In the

Supreme Court of the United States

ALYESKA PIPELINE SERVICE COMPANY,

Petitioner,

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,

Respondent.

No. 73-1977

Washington, D. C.
January 22, 1975

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Washington, D. C.,

Wednesday, January 22, 1975.

The above-entitled matter came on for argument at 11:17 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT E. JORDAN, III, ESQ., Steptoe & Johnson, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036; on behalf of the Petitioner.

DENNIS M. FLANNERY, ESQ., 1666 K Street, N. W., Washington, D. C. 20006; on behalf of the Respondents.

C O N T E N T S

[Afternoon Session - pg. 39]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1977, Alyeska Pipeline against The Wilderness Society.

Mr. Jordan, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT E. JORDAN, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. JORDAN: Mr. Chief Justice, and may it please the Court:

This case is here on certiorari to the District of Columbia Circuit, to review a four-to-three en banc decision of that Circuit, awarding attorneys' fees to the respondent environmental organizations here.

It arises out of the Alaska Pipeline litigation.

In order to understand the facts of the attorneys' fees case, it's necessary to refer briefly to the underlying litigation.

In mid-1969 permits were sought from the Department of Interior to construct the Alaska Pipeline. These applications were subsequently amended in December of 1969. As amended in December of 1969, they reflected the anticipated need at that time of approximately a hundred feet in width, in order to build this pipeline, because of the heavy construction equipment which is required.

The statute involved, in part of the Mineral Leasing

Act of 1920, provides for a right-of-way of essentially fifty feet plus the width of the pipeline; in this case 54 feet of four-foot pipeline.

Alyeska, in its December application, sought to acquire additional space under Department of Interior regulations that had been on the books for some years --

QUESTION: Is that the way you pronounce it -- "al-i-eska"?

MR. JORDAN: "Al-i-eska".

QUESTION: Not "al-yes-ka".

MR. JORDAN: "Al-i-eska" is the correct pronunciation, yes, sir.

QUESTION: Thank you.

MR. JORDAN: To acquire this additional space, as a special land-use permit there was a provision in the part of Interior regulations for awarding such permits.

Now, during 1969, and in the chronology set forth in the Appendix here which reveals that, the Department of Interior launched what was at that time really an unprecedented effort to evaluate this pipeline proposal, technically, environmentally, and what-have-you.

In January -- on January 1, 1970, the National Environmental Policy Act became law, and that's commonly referred to these days as NEPA.

In March the respondents filed suit in the District

Court. They filed suit only against the Secretary of Interior, and Alyeska, our client, the petitioner here, and the State of Alaska did not become parties to the litigation until approximately 18 months thereafter, when they intervened.

The claim in -- there were two distinct claims in the complaint.

First of all, was that the applicants were limited to 54 feet in width, and the Secretary of Interior had no authority to give them more under the Special Land-Use Permit, regulations, otherwise.

Secondly, that the Department of Interior had not yet complied with NEPA, which requires federal officials to consider environmental values, and filed so-called environmental impact statements for major projects.

Preliminary injunction issued in April 1970.

After that time the Department of Interior continued to assess the technical environmental aspects of the pipeline and also began preparing an environmental impact statement required by NEPA.

This statement was issued for public comment in March of 1972, and in May of 1972, Secretary Morton indicated his decision to award the permits, including the Special Land-Use Permits, which were challenged by respondents.

The legal issues involved were then litigated in the District Court in August of 1972, and the respondents were

unsuccessful on all issues.

The District Judge, who had entered the preliminary injunction, lifted that injunction.

An appeal then ensued to the District of Columbia Circuit, and there the respondents prevailed on the Mineral Leasing Act claim, or that part of their claim that related to the Special Land-Use Permits.

The Court did not decide the NEPA issues which had also been litigated in the District Court. Three of the judges, however, expressed a view that those issues ought to be decided, and that the Secretary's efforts complied with NEPA.

Certiorari was sought to this Court and was denied.

Thereafter, respondents filed a bill for cost and attorneys' fees with the Court of Appeals. Sought attorneys' fees only against Alyeska, one of the three defendants, and sought such fees only for a period beginning approximately at the time of the release of the final environmental impact statement in March of '72; did not seek any fees for the period in which the preliminary injunction was sought or obtained.

QUESTION: Did it seek just for their services in the Court of Appeals or for throughout the litigation?

MR. JORDAN: Well, it wasn't for throughout the litigation, but it covered such things, for example, as

obtaining expert comment on the environmental impact statement. They submitted four volumes of comments to the Secretary of Interior as part of the public comments.

Preparation of the Mineral Leasing Act brief, preparation of the briefs in connection with the NEPA issues.

Now, they did not specifically make a claim for the presentation in the District Court. However, the same briefs were used in the Court of Appeals. A somewhat unusual procedure, but the exact briefs were used in the Court of Appeals that were used in the District Court. So all the work that had been involved in doing the briefs was initially done for the District Court, then used thereafter in the Court of Appeals.

Meanwhile, Congress had begun to consider legislation to solve the problems created by the Court of Appeals decision. That legislation resulted in Public Law 93-153, which amended the Mineral Leasing Act and generally with respect to rights-of-way. But it did more than that, it contained specific provisions regarding the Alaska pipeline, and it directed issuance of all the necessary permits for the line.

Specially said that there would be no further compliance required with NEPA. And this, in effect, was a rejection of what had been respondents' principal contention in all of late 1971 and 1972; namely, the Secretary of Interior

had to consider a common corridor of pipelines through Canada, rather than through Alaska.

It also precluded judicial review, except for constitutional claims, and even for those provided direct appeal from a one-judge District Court to this Court.

After this legislation was enacted, the Court of Appeals granted the request for award of attorneys' fees against Alyeska.

The award was based on what we view as a considerably expanded concept of the private Attorney General doctrine, which some lower courts had embraced, and although the majority conceded that Alyeska had not violated any duty, that no duties were imposed on Alyeska by the two statutes which were in question, it nonetheless awarded fees against Alyeska.

This decision is in direct conflict with the Sierra Club vs. Lynn out of the Fifth Circuit, which is printed as an Appendix to our brief here.

Certiorari was then granted by this Court.

Now, our principal arguments in seeking reversal of the Court of Appeals decision are these:

First, it is our position, as the Fifth Circuit held in Sierra Club vs. Lynn, that it is equitable to award fees against a party who violated no duty and who could not control the acts of those upon whom the duties were imposed

by law.

Second, the court's unwilling to rule on that basis. We contend that the Court of Appeals applied an improper concept of the private attorney general doctrine, if indeed there is to be a private attorney general doctrine. Specifically, it was wrong to award fees on the Mineral Leasing Act aspects of the case, because that width provision in the Mineral Leasing Act was not something which reflected peculiar or unique congressional concern.

And secondly, it was wrong to award fees with respect to the NEPA issues on which respondents did not prevail in the District Court, in the Court of Appeals, or in the Congress.

Now, it's our contention that what the Court of Appeals did here is a major extension of the private attorney general doctrine, that it will stimulate a greatly increased amount of litigation in the federal courts, involving both environmental laws and hundreds of other federal statutory provisions; that there will be collateral litigation concerning the scope of this expanded and somewhat indefinite private attorney general exception; and that so unconstrained an exception raises serious questions of legitimate concern to this Court about the proper role of the judiciary as distinguished from the Congress in seeing which federal statutes are so important that attorneys' fees ought to be awarded to

support their policies.

QUESTION: Is there any case in this Court that has held that there is a general private attorney general exception?

MR. JORDAN: There is no such case. There was a reference to the private attorney general doctrine in Newman vs. Piggie Park Enterprises, but that was a statutory case --

QUESTION: That's right.

MR. JORDAN: -- under Title II of the Civil Rights Act. And it was more in -- the Court was effectively creating a presumption in favor of attorneys' fees under the statute there.

The Court noted last term, in the Rich vs. United States case, that it hadn't passed on that private attorney general concept. The Court has noted in various footnotes that other courts have discussed such a concept.

QUESTION: Yes.

MR. JORDAN: Before I get to the sort of the principal arguments, let me put to rest a couple of matters which are raised by Respondents' brief.

First, respondents seem here to be trying to suggest that Alyeska was guilty in concert with the Secretary of Interior of deliberately lawless conduct in seeking Special Land-Use Permits as an adjunct to a right-of-way under the Mineral Leasing Act.

This simply cannot be supported. Even the majority of the Court of Appeals conceded that the Mineral Leasing Act argument of Alyeska and the Secretary was, and I quote, "manifestly reasonable and assumed in good faith, particularly in view of the long administrative practice supporting it."

Secondly, respondents argue that their activities support an award of attorneys' fees under a kind of common benefit theory, which this Court has approved in cases such as Mills vs. Electric Auto-Lite and Hall vs. Cole.

But the Court of Appeals examined that theory, too, and said, in effect, if you're going to apply the "common benefit" exception to this case, you'd had to take that exception and, I quote, "stretch it totally outside its basic rationale".

The Court also noted that imposing attorneys' fees on Alyeska will not operate to spreadh the cost of litigation proportionately among the beneficiaries, the key requirement of the "common benefit" theory.

Now, in this regard, the D. C. Circuit is in agreement with the reasoning of the Fifth Circuit, in Sierra Club vs. Lynn.

Let me turn now to really our principal argument, and that is the fact that Alyeska has been held to answer on attorneys' fees for asserted violations of the duty by the Secretary of Interior.

This argument is really quite simple.

First, respondents made two arguments in the litigation earlier, that the Secretary lacked authority to give permits to Alyeska in connection with the right-of-way;

And, secondly, that the Secretary did not adequately comply with his responsibilities under NEPA, which requires environmental statements and public comment, and circulation among federal agencies.

The suit was brought only against the Secretary, no claim was ever made that Alyeska violated any duty. The Court of Appeals explicitly recognized that the duties were those of the Secretary.

Now, despite this, the Court of Appeals went on and awarded attorneys' fees against Alyeska, because of its substantial participation in the litigation -- which I cannot deny -- and because of the massive nature of its interests.

In our view, the participation in the litigation, and the massivity of Alyeska's interest, is simply not the point here.

The point is, as the Fifth Circuit has recognized, Alyeska was innocent of any wrongdoing, and yet it has been held responsible with regard to attorneys' fees.

Let me turn now, if I can, to the private attorney general doctrine.

That's the doctrine on which the Court of Appeals

rested its decision in this case, and plainly did so.

Now, we contend that if there is to be a private attorney general doctrine, which, as Mr. Justice Stewart's colloquy pointed out, this Court has never really approved, it ought to be confined in some way which makes it manageable.

One way to do that would be to confine it to cases involving either constitutional rights or rights which are created by statutes which implement and intend to give rights, substantive rights under constitutional provisions.

And it ought further to be limited to plaintiffs who prevail in a practical, if not a technical, sense.

Let's look at what the courts have in fact done with the private attorney general exception.

The brief of the respondents here, Footnote 91, sets forth a host of private attorney general cases. There are 28 there where fees were actually awarded.

When you look at those, you find that 26 of them involved either constitutional claims or claims under implementing statutes to constitutional provisions, such as 42 USC Sections 1981, 1982, 1983.

Only one case involves an environmental claim, that's the La Raza Unida case in California, a District Court case; and there's another case in California involving an antitrust claim under Section 7 of the Clayton Act.

Now, 24 of the plaintiffs in these 28 cases had

achieved success on the merits, and four of the plaintiffs had achieved substantially the same thing in the form of a consent decree.

In no case does it appear, at least as we can fathom it from the opinions, that the fees were awarded against a party without responsibility for a duty; in other words, a party which has not had some violation of a duty.

Now, with respect to the sort of the important statute argument, the Mineral Leasing Act width provision. the 1920 Act, simply cannot qualify as an important statute.

The Committee Reports,in connection with the passage of what was then Section 28 of the 1920 Act, don't even mention the width limitation. Nor do Committee Reports of similar statutes that have been kicking around in the Congress from 1914 through 1920.

QUESTION: How can the Court possibly decide whether or not that was or was not an imposing statute?

MR. JORDAN: Well, Mr. Justice Rehnquist, my position, or our position here is that the Court ought not to be doing that, that it's unmanageable, that if you're going to say this one is important, then essentially everything is important.

Or if you're not going to say that, but you're going to apply it to this one, you've got to pick and choose and say, Well, we think this one is important, or we think Congress

thought that this one was important.

QUESTION: Certainly if a width statute were passed today, with the environmental concerns that are apparent, I suppose one might say that it would possibly be very important that the Secretary grant just so much right-of-way and no more.

MR. JORDAN: Well, I think that could be, but I think you have to look at how Congress viewed it, not how the courts view it. And you ought to look for some objective determination of what Congress thought about it at the time it passed it.

QUESTION: But you sat here during the argument of this last case, we have a hell of a time figuring out what Congress meant substantively in a statute, that we should go further and decide whether or not Congress thought it was important.

MR. JORDAN: Well, I agree with your analysis, Mr. Justice Rehnquist, and I would say this, you know, that you can kind of go one way or the other.

One way is to say all federal statutes justify attorneys' fees awards. That is essentially an abandonment of the normal American rule of non-award.

Or you can say none do.

Now, a lot of lower courts, and particularly the Fifth Circuit, and District Courts in the Fifth Circuit, have said it's justified in certain types of cases. And they take the Civil Rights Act of '64 and '68 and the Voting Rights Act

and so forth, and they find other provisions, most of them enacted during the reconstruction era after the Civil War, and say: These are closely related, they're in the same ballpark, and we'll apply it to suits under these statutes.

QUESTION: Of course, the Civil Rights Act of '64 authorizes counsel to.

MR. JORDAN: Some titles do, such as Title II, but I recognize that the courts have applied it elsewhere.

What we're saying is that it's not up to use to say whether there ought to be a private attorney general exception.

QUESTION: Isn't there a third one, the general equitable powers of an Equity Court?

MR. JORDAN: Well, the opinions of this Court have often -- on attorneys' fees have often made reference to that general equitable power. I would say this about that:

That if you turn the lower federal courts loose and say federal statutes as important as the Mineral Leasing Act, you can award attorneys' fees in your general equitable powers, you have essentially abolished the American doctrine respecting non-award of attorneys' fees; giving due recognition to the importance of federal statutes in the federal courts.

QUESTION: I suppose, Mr. Jordan, that if we had a broad equity approach, we might then say that if someone in the posture of The Wilderness Society brought litigation of this kind and lost, that attorneys' fees could be taxed against

them. The equity power can't be one that works just one way, could it?

MR. JORDAN: Well, we don't think it should work one way, but that's exactly what the Court of Appeals said in its opinion. Judge Wright said: It's okay to award attorneys' fees against Alyeska, because they have such massive interests that they couldn't possibly be deterred from bringing the litigation.

On the other hand, it wouldn't work the other way around. So there's a lack of mutuality there, which the -- which Judge Wright was seeking.

QUESTION: Well, the same could be said of Ford Foundation, for example, if it brought some lawsuits, their resources are probably in excess of that of most private corporations in the country; but --

MR. JORDAN: I would certainly think that they --

QUESTION: -- that rationale wouldn't apply to Ford Foundation, would it?

MR. JORDAN: No, it certainly would not apply to the Ford Foundation. But --

QUESTION: Do you draw a difference between non-profit corporations and the Ford Foundation and people like that?

MR. JORDAN: I beg your pardon?

QUESTION: Do you draw a difference between a non-

profit corporation and Alyeska, or whatever it is?

MR. JORDAN: Well, let's put it this way --

QUESTION: Well, I mean there is a difference, you couldn't collect from them, and they could collect from --

[Laughter.]

MR. JORDAN: Well, they may be judgment-proof, Mr. Justice Marshall.

QUESTION: So there is a difference.

MR. JORDAN: That may be a possibility. But there's no indication that the organizations involved here are in that category.

We do think that there is a difficulty with this, the lack of mutuality, and we basically think that this Court and the lower federal courts ought not to get in the business of trying to pick and choose between statutes.

If you want to have a private attorney general doctrine, it recognizes in Civil Rights and Civil Rights derived cases that possibly is a manageable distinction. If you start extending it beyond constitutional rights, it's hard to see where you draw the line.

Let me say, a minute, something here about the NEPA claims.

As to those, it's simply clear that respondents have not prevailed. There's been no ruling on NEPA. The District Court Judge found for the Petitioner. Three judges

in the Court of Appeals, who expressed an opinion, said NEPA was satisfied by the Secretary; and Congress has rejected the NEPA claims.

Hence, there just cannot be a valid private attorney general claim based on the NEPA aspects of the litigation.

I would point out there that even Congress, in passing things such as Title II of the Civil Rights Act, with its attorneys' fees provision, has made distinctions about prevailing and not prevailing. The Title II provision requires that the party prevail.

There's some other federal statutes that do not make that distinction.

But even on something as important as the Civil Rights Act, Congress at least has required that the party prevail.

Now, there are a couple of additional things about the benefits rationale that fit in with the business of success.

Let me add a couple of thoughts on those.

First of all, most of the specific benefits claimed here are a result of the preliminary injunction. Alyeska wasn't a party then, didn't become a party for about another sixteen months. And yet, perhaps, 70 percent of what's claimed here really relates to the attack on the final environmental impact statement.

There is, therefore, no relationship between the fees claimed and the benefits claimed.

And secondly, respondents claim that it's their litigation and their activities which have produced these various changes in the construction plans for the pipeline. This is of great benefit to the country and to Alyeska.

This just isn't supported by the record, and let me take just one example, which I picked from the brief of respondents, to illustrate this.

They talk about buried and elevated pipeline. That's important because in permafrost soil if you bury a hot pipeline in the wrong place, the soil will thaw and it will slump, and it may damage the pipeline and could damage the environment.

Everyone agrees that this is true, and you have to be careful about it.

But there's no element of the whole pipeline business that the Department of Interior was more aware of and more concerned about. That concern goes back to the latter half of 1969, it antedates NEPA, it antedates this suit by several months.

In December of 1969, Secretary Hickel wrote to Chairman Jackson of the Senate Interior Committee, pointing out that an Interior study had showed there were great problems with this and that there were a great many unresolved problems.

The day before this suit was brought, March 25th, 1970, the Director of the Geological Survey, who was later to become Under Secretary of Interior, had a long involvement with this whole pipeline problem, sent a memorandum to Secretary Hickel, saying: I've gotten a study in from my staff people, this is very troublesome, there are a lot of problems here. A lot more of the line is going to have to be buried; there's no way around it.

And yet respondents are trying to claim credit for this and various other things which were the product of the activities of a host of government officials.

Now, those things I've just mentioned are in the record, they are attached to the affidavits that were submitted on March 30, 1970, in the District Court. Those affidavits are referred to in the Appendix at page 12, and we're talking about Exhibit 19 to the Horton deposition and Exhibit B to the Pecola deposition.

We just don't think that the claims of credit can be justified by the facts.

For these reasons, and those set forth in our brief, Mr. Chief Justice, we submit that the judgment of the D. C. Circuit should be reversed.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jordan.

Mr. Flannery.

ORAL ARGUMENT OF DENNIS M. FLANNERY, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. FLANNERY: Mr. Chief Justice, and may it please the Court:

QUESTION: Mr. Flannery, has the amount of this award been fixed?

MR. FLANNERY: It has not, Your Honor. That has specifically been left by the Court of Appeals for a later determination.

QUESTION: But was the -- the hours were pretty well defined, weren't they, by the Court of Appeals, as to what would be included and what wouldn't?

MR. FLANNERY: Yes, they were, Your Honor.

QUESTION: So what was the total hours?

MR. FLANNERY: The total hours were something over four thousand and --

QUESTION: Forty-four hundred and something is what the claim says.

QUESTION: Well, they had just approved your claim, then? You claimed 4400 hours or something like that.

MR. FLANNERY: We claimed 4400 hours, and the Court of Appeals indicated that half of that should not be recovered, because they thought it would be appropriate to divide the award between the government and the --

QUESTION: Well, I understand, but the hours -- the

total hours that they approved were 4400 and then they just say the company should just pay half of that.

MR. FLANNERY: Well, I can't -- and they didn't really get into the question of the hours as such. They said the question of the hours and the skill and the other points would be deferred for a later -- for later consideration. But it did say one-half of the total efforts that were taken in preparing the case for the Court of Appeals should be awarded against Alyeska; yes, Your Honor.

QUESTION: Was this to be left up to the District Court in the first instance?

MR. FLANNERY: It was, Your Honor.

QUESTION: Yes.

QUESTION: Did you claim an amount?

MR. FLANNERY: No, we did not.

QUESTION: And the rest of it was to be awarded -- or was it to be awarded against the government?

MR. FLANNERY: No, it's borne by the organizations involved, The Wilderness Society, --

QUESTION: Nothing against the government?

MR. FLANNERY: -- and the lawyers will swallow that. Yes, Your Honor.

QUESTION: Right.

QUESTION: The statutes forbid any levy against the government, do they not?

MR. FLANNERY: We did not go behind the statute, we accepted that as a prohibition, and made the contention that we thought it was fair in this case to award the entire four thousand hours against Alyeska. The Court disagreed with us on that, and said they thought half an award would be appropriate.

QUESTION: Unh-hunh.

MR. FLANNERY: Listening to my good friend Mr. Jordan's argument, and reading his brief, you -- at least I sort of get the picture of a poor harmless soul who was walking past the U. S. Courthouse one day, and a big hook came in, and the next thing he knew he was taxed with fees.

And that's really not -- not the way this happened.

Just briefly, to go back a little bit:

The oil companies that Mr. Jordan represents discovered and got rights to this vast amount of oil on the North Slope of Alaska, and then they had to determine how to get it to market.

They looked, and they considered various plans, and they determined that the way they would like to do it is to construct a hot oil pipeline across the entire length of Alaska, and then to load the oil, when it got to the bottom of Alaska, on marine tankers, and then ship the oil to market.

That was their decision. Nobody told them to build it that way, no one told them they had to do it that way.

They then set about determining how they would go about getting permission to do that, since most of the lands that would be crossed would be federal lands.

The record clearly indicates that Alyeska recognized that the statute -- and, my God, it's hard to imagine a clearer statute -- the statute says on its face that rights-of-way will be limited to fifty feet. Not only does it say that, it then says that the Secretary cannot grant rights-of-way under any other provision.

Then, if that isn't enough, it says: And if he does, and if a right-of-way is limited -- or is issued that violates the statute, the oil company that receives the statute -- receives the right-of-way will forfeit it.

This was the statute on its face.

QUESTION: Well, if it's all that clear, why did it take 4400 hours to --

MR. FLANNERY: Your Honor, --

QUESTION: -- figure out what the law was?

[Laughter.]

MR. FLANNERY: We think the case should have ended in April of 1970, when we received the preliminary injunction. When Alyeska came in, it filed a, I think, about a 200-page brief, finally, ultimately, trying to justify why the statute didn't say what it said.

It went -- passed through 200 years of history of

internal Interior Department regulations.

QUESTION: Well, I can see on your theory why it would take your opponent a good many hours to prove that the statute didn't mean what it said. But we're talking about your time.

MR. FLANNERY: Yes. And I think we had to more or less do the same thing, to show not only did it say what it said on its face, but it meant it.

I think the Court of Appeals, in its opinion, indicated why we had to do that. Judge Wright, after saying that the statute was as clear as it could be, said: But it may well be that fifty feet couldn't have meant fifty feet, and we will go beyond.

And the Court went beyond all of the other facts, it looked at the Interior Department regulations. Indeed, Your Honor, it found that on the face of the regulations -- not only on the face of the statute -- the kinds of permits contemplated here were banned. It found no long-standing administrative practice.

And we anticipated, and it happened, that the oil companies, with their resources, joined up with the government, combed the field offices of the Interior Department around the country, looking for any shred of evidence that might give them an indication that this was a long-standing practice.

There was none. When the record finally came down,

after these three years, Mr. Jordan and his -- and the government, came up with actually five documented instances of this kind of permit that they claimed constituted a long-standing practice, and none of them before 1960.

I think the total miles involved were around fifty or sixty miles.

But, for some reason, the oil companies did not want to go to Congress. At any time, in the three years that this litigation was filed, the oil companies were free to go to Congress. No one stopped them from doing it. In fact, the theme of Wilderness Society I is that this was a prescription that was directed to the oil industry, and Congress specifically said if the oil industry wants more land it should come back to us and tell us why.

And Alyeska was not compelled to go to the Secretary of Interior, it could have read, as we read, the preliminary injunction in 1970, and at that point gone to Congress.

It could have gone to Congress at any time, and therefore this litigation certainly didn't burden the courts. The only people that really burdened the courts were Alyeska. They were the ones who insisted on litigating this all the way through, right up to this Court.

This Court, I might note, denied certiorari the first time around four days after receiving our opposition. And yet the litigation was long and prolonged because of

Alyeska's decision, not ours.

And the real issue here is: Who should bear the economic burden of compelling Alyeska and the Trans-Alaska Pipeline System to comply with the law?

And the question really is one between Alyeska and Exxon and ARCO and Amerada-Hess on one side, and the Wilderness Society and the Environmental Defense Fund and the Friends of the Earth; and who, between those two, should be compelled to bear at least part of the economic burden of this litigation.

In our position -- in our -- Yes?

QUESTION: If, given all your positions in the case, the Secretary had acted properly and performed his duty on your theory, the matter would have been disposed of a long time ago, wouldn't it?

MR. FLANNERY: That's correct, Your Honor. I think if the Secretary had acted, as he should have, back in 1970, the litigation would have been over, I think; and certainly if Alyeska had acted correctly and listened to the preliminary injunction, the litigation would have been over.

QUESTION: But for eighteen months, at least, the Secretary was, from your point of view again, in error on his own, wasn't he?

MR. FLANNERY: Well, he was the only party before the court, and, needless to say, we were not anxious to invite

Mr. Jordan and his law firm and the oil companies into the lawsuit. But we knew they would come when push came to shove.

But certainly the Secretary, in the time that the preliminary injunction was in effect, at any time could have gone to Congress, and Mr. Jordan and his clients could have also. They were not prohibited in any way.

In fact, I think the clear purport of the statutory scheme was for Mr. Jordan and his clients to go to Congress.

We don't really think that the question of technical, legal liability is a sine qua non for the award in this case. It certainly was not the basis on which the Court of Appeals proceeded, and we think correctly so.

But even on that point, the Mineral Leasing Act of 1920 has a clear forfeiture provision which, in a very real sense, put a direct legal liability on Mr. Jordan and his clients.

QUESTION: Would this record show, in the present state, what proportion of the total of 4400 hours of legal work had the impact that you argue for on the actions of Congress, the subsequent actions of Congress?

MR. FLANNERY: Yes. Your Honor, yes, in --

QUESTION: A substantial part?

MR. FLANNERY: Yes, I think a substantial part. The last item in the Joint Appendix is the actual bill of costs that was submitted to the Court of Appeals, together

with an affidavit from me, which explained the various segments of the work, and what the various elements related to.

I think even here, thought, it's important to focus on something. Mr. Jordan indicates that the NEPA issues, in so far as they were litigated, really were irrelevant, that we didn't prevail. Admittedly, we didn't prevail, because we prevailed on a threshold question.

But, again, The Wilderness Society and the groups I represented, when the Secretary announced, in May of 1972, that he was going to go ahead and issue permits, notwithstanding the preliminary injunction, and notwithstanding the limitation in the Mineral Leasing Act, we immediately filed a motion for partial summary judgment solely on the Mineral Leasing Act ground, which was the earliest time we could do it.

We said, we believe this is dispositive of this case; we request the Court to rule on it promptly, that Alyeska and the government have had three years now to figure out why fifty feet doesn't mean fifty feet, and we are satisfied to go on that issue alone.

Alyeska, which, by this time, had intervened, and, as Mr. Jordan has indicated, very vigorously intervened, filed a motion the next day and argued: No, don't do that; require The Wilderness Society and Environmental Defense Fund

to litigate all the issues, require them to litigate the NEPA issues as well.

And specifically, Mr. Jordan said -- not the government, not the State of Alaska, but Mr. Jordan in his papers -- that unless the NEPA issues are briefed and argued, the Court will not have a basis for determining even the Mineral Leasing Act issue; that you cannot determine the Mineral Leasing Act issue in the abstract, you need to get the whole technical background and development of this entire case.

And,he submitted, when you have that and when you tell The Wilderness Society to submit a NEPA brief, we are then convinced that you will rule out their arguments on the Mineral Leasing Act.

And so even on that issue, we were told to litigate at Mr. Jordan's insistence.

Now, Mr. Jordan says that we did not prevail on the NEPA issues. We didn't prevail on the NEPA issues for precisely the reason that we have suggested to the Court: that if the Mineral Leasing Act were indeed a threshold bar, the Court would be, in a sense, giving an abstract opinion on an issue of no significance, because Congress would have the final determination. And that's what ultimately happened.

I might say that there are questions raised frequently

about delays, and whether the environmentalists caused the delays in the Alaska Pipeline. But the record indicates that the environmentalists are responsible for none or hardly any delay. The initial suit was filed in the beginning of 1970, the earliest possible time. The oil companies and the Secretary were put on notice that both the Mineral Leasing Act and NEPA imposed some fairly serious obligations on them, that they ought to adhere to before going ahead with this project.

Mr. Jordan skips from 1970 to 1972, but there was a significant series of events that occurred in early 1971, when the Interior Department published a draft impact statement, in January of 1971.

The thought there was that that would serve as a basis for the go-ahead on the project, and that there might be some fixing up of the statement as a result of comments, but by March or so of 1971 there would be a go-ahead.

That statement was given by the Interior Department to Mr. Jordan's clients prior to its publication. Many of the comments about the impact of the Trans-Alaska Pipeline System were softened. There was tremendous criticism of that impact statement, as a result, by our organizations, by other federal government agencies; and, as a result, it was not really until February of 1971 that the Interior Department and, I submit, Mr. Jordan's clients got down to the serious business of

grappling with this, the real complexities of this project.

So really a whole year was lost from March of 1970 to around February of 1971, and it's a year for which these respondents are in no way responsible.

And then from 1971, as I indicated, to 1972, there was the work being done on the environmental impact statement. We don't claim that -- credit for the good things that came, and there are a lot of good things that came through that effort. In the course of this litigation we deposed the individual who was placed in charge of the drafting effort by the Secretary of the Interior, a geologist named Dr. David Breu, and I have never found or met a finer public servant and a more dedicated man in my life, and he received accolades from us as well as from Mr. Jordan's clients.

We had some problems with the work that was completed, but there couldn't have been a man who worked harder or who had the public interest more at heart.

But then when that impact statement was issued, as I have indicated, why, we presented our views to the Secretary about what we thought still was wrong with it, we were perfectly willing for the litigation to end at that point and for Congress to do its job.

We submitted the papers, but the oil companies wanted to keep the case in the courts.

Ultimately, we prevailed on a Mineral Leasing Act

issue, and Mr. Jordan says in his brief and says today that it was on a technical issue that was of no importance. What difference does fifty feet mean?

Well, I think the subsequent history, if anything, demonstrates what the importance of it was. Congress didn't say, My God, fifty feet is absurd, we don't care; take a hundred, take a thousand, just build this thing and get the oil down.

There are ten months of debate, and with all of the pressures that were placed, and realistic ones, all of the knowledge of the impending energy problem, the decision to build the Trans-Alaska Pipeline without further litigation passed by the Senate, by a 49-49 vote, with Vice President Agnew breaking the tie; and it passed in the House by a vote of 221-to-198.

And even then, the proponents of that legislation -- it certainly was an unusual legislation; but even then they said that the delays that have already occurred as a result of this litigation, which permitted the Interior Department and Alyeska finally to get down to work and do what they should have done all along, convinces us that now we can go ahead.

So I don't take the subsequent legislation that came out of the Congress as a defeat for the environmental groups, that is precisely what they had been asking for all

along. They had been asking that there be a real and considered judgment of what the implications of this project were. We got that.

And they were asking that the matter be referred to Congress, as Congress has indicated it wished in the Mineral Leasing Act of 1920. We got that.

And there's been no further dispute. The pipeline is being built. We wish the oil companies well, and we do hope that it will be done in an environmentally responsible manner; and presume that it will.

QUESTION: The pipeline that will be built differs -- will you tell us -- in what way from the one that was originally proposed?

MR. FLANNERY: Well, the one that was originally proposed was a -- really, it's hard to say whether anything was originally proposed. What the oil companies essentially went to the Interior Department with was a map, and a line where they planned to go, and essentially what they said was: that we'll get out in the field, and out in the field we'll be able to make adjustments.

But the principal differences were, No. 1, that all of the river crossings were to be buried, and that would have had tremendous erosion problems, and it would have been significant ruptures along the line. All of the overland portion, with the exception of about five percent, was to be

buried. Now it's more -- was to be buried; now about 55 percent or so will be elevated.

There was very little understanding of the topography along the route of potential landslides and avalanches; and, of course, the most significant problem and one, by the way, that remains a problem, one that concerns everyone still greatly, including, I'm sure, the oil companies, is that the southern two-thirds of the Alaska Pipeline route is seismically about the most active area in the world. In fact, the southern terminus, Valdez, was destroyed in 1964 by a major earthquake.

The Interior Department impact statement indicates that there will be -- will be -- a major earthquake along the pipeline route sometime during its life.

Now, the time that has gone by has at least permitted Alyeska to prepare contingency plans and certain defenses in areas where they know there are potentially active faults; the most obvious one is the Denali fault, which everyone has been aware of for a while.

The frightening thing, though, is that the Interior Department's statement indicates that there may be other potentially -- potentially seismic active faults all along the route that cannot be predicted, so we may be in for some very serious problems in the years ahead, if one of those should become active.

And, by the way, the conclusion is that if there is a major rupture, there will be a minimum of about 60,000 barrels of oil that will spill into the lakes and the streams before preventive measures can be taken.

QUESTION: Have there been any engineering changes to -- in anticipation of the possible spill?

MR. FLANNERY: Yes. As I said, Your Honor, I think there have been, certainly with respect to the Denali fault and other areas. There have been protections that have been built in.

There also was, I think, a much greater knowledge of the permafrost problems, of the problems with vegetation, of how to restore vegetation, which is important nonly only for the environment but also for the integrity of the pipeline, because these pressures can be just enormous if you start interfering with the permafrost, you have melting going one way and then sort of coming back against the pipeline.

And it's still an amazingly complex project and one that's going to take all of the efforts of Mr. Jordan's clients to cope with, and we sincerely hope they'll be able to do it.

I think another problem, which I might mention, is the -- well, it's called the Trans-Alaska Pipeline, and that certainly is what it is. Once it makes it through -- if I could just have a minute -- once the pipeline makes it through the entire route the problems really only begin, because then

it has to be loaded on to these major super tankers, and again, the final impact statement says that -- and this is now when all the study is over -- that in the average year of the pipeline we can expect 140,000 barrels of oil to pollute the northeast Pacific, which is the last and really major unpolluted ocean area in the world.

And that's only an average figure. One super tanker crash will spill a million barrels.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

MR. FLANNERY: Thank you, Your Honor.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:04 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Flannery, you may resume.

ORAL ARGUMENT OF DENNIS M. FLANNERY, ESQ.,

ON BEHALF OF RESPONDENTS -- Resumed

MR. FLANNERY: Thank you, Mr. Chief Justice.

The petitioner does not in its brief, and does not seriously here today, question the power of the court below to make the award of fees in this case. Nor does it really seem to be arguing that the factors cited by the Court, as applied to this case, do not justify or do not support the award of fees.

And what really appears to be the principal argument, it certainly seems to be true in the brief, and I think it was the thrust of the argument today, was that somehow if this decision to award fees in this case is allowed to stand, the lower courts will be set off in all sorts of directions, issuing all sorts of unpredictable opinions awarding fees.

And I respectfully suggest that the lower courts are entitled to a little more confidence than that. Indeed, a hundred years ago, when this Court first extended and recognized the validity of an award of fees in the common fund cases, in Trustees v. Greenough, that very argument was made, that if you permit lower courts who are familiar with the

particular facts of a particular case to decide that fees should be awarded, we will be set off in a parade of horrors.

QUESTION: Well, when that case was decided, there was a substantial body of precedent in State courts, in the exercise of equity powers, on the theory that there was a benefit conferred or a fund created, was there not?

MR. FLANNERY: Mr. Chief Justice, what the Court really looked to was the traditional English practice --

QUESTION: Yes.

MR. FLANNERY: -- and most of the cases cited were the traditional equity powers of the English court. And, I submit that that same equity power, as exercised -- it is really the same power that was exercised by the Court in this case.

QUESTION: I'm a little puzzled by your prior statement, your earlier statement, at the outset, that you didn't think your friend was disagreeing too much with you. I thought he had disagreed with you most violently and said there was utterly no precedent whatever, of any kind. for the allowance of attorneys' fees in cases of this kind.

MR. FLANNERY: Well, if he did, he's certainly in error. And I didn't understand him to say that. In fact, I think he conceded that there -- and in response to Mr. Justice Stewart's question, this Court has not directly passed on the private attorney general theory as such; but

certainly there is extensive precedent in the lower federal courts --

QUESTION: Yes, but what precedent in this Court?

MR. FLANNERY: And I certainly agree with that also, Your Honor. Just as in Greenough, there was no precedent in this Court for recognizing an award of fees in the context of the common fund.

But I think they're the same considerations, really, that gave rise to the award in Greenough, apply here. Really, what the Court was saying: Is it fair, in circumstances such as that, when one individual has really had to take the burden of a litigation that goes far beyond any interest of his own, is it fair for that individual to bear the full burden of the litigation, when there's an equitable mechanism available for spreading the cost?

And I believe that's exactly the same factor that the Court of Appeals below recognized in this situation. And I think the Court of Appeals recognized, and I think the record here demonstrates amply, that this is a unique case, this is a truly extraordinary case. The issues are extremely complex, the litigating burden that the respondents, for no economic benefits, had to assume was immense. And the results of the litigation were beneficial, and they were not a benefit that in any way adhered to the economic gain of the respondents.

Now, a hundred years ago, much the same argument

that Mr. Jordan has made today was made, and this is what Justice Bradley said: A just respect for the eminent judges under whose direction many of these cases have been administered would lead to the conclusion that allowances of this kind, if made with moderation and a jealous regard to the rights of those who are interested, are not only admissible but agreeable to the principles of equity and justice.

And I submit that that is precisely what happened in this case, and that the court with the greatest familiarity of this record, and the court which struggled with this case over a period of five months in reaching the decision in Wilderness Society I, was it correct in ruling that this was an appropriate case for award of fees.

QUESTION: Do you think the equity powers that you speak of are broad enough so that if you had, hypothetically, a case where a volunteer non-profit organization brought a suit, kept the litigation -- had a litigation that kept on going for many, many months, with an extraordinary amount of time involved, that then it was found to have had no basis at all to the case, and all the relief denied, do you think the Court would have the authority and appropriately charge fees against the plaintiff in the action?

MR. FLANNERY: I can't -- there is, of course, traditional powers, under the obdurate behavior standard or also for a misuse of court processes, the courts have always

had this power to punish, and it really is a power to punish, for frivolous litigation.

I would say, to the extent that that sort of litigation was not frivolous, but was not, in the end, proven to be meritorious, the traditional principles of the American rule, nothing else outstanding, would probably dictate that each party bear its own fees.

And I think that what the Court of Appeals in this case said was that the very principles that stand behind the American rule, which is that there aren't to be barriers toward litigating meritorious interests, would permit an award of fees in this case, but would not necessarily require -- and really shouldn't -- the wholesale abandonment of the American rule in every other context.

And I think what we're talking about here, Mr. Chief Justice, is a truly exceptional case.

QUESTION: Well, then it just boils down to the deeper pocket under your analysis, doesn't it?

MR. FLANNERY: No -- I don't think so, Your Honor. I think what the Court said was: Look at these individuals who had no economic gain at all and look at the position they were in, that they had to step into the breach to get the law enforced, for no economic interest at all.

That, combined with the other factors cited by the Court, led it to the conclusion that if there was an equitable

way of shifting some of that cost, it could do so.

Then, on the other side of the coin, it looked to see who that cost could be shifted to. It determined that Alyeska, for many of the factors I have discussed this morning, was certainly a responsible party in the litigation, who really was responsible for many of the issues that were raised in the litigation, was very active.

Then the last thing the Court looked to was: Now, if we do, in light of those factors, shift fees from the respondents to the petitioner, is there any way that the shifting of fees could act as a deterrent to Alyeska or anyone else similarly situated to litigate its interest in court?

And the Court said no. But that was --

QUESTION: But supposing the procedural history here had been almost exactly the opposite, where it had been determined that your client had been wrong at every juncture, and then Alyeska comes in and asks for attorneys' fees at the close of the situation?

Now, I take it, your client probably isn't insolvent. Would your clients' resources be tests by the same standards that Alyeska's were, in determining whether or not fees could be awarded?

MR. FLANNERY: Well, I think here you're talking about really a different interest; you're not talking about

the purpose, you're talking about a very different purpose of an award. Here you're saying that if you have litigation where one party wins and one party loses, should the party that wins be awarded fees?

And I think the answer, under the traditional American rule, is no.

And what we're talking about here is a very limited exception, where you do have, when the case is over, the party which had to intervene simply because the law was not being upheld for anyone else, should that party, as in this case, compared with Alyeska, be forced to bear that burden?

And I think the --

QUESTION: But almost any -- almost any party can come in and say the law just isn't being enforced, I'm going to enforce it.

MR. FLANNERY: That's correct.

QUESTION: That's pretty broad.

By the way, who's going to -- assume you win, where does the fee go?

MR. FLANNERY: The fee that is awarded to me will go to the Center for Law and Social Policy, which is the --

QUESTION: Awarded to you? I thought -- who applied for fees, you or the client?

MR. FLANNERY: Oh, I'm sorry, the client applied for the fees, and --

QUESTION: And when the -- if it's awarded, and the check is made out, to whom will it be made out?

MR. FLANNERY: Well, I presume, in most of these attorneys' fees cases, and this is certainly the way the NAACP Legal Defense and Educational Fund cases worked, the fee is either made out to the client itself, the Court indicating that the fee is to go to the lawyer or to --

QUESTION: Well, is the client under any obligation to you to pay a fee?

MR. FLANNERY: No obligation to pay a fee, no, Your Honor.

QUESTION: And -- so that the client keeps the fee, doesn't pass it on to you?

MR. FLANNERY: No, he would pass it on to the organizations, Your Honor.

QUESTION: I know, but the organization would keep the fee, they wouldn't pass it on to you, is that --

MR. FLANNERY: The Center for Law and Social Policy would keep the fee, I will not get a penny from it.

QUESTION: Now, is that a federally financed organization, or partially federally financed?

MR. FLANNERY: Not at all, Your Honor.

QUESTION: It's not financed by the Legal Services Corporation?

MR. FLANNERY: No, Your Honor.

QUESTION: Nor OEO and never has been?

MR. FLANNERY: No, Your Honor, its principal funder is the Ford Foundation.

QUESTION: Unh-hunh.

QUESTION: I suppose there's taxpayer money in there, in the broad sense that donations, contributions to The Wilderness Society are tax-deductible?

MR. FLANNERY: Yes.

QUESTION: Some unidentifiable portion of it is money that otherwise would have gone in taxes.

MR. FLANNERY: The Internal Revenue Service has been presented with the question, and has ruled that awards of fees to -- that would go to groups such as the Center for Law and Social Policy are appropriate, and it doesn't affect the basic charitable nature of the organization.

QUESTION: Well, that would --

MR. FLANNERY: But, of course, as I indicated, the individual lawyers will not be profiting from it.

QUESTION: That may be another question that probably is irrelevant, that if none of the lawyers receive any of this, and if the lawyers have all been paid for their services, then, as a matter of arithmetic, I suppose the Center will be receiving more money as a result of this litigation than the Center paid out to the lawyers who conducted it.

MR. FLANNERY: Well, I think that the standard, and

certainly this is the standard that the Fifth Circuit has reached in a number of Civil Rights cases, going over the years, is that the appropriate standard should be the value of the legal services, taking in a lot of other considerations.

And in a situation such as this, if lawyers are willing to take on these cases for less remuneration, and certainly the remuneration I received would be a very small portion of what Mr. Jordan would receive for arguing the opposite side of the case, that that should not be the standard, really, that would determine the award.

Because, otherwise, it would really be the poorer the group and the more sacrificial the lawyer, the less the award would be. And that, I think, would present very, very difficult problems.

QUESTION: But the ancient equity doctrine that was first articulated here a hundred years ago was always based on restoring the expense of litigation, was it not?

MR. FLANNERY: Yes.

QUESTION: No one made any profit out of it, except in the sense that lawyers got fees, but no one had any margin in the old equity rule.

MR. FLANNERY: But what we're talking about here is, I think, a real economic burden, and the question is, if you have lawyers who are taking on this case, as I did here, for substantially less than what they would make -- and

certainly, as a father of five, I can say it was substantially less --

QUESTION: But that gets us into some rather subjective factors.

MR. FLANNERY: Well, I think what the Courts are trying to do is get away from the subjective factors by simply valuing the legal service, and not getting into this question about just how much this salary was paid, and how much the secretaries were paid, and how much the typewriters cost, and how much it cost to heat the room where we had to answer the 200-page brief. And I think that the --

QUESTION: But if the rationale is to, not to deter litigation, I would think that the answer you just gave to the Chief Justice does not really support your proposition. It may seem perhaps a harsh result, but if in fact lawyers are willing to bring these kinds of lawsuits for less than the going rate, the fact that they don't receive ordinary counsel fees apparently will not deter them.

MR. FLANNERY: No, I think it seriously does. There's no question that this litigation was one that was -- one that the groups themselves had to think very seriously about, knowing what they were getting into; and I can certainly say from a personal nature that I certainly had to think very seriously about whether I was willing to take it on under the conditions that I knew I'd be working under, knowing that

the nature, and this --

QUESTION: Well, how will it deter -- how will refusal of counsel fee here deter further litigation, when the money, if it's forthcoming for counsel fees is going to go to the organization, not to the lawyer? They are still going to be asking lawyers to take things on, just like they asked you.

MR. FLANNERY: Yes, that's right.

QUESTION: And if they can get them, they can get them; if they can't, they can't.

How is the money going to help with respect to further litigation?

MR. FLANNERY: Well, that --

QUESTION: As far as lawyers' fees are concerned?

MR. FLANNERY: Well, the money is going to help, because at least it will -- it will --

QUESTION: So that it can pay the next lawyer who charges no more than you?

MR. FLANNERY: That's essentially right. But I think it also permits the organization --

QUESTION: That hasn't got much to do with this case, for that matter.

MR. FLANNERY: I don't think it does; but I think that the fee in this case, which I think is based on this case alone, is one that really talks about a real economic

burden, either that a lawyer gave up or didn't. But we're talking about, you know, the actual facts.

I think that in so far as what's going to be done with the money, it certainly would be possible for the lawyers and for the group simply to say that the lawyers would receive whatever extra money they would get when they won the case, and therefore would be made whole.

It just happens that lawyers with the Center, as lawyers with the NAACP Legal Defense and Educational Fund, have agreed that they will not take the extra money.

But I really don't see why that should be the distinction as to what the actual award should be.

QUESTION: You might --

QUESTION: And you'd rather have it go directly to the organization, rather than to you --

MR. FLANNERY: I do not --

QUESTION: -- even if you gave what was left after taxes to the organization?

MR. FLANNERY: Either way the organization will get as much as I can give it, and I won't take anything.

QUESTION: Yes.

QUESTION: Your thesis might be equally applicable in cases where the government brings an action, let's say, antitrust or other enforcement in some economic area, and the government then sought fees from the losing party and made

the claim that,generally known among, in the profession, that lawyers in the Department of Justice are working for less than they could get outside, and therefore the differential should go into the government's coffers. But has any court ever allowed the government that kind of cost of litigation anywhere?

MR. FLANNERY: No, but I think that the government is the Attorney General, and I think that it is generally understood that when the government brings litigation, of course -- and we're talking about really a solid base, there are taxes which are going to support the government lawyers, there are pension funds, there's hospitalization, there's retirement; you're talking about a very different situation for a lawyer, even though, obviously, lawyers and career lawyers are making sacrifices.

They are a very different situation from a private lawyer, who is really moving into the place of the government for one reason or another, who is then shouldering the burden; and I think that this is, this decision in this particular case is designed to lighten that burden.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Jordan, do you have anything further?

REBUTTAL ARGUMENT OF ROBERT E. JORDAN, III, ESQ.,

ON BEHALF OF THE PETITIONER

MR. JORDAN: A few further observations, Mr. Chief Justice.

It seems to be difficult to persuade Mr. Flannery of our good faith, but I hope I'll do a better job with the Court.

The Court of Appeals said that our position was taken in good faith, in view of the long administrative practice.

I'd just like to point out a few additional things.

The practice of special land-use permits was supported by opinions of the Attorney General, going back into the 1870's. The Department of Interior had regulations on special land-use permits for many years.

Perhaps most significant, in 1923, three years after the Mineral Leasing Act was enacted, there began a practice of giving in fact more land than the statute literally allowed for the purpose of pumping stations. That had been done for approximately fifty years when this litigation came along. That had been codified in the Interior Regulations, and had been expanded to include not only pumping stations but other necessary facilities.

Now, that's an element of our good faith.

I would also point out that the Court of Appeals

accepted this argument with respect to pumping stations and rejected the argument of the respondents on that point.

And finally I would say that in 1970 the Ninth Circuit had decided a case, Sierra Club vs. Hickel, 433 Fed 2d 24, which was subsequently before this Court under the name of Sierra Club vs. Morton, on the basis of a standing issue -- resolved on the basis of a standing issue.

The Ninth Circuit had allowed as an alternative holding the Department of Agriculture to tack, if you will, special land-use permits onto a specific acreage limitation for recreation developments in the Mineral King Development.

Now, Mr. Justice Blackmun had something to say about that when the case was up before this Court, but the point was that in 1970, the relevant time, we were relying on that kind of opinion in the Ninth Circuit on a very closely related point.

There have been some other discussions here about relative portions of the fees for various activities. I'd like to just re-emphasize a point I made in my principal argument.

The benefits which Mr. Flannery claims were benefits of the preliminary injunction. Now, presumably, no fees were sought for that, because there was no deep pocket there to go after. Alyeska was not a party to the litigation at the time of the preliminary injunction, did not become so for many

months.

But most of the fees claimed, and certainly the fees claimed relating to the NEPA issues, are of a nature having nothing to do with the benefits involving changing the pipeline construction. That had already taken place, largely, by March of 1972 when the final environmental statement came out.

And most of that related to the trans-Canadian alternative.

Now, in the District Court, the transcript of August 14 and 15, 1972, when these issues were argued, just before lunch one of those days Judge Hart asked the respondents here: What do you really want? What is it you want this Court to do in the way of an order? Come back after lunch and tell me.

And that's the transcript of that proceeding, which is referred to in the Appendix at 31.

After lunch the respondents came back and said: What we really want here is an addendum to the final environmental impact statement dealing with these common corridor pipeline arrangements through Canada and Alaska.

That's what the whole NEPA exercise was about. That's what respondents were seeking at that time. And that has nothing, absolutely nothing, to do with bringing about changes in the construction of the pipeline.

One more point.

With respect to who brought about these changes, the record's not very satisfactory on this, and the reason, of course, is that this thing was initially determined by the Court of Appeals in the first instance. It was not before the District Court.

And the record that we have here was not designed to shed light on the attorneys' fees issues.

But if you were to go back to the record you would find document after document after document that supports the notion that people like Oscar Ferens and Ruben Caccidorian of the Geological Survey were the people who brought about the changes on burying and elevation. That Bob Page of the Geological Survey was the fellow who was in there saying time after time again: You've got to more closely examine the seismic, the earthquake problem.

And there's example after example of that that could be given.

So the idea that there's a great contribution here is really one of self-congratulation, I think, and would not be supported by a detailed examination of the record.

With respect to the powers of equity, we're not challenging the power of this Court, we're not talking about power, we're talking about wisdom here: How should the equity power be exercised?

We say it should not be exercised against the party who was guilty of no wrongdoing, and we say further that it should not be exercised to create the kind of open-ended private attorney general's exception, which is reflected in the Court of Appeals opinion.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:25 o'clock, p.m., the case in the above-entitled matter was submitted.]

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