *Hall*. There the plaintiff brought suit under section 102 of the Labor-Management Reporting and Disclosure Act of 1959[37] because he had been expelled from a union for introducing a resolution at a union meeting which was critical of the union officers. The district court held for the plaintiff and the issue on appeal was the propriety of awarding attorneys' fees. The Supreme Court granted the award theorizing that the plaintiff had conferred a substantial benefit on the other members of the union by protecting their right to free speech at union meetings.[38]

32. Sprague v. Ticonic Nat'l Bank, 14 F. Supp. 900 (S.D. Me. 1936).
33. 307 U.S. at 161.
34. 396 U.S. 375 (1970).
35. 412 U.S. 1 (1973).
36. 396 U.S. at 396.
37. 29 U.S.C. § 412 (1959).
38. 412 U.S. at 8.

These cases all illustrate the Supreme Court's gradual expansion of the common fund exception so as to increase the number of cases where an award of attorneys' fees is proper. However, the *Alyeska* decision departed from this steady trend.

In cases falling under one of the two acknowledged exceptions to the American rule, the Supreme Court has recognized that the awarding of attorneys' fees to successful plaintiffs "is part of the historic equity jurisdiction of the Federal courts."[39] In *Hall*, the Court stated this in the following way:

> Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees 'is part of the original authority of the chancellor to do equity in a particular situation,' and federal courts do not hesitate to exercise this inherent equitable power whenever 'overriding considerations indicate the need for such a recovery.'[40]

It is clear from these acknowledgments, therefore, that the Supreme Court has not viewed the statute of 1853 as confiscating the inherent equitable power of the federal courts to grant an award of attorneys' fees in the appropriate situation.[41]

Apart from the American rule and its exceptions, the Supreme Court has previously recognized the private attorney general concept. In *Newman v. Piggie Park Enterprises, Inc.*,[42] the plaintiffs

39. Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164 (1939).
40. 412 U.S. at 4-5.
41. The fact that other recent federal statutes have provisions for the granting of attorneys' fees and NEPA and the Mineral Leasing Act do not does not imply that Congress intended that under NEPA and the Mineral Leasing Act a successful plaintiff should not receive an award of attorneys' fees. In *Hall* and *Mills*, the Supreme Court rejected similar and stronger arguments that where some sections of a statute contained express provisions for the recovery of attorneys' fees, the absence of such provisions in other sections necessarily implied that fees were not to be allowed under these latter sections. In *Hall*, the Court said: "We cannot fairly infer from the language of that provision [that did not provide nor prohibit attorneys' fees] an intent to deny courts the traditional equitable power to grant counsel fees in appropriate situations." 412 U.S. at 10. Certainly, if the fact that a different section of the same statute provided for an award of attorneys' fees did not imply a congressional intent to deny attorneys' fees under sections that did not so provide, then the fact that Congress has provided for the awarding of attorneys' fees in other statutes should not imply that Congress intended to deny the fees under NEPA or the Mineral Leasing Act.
42. 390 U.S. 400 (1968). *See also* Bradley v. Richmond School Bd., 416 U.S. 696 (1974), where the plaintiffs were awarded attorneys' fees in

brought a class action under the Civil Rights Act of 1964[43] to enjoin racial discrimination at the defendant's restaurant. The district court found for the defendant, but the court of appeals reversed and remanded, directing the lower court to award attorneys' fees to the plaintiffs to the extent of the defendant's bad faith in attempting to delay the litigation. On appeal, however, the Supreme Court held that attorneys' fees were to be awarded regardless of the defendant's bad faith. It based its holding on a provision of Title II of the Civil Rights Act of 1964 which provided for the awarding of attorneys' fees.[44] The Supreme Court incorporated the concept of a private attorney general into the statutory scheme to explain the congressional purpose in having a provision which permitted the federal courts to award attorneys' fees at their discretion.[45] It held that a plaintiff who succeeds in obtaining an injunction under Title II should ordinarily recover his attorneys' fees unless there are special circumstances which negate such an award. In explaining the rationale behind the private attorney general concept, the Court said:

> When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not 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 attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees —not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.[46]

Thus, although the Civil Rights Act had provided for the awarding of attorneys' fees, it was the Supreme Court which first enunciated the concept of a private attorney general.

As a result of the *Piggie Park* decision, lower federal courts began applying the private attorney general rationale even when there was no statutory authority for it.[47] One of the most fre-

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their suit to force desegregation of the public school system; Northcross v. Board of Educ., 412 U.S. 427 (1973).

43. 42 U.S.C. § 2000a (1964).
44. *Id.* § 2000a-3(b).
45. 390 U.S. at 402.
46. *Id.*
47. *See, e.g.*, Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974) (civil rights class action against prison officials); Cornist v. Richland Parish School Bd., 495 F.2d 189 (5th Cir. 1974) (action brought by teachers to contest school board's discriminatory employment policies); Taylor v. Perini, 503 F.2d 899 (7th Cir. 1974) (civil rights suit by prisoners alleging

quently cited federal decisions using the concept was *La Raza Unida v. Volpe*.[48] There, the plaintiffs originally sought to enjoin the construction of a state highway. When the injunction was granted,[49] they asked for attorneys' fees. In awarding them, the court employed the private attorney general concept and summarized the criteria which other federal courts had used in applying this rationale for awarding attorneys' fees.[50]

1). The plaintiff must effectuate a strong congressional policy.
2). The plaintiff must benefit a large class of people.
3). There must be a necessity for private enforcement of the policy, as opposed to governmental enforcement.
4). The financial burden of the litigation must outweigh any potential benefit to an individual litigant.

The court in *La Raza Unida* applied the private attorney general concept as an exception to the American rule. The concept had originally been recognized in *Piggie Park* as existing within a statutory framework. To fashion this new exception was simply a logical extension of past Supreme Court decisions which had been expanding the exceptions to the American rule, particularly the common fund exception. However, in *Alyeska*, the Supreme Court refused to follow precedent and would not allow the federal courts

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discriminatory policies of prison officials); Fowler v. Schwarzwalder, 498 F.2d 143 (8th Cir. 1974) (suit to enjoin use of examination for firemen on the grounds that the examination was discriminatory); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (plaintiff challenged Hawaii's one year residency requirement for state welfare benefits); Morales v. Haines, 486 F.2d 880 (7th Cir. 1973) (black brought suit to enjoin city zoning law which prohibited residential construction in city limits); Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) (plaintiff brought suit alleging racial discrimination in leasing of apartments); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973) (action by former chaplain of state mental hospital for wrongful discharge which violated his right to free speech); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972) (reapportionment suit based on the exclusion of a class of college students from voting).

48. 57 F.R.D. 94 (N.D. Cal. 1972).
49. La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971).
50. Summarizing its test, the Court said:

> The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a private attorney general should be awarded attorneys' 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 or private enforcement are such as to make the award essential.

57 F.R.D. at 98.

to exercise what the Court had previously acknowledged as their "inherent equitable power."[51]

IV. POLICY CONSIDERATIONS

Just as *Alyeska* fails to follow the judicial precedents, so too does it overlook prevailing policy considerations. Recently, the under-representation of public interests in our legal system and the desirability of increasing public interest representation in this system have been noted.[52] The court in *La Raza Unida* pointed out that "[r]esponsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants,"[53] and an amicus brief noted that "only private citizens can be expected to guard the guardians."[54]

The most obvious reason for the under-representation of the public interest in litigation is a financial one.[55] Generally, no one individual has a sufficient enough interest in public interest litigation or legislation to induce him to expend substantial financial resources in furthering that cause. On the other hand, private and corporate interests are usually well protected both legally and financially.[56]

The tide of public interest litigation has arisen significantly in recent years,[57] with much activity in the environmental area. Because of the nature of their organizations, environmental groups are often forced to rely on litigation rather than attempting to further their goals through legislation.[58] In following this course,

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51. 412 U.S. at 5.
52. Nussbaum, *supra* note 24, at 305-11. The term "public interest" defies precise definition. Nussbaum lists three characteristics of public interest law suits:
    1). The litigation involves issues of extreme importance.
    2). The litigation will affect a substantial number of people other than the plaintiff.
    3). The litigation is brought by a private plaintiff.
    Id. at 305-06.
53. 57 F.R.D. at 100-01.
54. *Id.* at 101.
55. Nussbaum, *supra* note 24, at 311.
56. Large law firms dealing mainly with corporate clients usually are able to attract the more qualified law school graduates. Thus, while the corporation gets the best legal assistance, the public interest is often inadequately represented. *See* COUNTRYMAN & FINMAN, THE LAWYER IN MODERN SOCIETY 12 (1966).
57. Nussbaum, *supra* note 24, at 301.
58. The obvious reason for this preference for litigation is our tax system, under which environmental groups will lose their status as charitable organizations and their tax-exempt status if they engage in substantial legislative lobbying. The loss of classification as a charitable or-

they face a severe financial obstacle.[59] Environmental lawsuits are generally very complex.[60] They often seek injunctive relief; therefore, there is no monetary award to the plaintiffs from which they can pay their attorneys' fees.[61] Without the availability of an award of attorneys' fees to successful plaintiffs, litigation in the environmental area, and to some extent in other public interest areas, will be significantly inhibited.

The Supreme Court's decision in *Alyeska* is considered by some as severely discouraging the environmental movement.[62] Litigation in the area is necessary if environmental legislation, such as NEPA, is to be enforced. But generally, United States district attorneys have neither the expertise nor the desire to enforce environmental legislation,[63] and on its face, NEPA does not provide for sanctions for violators.[64] Therefore, it is left to citizen advo-

ganization would be very damaging to an environmental group because donations to the organization might dry up if donors could not use their contributions as charitable deductions on their tax returns. Similarly, the disadvantage of losing the tax exempt status is apparent. *See* INT. REV. CODE OF 1954 § 170(c)(2) [hereinafter cited as CODE] which defines a charitable organization as "(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . (D) No substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation. . . ." CODE § 501(c) provides that organizations are exempt from federal income tax if they are "(3) . . . organized and operated exclusively for religious, charitable, scientific, literary or educational purposes . . . [n]o substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation."

59. *Alyeska* involved more than 4,000 hours of legal work. The estimated award to be paid by Alyeska was over $100,000. *See* Witt, *After Alyeska: Can the Contender Survive?*, JURIS DOCTOR, Oct., 1975, at 35.
60. King & Platter, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27 (1973).
61. *Id.*
62. *See* 6 ENV. L.R. 133 (1975), in which two attorneys' opinions on this subject are given. Dennis Flanney who represented the Wilderness Society in *Alyeska* said that the effect of the decision would not be great because an award of attorneys' fees was not guaranteed under the private attorney general exception, and if such an award were made, it was only after the litigation. In his opinion, this is not a good way to fund litigation.

However, Natalie Black, an attorney who has represented the Sierra Club at times, said that *Alyeska* will hamper environmental groups because if they cannot recoup funds from one suit, they will will be unable to finance litigation in other areas. As for public interest litigation in general, there are some indications that the *Alyeska* decision will be disastrous in that it will financially discourage public interest plaintiffs. *See* Witt, *supra* note 59.
63. *See* 5 ENV. L.R. 10095 (1975).
64. 42 U.S.C. §§ 4321 *et seq.* (1970).

cates to enforce congressional mandates in the environmental area by seeking injunctions.[65]

Several underlying policy considerations influenced the Court in *Alyeska*. First, the Court made reference to its fears about the manageability of the private attorney general exception.[66] There were two main concerns in this area. One was the prospect of federal courts being required to determine what statutes should be considered important enough to warrant application of the private attorney general concept. The Court felt this should be determined by Congress, not by the courts. However, in expressing this fear the Court ignored the crucial question which was whether the successful plaintiffs had protected a substantial public interest. The purpose of the private attorney general concept is to encourage private citizens to litigate in the public interest; therefore, if the plaintiff succeeds in protecting the public interest, his expenses should be paid.

In determining what is in the public interest, the consideration of congressional mandates would clearly be relevant, but it should not be controlling. Other factors that should be considered are the number of people potentially benefited by the litigation and the actual benefit of the litigation. It should be noted that this requirement of protecting a substantial public interest is not the same as asking whether the public was actually benefited, which is often a volatile question. A court should not weigh the good results of the litigation against its bad results and come up with a net result, but rather it should determine whether the plaintiff was attempting to protect a substantial public interest, even though there were some incidental detrimental effects which the plaintiff did not intend. Such an application of the private attorney general concept will best further the purpose of the concept which is to encourage public interest litigation.

The distinction between protecting the public interest and benefiting the public interest can be seen by analyzing typical environmental suits. For example, if environmentalists enjoin the

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65. Public interest suits have speeded court definition of what is required of federal agencies under environmental protection statutes. These suits have forced greater sensitivity in both government and industry to environmental considerations. Furthermore they have educated lawmakers and the public to the need for new environmental legislation.
Comment, *Liability for Attorneys Fees in the Federal Courts—The Private Attorney General Exception*, 16 B.C. IND. & COM. L. REV. 201 (1975), *citing from* U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 2D ANN. REP. 155-56 (1971).

66. 421 U.S. at 246.

construction of a dam, they will clearly be protecting the public interest if the construction would harm the environment. This does not necessarily mean that the public interest will be benefited. The determination of the actual benefit to the public interest would require balancing the dam's advantages (preventing floods and providing hydroelectric power) against its environmental disadvantages (altering the ecological balance).

The Court in *Alyeska* failed to recognize the distinction between asking whether the plaintiffs protected a substantial public interest and whether the public was actually benefited. It only asked the latter question; this resulted in concern over the possible damage done to the public interest by delay in the construction of the Alaska Pipeline at a time when there was an energy crisis. However, using the analysis set forth in this article, the plaintiffs in *Alyeska* were deserving of an award of attorneys' fees because they had protected a substantial public interest in the environment.

Besides deciding what statutes warrant application of the private attorney general concept, there was a second manageability problem. It concerned determining what was a reasonable attorneys' fee. However, this was not an insurmountable problem since many federal statutes[67] and private contracts specifically provided for the awarding of attorneys' fees to a successful plaintiff and, therefore, the federal courts were already engaged in the determination of what was a reasonable attorneys' fee. In addition, since the judge who determined the fee award was the same judge who listened to the entire case, he was in excellent position to decide what would be a reasonable award. As one federal court said: "A trial court has firsthand knowledge of the proceedings before it and it is thus clearly qualified to place a value on [the legal] services without opinion evidence of an expert witness on the subject."[68]

67. For an extensive list of federal statutes which specifically provide for an award of attorneys' fees see 421 U.S. at 260 n.33.

68. Montalvo v. Tower Life Bldg., 426 F.2d 1135, 1150 (5th Cir. 1970). In addition, the American Bar Association lists eight factors which should be considered in determining what is a reasonable attorney's fee. They are:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
3. The fee customarily charged in the locality for similar legal services.
4. The amount involved and the results obtained.
5. The time limitations imposed by the client or by the circumstances.

In addition to its fears regarding the manageability of the attorney general concept, the Court was also concerned about the danger of swamping the federal courts with environmental litigation. Although this fear may be legitimate, it does not balance out the strong need for public interest litigation in general, or environmental litigation in particular. In addressing the issue of swamping the courts, Chief Justice Burger had previously noted that, in the past, fears that new proposals would have this effect were usually not borne out.[69] In addition, a Justice Department study has shown that at the time the study was made less than one per cent of the problem of overcrowding in the federal courts could be attributed to environmental litigation.[70]

Although the fears expressed in *Alyeska* have some basis, they are not substantial enough to outweigh the benefits of the private attorney general concept. The value of encouraging public interest litigation is worth the potential problems resulting from the private attorney general concept.

V. SOLUTION

A full evaluation of all the judicial precedents and the policy considerations has shown that the elimination of the private attorney general concept is not warranted. If the private attorney general concept were to be accepted when it was not statutorily prescribed, some concrete and pragmatic criteria should be established to govern the administration of the concept. Justice Marshall, in his dissent in *Alyeska*, listed three such criteria:

> (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiffs pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and, (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.[71]

These criteria differ in several respects from the four listed in *La Raza Unida*.[72] In comparing the two sets of criteria, where

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6. The nature and length of the professional relationship with the client.
7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1974).

69. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966).
70. *See* 3 ENV. L.R. 50015 (1973). Of course, this does not take into consideration the fear that many additional public interest suits, other than environmental suits, would be brought if the private attorney general exception were adopted.
71. 421 U.S. at 285 (Marshall, J., dissenting).
72. *See* note 50 and accompanying text *supra*.

the *La Raza Unida* court required that the plaintiff effectuate a strong congressional policy and benefit a large class of people, Justice Marshall merely required that the plaintiff protect an important right shared by the public. He would not require a congressional mandate of that right. It is unclear precisely what test Marshall envisioned, but he appeared to be looking to see if the plaintiff actually benefited the public interest. This article has already discussed the contention that the better test would be whether the plaintiff protected a substantial public interest, not whether there was a net benefit to the public.[73]

Marshall's second criterion, that the plaintiff's interest would not justify the costs of litigation, was the same as the fourth criterion listed in *La Raza Unida*, and it is essential to the private attorney general rationale. Justice Marshall neglected one requirement for the application of the rationale, which the *La Raza Unida* court mentioned and which appears to embody the very reason for the private attorney general concept—that there be a definite need for private enforcement in the area involved in the litigation. If there is no need for private enforcement, then why encourage such private actions through the awarding of attorneys' fees?

Finally, Justice Marshall's third criterion, that the cost be shifted to the class that benefits from the litigation, was not necessary. As noted by the majority in a footnote in *Alyeska*,[74] Marshall was confusing the private attorney general exception with the common fund exception in which the sole purpose of fee-shifting is to place the burdens of litigation on those who actually benefit from it. However, in the private attorney general concept, although the litigation is for a worthy purpose, it is not the purpose of the concept necessarily to place the costs of the litigation on the beneficiaries of the litigation. Rather it is to encourage private parties to litigate in the public interest. The court in *La Raza Unida* noted that the costs and benefits of the litigation were somewhat matched but implied that this was only a factor to be considered and not an absolute requirement for the application of the concept.[75]

Thus, in light of the private attorney general concept's purpose, namely, to encourage public interest suits, the criteria to be used in determining when the concept is applicable should be: (1) the successful plaintiff protected a substantial public interest; (2) there was a definite need for private enforcement; and (3) the plaintiff's

73. *See* discussion on p. 294-95 *supra*.
74. 421 U.S. at 264 n.39.
75. 57 F.R.D. at 101.

pecuniary interest in the outcome, if any, normally would not justify incurring the cost of counsel.[76] By applying these three criteria, the purpose of the private attorney general concept will be effectuated.

VI. CONCLUSION

The *Alyeska* decision struck a severe blow to the environmental movement. The Supreme Court's decision is not supported by a careful reading of the precedents. Policy arguments appear heavily weighted in favor of the private attorney general exception to the American rule. The three criteria which this article suggests should be used in applying the exception would provide a practical alternative to the harsh rule announced by the Court.

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76. 421 U.S. at 272 (Marshall, J., dissenting).