

# *Satsky v. Paramount Communications, Inc.:* Mining the Ore from Consent Decrees in Environmental Cases

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## I. INTRODUCTION

*Satsky v. Paramount Communications, Inc.*<sup>1</sup> was a class action suit by citizen groups seeking damages and a modification of a consent decree between a State and a polluter. *Satsky* is significant because the facts leading up to the suit are typical<sup>2</sup> of many environmental disputes.<sup>3</sup> Two years after a consent decree was adopted, a class action suit was brought by citizens, recreation businesses along the Eagle River, and sport fishing associations for damages to their livelihoods and economic losses.<sup>4</sup> The “[p]laintiffs believe ‘the consent decree is not worth the paper it’s written on . . . [because i]t hasn’t solved the problem’ of contamination from the Eagle mine.”<sup>5</sup> They claimed that years of mining and the remediation activities polluted the Eagle River and caused their injuries.<sup>6</sup> They sought \$300 million in damages and indirectly demanded modification of the consent decree.<sup>7</sup>

Part II of this Case Comment details the pertinent facts of *Satsky*. Part III

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<sup>1</sup> 7 F.3d 1464 (10th Cir. 1993).

<sup>2</sup> Following three years of negotiations, the State of Colorado and Paramount entered into a consent decree requiring Paramount to pay fines and remediate the site and surrounding areas. *Satsky*, 7 F.3d at 1467.

<sup>3</sup> The case is significant because a majority of environmental actions result in consent decrees, and this case undermines the value of those decrees. The significance is evidenced by the fact that the Attorneys General of 10 states (California, Colorado, Kansas, Montana, Nevada, New Mexico, Oklahoma, Utah, Washington, and Wyoming), as well as the Natural Resources Defense Council and the Colorado Trial Lawyers Association, filed amicus curiae briefs with the court of appeals. *Satsky*, 7 F.3d at 1466.

<sup>4</sup> The business-plaintiffs are Eagle River White Water, Inc., Mark C. Lokay, also known as Vail Fishing Guides, Gore Creek Flyfisherman, Inc., and Beaver Creek Flyfisher. These plaintiffs sued in a class action on their own behalf and as representatives of a class of similarly situated individuals and businesses. *Satsky*, 7 F.3d at 1464. The class is estimated to include about 2000 citizens and 2000 businesses. *Paramount Argues Eagle Mine Suit Barred by Earlier Final Judgment in Superfund Case*, 5 Toxics L. Rep. (BNA) No. 33, at 1041 (Jan. 23, 1991) [hereinafter *Paramount Argues Eagle Mine Suit*].

<sup>5</sup> *Paramount Argues Eagle Mine Suit*, *supra* note 4, at 1041 (quoting the plaintiffs’ attorney Herbert DeLap).

<sup>6</sup> *Satsky*, 7 F.3d at 1467.

<sup>7</sup> *Paramount Argues Eagle Mine Suit*, *supra* note 4, at 1041.

discusses consent decrees and the role they play in environmental policy. Part IV then discusses the effects *Satsky* has on the consent decree and suggests that, in *Satsky* and similar cases, laches should bar plaintiffs to the extent that they ask the court to use its equity powers to modify the consent decree. Part V analyzes *Satsky* as a de facto untimely intervention claim. By applying principles used when analyzing untimely intervention claims to *Satsky*, further reasons exist to bar the modification request. Finally, Part VI discusses res judicata and parens patriae standing as they relate to consent decrees between the government and private defendants. Part VI then examines the difficulty of applying res judicata in cases like *Satsky* where some of the citizen plaintiffs' claims are purely private, some are entirely in the public interest, and most lie somewhere on the continuum between these two extremes.

As this Case Comment will illustrate, *Satsky* raises an infinite number of issues that have no simple answers. The purpose of the Case Comment is to apprise the reader of the complex issues that exist when citizens sue a private party on the same transaction that was the subject of a prior judgment between that defendant and the government.

## II. FACTS AND ISSUES IN *SATSKY*

The Eagle Mine was operated between 1916 and 1981.<sup>8</sup> The mining activities contaminated the Eagle River with lead, zinc, and several other heavy metals.<sup>9</sup> In 1983 the State of Colorado instituted a suit which included claims of CERCLA<sup>10</sup> violations, common law and statutory nuisance, strict liability in tort, and negligence.<sup>11</sup> During negotiation of a consent decree, Colorado represented to Gulf + Western that it believed it was entitled to recover damages as trustee for injured citizens.<sup>12</sup> Colorado also filed a report that

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<sup>8</sup> Gulf + Western, Inc. operated the mine for a majority of this period. In 1983 Paramount Communications, Inc. merged with Gulf + Western, Inc. and succeeded as owner of the Eagle Mine. *Satsky*, 7 F.3d at 1466. The State of Colorado instituted the action that resulted in the consent decree against Gulf + Western, Inc. *Id.* at 1467.

<sup>9</sup> The other contaminants include antimony, arsenic, beryllium, cadmium, chromium, mercury, nickel, silver, thallium, and uranium. *Id.* at 1467 n.3.

<sup>10</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988).

<sup>11</sup> *Satsky*, 7 F.3d at 1467.

<sup>12</sup> Answer Brief of Appellee Paramount Communications, Inc., at 21, *Satsky*, (No. 92-1037). The interrogatory asked:

Do you contend that any parcel of real property has been reduced in value by the alleged release of hazardous substances involved in this action and, if so, identify the parcel of property involved, the owner, and the amount of reduction. . . .

sought to “quantif[y] damages to local residents of Eagle County, Colorado and to non-residents . . . .”<sup>13</sup> Paramount was unsuccessful in a motion to exclude the State’s report<sup>14</sup> and thus, Paramount was forced to pay for damages to citizens and private property under the consent decree approved by the district court in 1988. The consent decree also embodied a plan for Paramount to clean wastes from the mine and surrounding areas.<sup>15</sup> In 1990 the *Satsky* class action suit was filed seeking, among other things,<sup>16</sup> CERCLA response costs, punitive damages, and an injunction barring any further releases of hazardous materials.<sup>17</sup> The plaintiffs relied on claims of CERCLA violations, negligence, strict liability, nuisance, trespass, and misrepresentation.<sup>18</sup>

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[The State replied:]

Yes. The state presently believes that property adjacent to the Eagle River in the Minturn area has been reduced in value, but the state has not yet determined the amount of this injury. With regard to property value outside of the Minturn area, the state has not yet determined whether any injury was [sic] occurred. *If the state does determine that an injury has occurred, the state believes it is entitled to recover as trustee from defendants for he injury.*

*Id.* at 21–22.

<sup>13</sup> *Id.* at 22 (emphasis omitted).

<sup>14</sup> *Id.* at 23–24.

<sup>15</sup> Consent Decree, Order, Judgment and Reference to Special Master, State of Colorado v. Gulf + Western, Inc., No. 83-C-2387 (D. Colo. 1988). In the consent decree, Paramount agreed to clean up wastes in the mine, at five dumping sites, and along the Eagle River. Paramount also paid the State of Colorado \$1.7 million in natural resource damages, \$1.75 million for State response costs and a 15-year remedial action plan, \$1.1 million for continued State oversight, and \$250,000 to clean the Eagle River; and executed a \$500,000 letter of credit for future environmental remediation. *Fraud Claim Against Colorado Mine Proceeds; Six Other Counts Barred Under Res Judicata*, 6 Toxics L. Rep. (BNA) No. 29, at 861 (Dec. 18, 1991).

<sup>16</sup> Plaintiffs claimed injuries include:

property damage, diminution of value to real estate, loss of income and other economic losses including loss of asset value, increased operating expenses, increased cost of personal protection from contaminated domestic water or the threat of contaminated domestic water, loss of water quality or quantity, loss of enjoyment of real property, mental anguish, and emotional distress and an increased risk of harm and an increased risk of contracting fatal or otherwise serious illnesses.

*Satsky*, 7 F.3d at 1470 (quoting plaintiffs’ second amended complaint).

<sup>17</sup> *Id.* at 1467.

<sup>18</sup> *Id.* This Case Comment does not consider the misrepresentation claim in the class action suit because it stems from the consent decree itself, and there is no question that the consent decree cannot act as a bar on that claim.

The issue in *Satsky* was whether the citizens, suing on claims similar to those already addressed by the State, were barred by the res judicata effect of the consent decree. The district court granted summary judgment for Paramount on all the plaintiffs' claims with the exception of the misrepresentation claim.<sup>19</sup> The court held that the citizens' claims sought "essentially the same damages and injunctive relief as were sought in Paramount I."<sup>20</sup> The Tenth Circuit reversed and remanded the case, holding that "[t]o the extent these claims involve injuries to purely private interests, which the State cannot raise, then the claims are not barred. By 'purely private interests,' we mean claims that the State has no standing to raise."<sup>21</sup>

### III. GENERAL CHARACTERISTICS OF CONSENT DECREES AND THEIR ROLE IN ENVIRONMENTAL DISPUTES

Consent decrees<sup>22</sup> are the result of negotiations and have characteristics of

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<sup>19</sup> *Satsky v. Paramount Communications, Inc.*, 778 F. Supp. 505, 511-12 (D. Colo. 1991), *rev'd*, 7 F.3d 1464 (10th Cir. 1993).

<sup>20</sup> *Id.* at 511. The courts in the *Satsky* case have referred to the action between the State and Paramount that resulted in the consent decree as *Paramount I*, and to the class action suit as *Paramount II*. Aside from the fraud claim, the district court held that "[t]he only discernibly different relief sought is for medical detection and surveillance services to study adverse health effects to the Plaintiffs . . . ." *Id.* The court then noted "that health studies performed for the *Paramount I* litigation concluded that there was no threat to human health and the RAP [Remedial Action Plan] incorporated in the Consent Decree provided for extensive containment, clean-up, and monitoring of the mine site and surrounding water supplies." *Id.* The court also found that while no claim for trespass was brought in *Paramount I*, one could have been brought, and thus, under res judicata, the plaintiffs in *Satsky* were barred from raising that claim. The court went on to say that "[t]he damages caused by intrusion of hazardous substances from the Eagle Mine onto the surrounding property were considered in the Consent Decree," and found that the trespass claim was simply "another way of stating a claim for damages that were addressed in the *Paramount I* Consent Decree." *Id.*

<sup>21</sup> *Satsky*, 7 F.3d at 1470.

<sup>22</sup> Consent decrees vary widely in form and content, but the key feature of a consent decree is that the underlying issues of the dispute are not resolved in an adversarial courtroom proceeding. 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4443, at 383 (1981). The term "consent decree" can be used synonymously with "consent judgment," but "consent judgment" is occasionally used when referring to an agreement involving only monetary damages. Timothy K. Webster, *Protecting Environmental Consent Decrees from Third Party Challenges*, 10 VA. ENVTL. L.J. 137, 140 (1990). For the purposes of this Case Comment it makes no difference whether the remedy embodied in the agreement is equitable, monetary, or a combination of the two.

both contracts<sup>23</sup> and judgments.<sup>24</sup> Because the consent decree is a contract, it can be enforced upon contract theories in the court that approved it, which is also the court most familiar with the case. This route of enforcement results in quick issuance of judicial orders because the court typically does not need to inquire about past proceedings and activities or the intent of the parties who entered the decree.<sup>25</sup>

Because consent decrees are also considered judgments, they have preclusive effects on the parties and their privies.<sup>26</sup> There is general agreement that the extent of preclusion should be based upon the intent of the parties to be bound by the consent decree.<sup>27</sup> The judgmental aspect of consent decrees played a significant role in *Satsky*. Paramount argued that the citizens were

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<sup>23</sup> [T]he judgment results from a basically contractual agreement of the parties. It can be entered only if the parties have in fact agreed to entry, it is to be enforced in accord with the intent of the parties, and it can be vacated according to basically contractual principles of fraud, ignorance, mistake, or mutual breach.

18 WRIGHT ET AL., *supra* note 22, § 4443, at 383; *see also* Local Number 93 Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986).

<sup>24</sup> "A consent decree . . . is an agreement that the parties desire and expect will be reflected in and be enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Satsky*, 7 F.3d at 1468 (quoting *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757 (1992), which held that consent decrees are subject to Federal Rule of Civil Procedure 60(b), the rule governing "a final judgment, order, or proceeding").

This Case Comment gives only cursory coverage to consent decrees. For more in-depth analysis of consent decrees and environmental actions, *see generally* Robert V. Percival, *The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. CHI. LEGAL F. 327.

<sup>25</sup> Other advantages of consent decrees include the following:

First, . . . disputes settled by consent decree are subject to the continuing oversight and interpretation of a single court. Second, enforcement of a consent decree does not require the filing of a second lawsuit to establish the validity of the settlement agreement. Third, a consent decree provides a "more flexible repertoire of enforcement measures." Fourth, consent decrees lower the costs of enforcing settlements by channeling any consequent disputes into a single forum (the court that issued the decree) and reduce the parties' risks of inconsistent duties. Fifth, consent decrees "also facilitate the monitoring of compliance after the decree is entered." Finally, because consent decrees are subject to continuing judicial oversight, they may be adjusted by the issuing court in order to account for changed circumstances.

John R. Thomas, Note, *United States v. Fisher: "Posner's Dilemma" and the Uncertain Triumph of Outcome over Process*, 21 ENVTL. L. 427, 434-35 (1991) (footnotes omitted).

<sup>26</sup> *See infra* part VI.

<sup>27</sup> 18 WRIGHT ET AL., *supra* note 22, § 4443, at 384.

parties to the consent decree because they were in privity with the State, and were barred from suing because it was the intent of the State and Paramount to resolve the matter once and for all.<sup>28</sup> The plaintiffs, on the other hand, contended that the consent decree was not a judgment, and that even if it was, it could not bind citizens solely because it was entered by a government official.<sup>29</sup>

Consent decrees play a significant role in environmental disputes.<sup>30</sup> Allowing experts and attorneys to work out a consent decree rather than contesting every last figure and data point has several advantages over litigation. First, there is more flexibility in negotiations than in a courtroom battle because the parties are willing to compromise and to reach a result that satisfies both sides.<sup>31</sup> Second, in environmental disputes, the parties have an inherent understanding of the technical and policy issues involved. This deeper

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<sup>28</sup> *Satsky*, 7 F.3d at 1467.

<sup>29</sup> *Id.*

<sup>30</sup> For example, 42 U.S.C. § 9622(d)(1)(A) (1988), referring to settlements under CERCLA, provides:

Whenever the President enters into an agreement under this section with any potentially responsible party with respect to remedial action under section 9606 of this title, following approval of the agreement by the Attorney General, except as otherwise provided in the case of certain administrative settlements referred to in [42 U.S.C. § 9622(g)], the agreement shall be entered in the appropriate United States district court as a consent decree.

*Id.*

The EPA (acting through the Army Corps of Engineers) does not have the financial resources to perform site assessments and health studies and then implement a remedial action plan at every hazardous waste site. Thus, a consent decree is preferred because it contractually places the responsibility for the investigations, cleanup activities, and expenses on the polluter, and the EPA is left to oversee the cleanup and take action when the consent decree is breached. *See* Thomas, *supra* note 25, at 429-30.

<sup>31</sup> The United States Supreme Court has noted that:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. . . . The parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and the skill to achieve.

United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) (footnote omitted).

understanding compels the parties to balance the costs and benefits of a myriad of solutions and come up with what is arguably an ideal solution. On the other hand, there is a possibility that a judge who lacks any formal scientific training will impose a solution that is anything but ideal under the circumstances.<sup>32</sup> Thus, in environmental disputes, combining the flexibility of a consent decree with the inherent familiarity of the parties usually results in a solution that both the regulator and the regulated can live with.<sup>33</sup> Third, consent decrees define the rights and responsibilities of the defendant.<sup>34</sup> As the negotiators address the substantive issues and details of implementing the solution, they incorporate the negotiated terms into the consent decree. Both parties can then point to the consent decree as binding on their rights and obligations when a subsequent conflict arises.<sup>35</sup> For these and various other reasons, when it comes to environmental disputes, there are strong incentives to negotiate and settle in a consent decree rather than litigate.<sup>36</sup>

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<sup>32</sup> See LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 18-19 (1984). When the factfinding process in techno-trials is left to a lay jury, the chances that an ideal solution will ultimately result are even more remote. See generally PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 111-29 (1991) (noting how the inconsistent verdicts in several jury trials coupled with the uncertainty of results in hundreds of pending cases caused Marion Merrill Dow to permanently stop production of Bendectin after numerous tests by government agencies in several countries indicated it was safe).

<sup>33</sup> See BACOW & WHEELER, *supra* note 32, at 19 (stating that because the negotiators are stuck with their settlement, they are more likely to consider the details involved in implementing the settlement than a judge who never sees the dispute after entry of a final decree).

<sup>34</sup> See Thomas, *supra* note 25, at 438-39.

<sup>35</sup> For example, suppose a remedial action plan embodied in a consent decree required a two-foot compacted clay cover over a contaminated site to prevent percolation of rainwater through the contaminated zone and into an adjacent aquifer. This decision was probably made during negotiations after consideration of various factors such as the permeability of the silt or clay in the area, whether there was an adequate volume of soil to cover the site, and the site hydrogeologic conditions. If the government agency that entered the decree comes back three years later and demands that the defendant install a synthetic liner in addition to the clay cover, the defendant has the consent decree to use as a shield. While the defendant might ultimately have to install the liner, the agency must overcome the contract in the court that approved it, and answer questions about why it did not require this action in the original consent decree.

<sup>36</sup> "Not only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation. Thus '[v]oluntary settlement of civil controversies is in high judicial favor.'" Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (quoting *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969)), *cert. denied*, 467 U.S. 1219 (1984); H.R. REP. NO. 253,

The incentives to negotiate and form consent decrees must be remembered when considering *Satsky*. While the plaintiffs have been careful not to specifically request modification of the consent decree, many of their requests, such as medical monitoring, were specifically considered and rejected during the consent decree negotiations. Furthermore, their contempt for the consent decree is obvious from public statements of their attorney and comments in their complaint. By allowing the finality of the consent decree to be seriously questioned by citizen claims seeking modification, the Tenth Circuit has reduced the incentive to enter consent decrees and promoted litigation and delay by responsible parties. This is a step in the wrong direction, and the doctrines of laches, untimely intervention, and *res judicata* warrant against the use of suits like *Satsky* to undermine the effect of a valid consent decree.

#### IV. THE AFFIRMATIVE EQUITABLE DEFENSE OF LACHES AND *SATSKY*

Laches was not considered in *Satsky*, but it is relevant to this discussion because in seeking modification of the consent decree, the plaintiffs were seeking equitable remedies. Laches is a common law equitable defense that is similar to a statute of limitations. However, it does not apply in a mechanical manner after a definite time period like the statute of limitations; rather it applies only when equity so requires.<sup>37</sup> Laches is based on the principle "that equity aids the vigilant and not those who slumber on their rights."<sup>38</sup> The

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99th Cong., 1st Sess., pt. I, at 30-32 (1985) (stating that EPA has more authority to settle under the Superfund Amendments and Reauthorization Act (SARA) because under the original Superfund law so much money and time was wasted in litigation); Frederick Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261, 287 (stating that EPA prefers consent decrees over other forms of settlement).

<sup>37</sup> Although laches promotes many of the same goals as the statute of limitations, the doctrine is more flexible and requires an assessment of the facts of each case—it is the reasonableness of the delay rather than the number of years that elapse which is the focus of the inquiry.

*Stone v. Williams*, 873 F.2d 620, 624 (2d Cir.), *cert. denied*, 493 U.S. 959, *opinion vacated on reh'g*, 891 F.2d 401 (2d Cir. 1989), *cert. denied*, 495 U.S. 937 (1990). *Stone* is enlightening when considering the facts in *Satsky*. In *Stone*, the plaintiff was the illegitimate daughter of country singing star Hank Williams, Sr., who claimed she did not bring her royalties claim until five years after she knew of her rights because she feared embarrassment and publicity. The court said those fears were legitimate and understandable, but not sufficient to make the delay reasonable and stop the application of laches. In *Satsky*, the plaintiffs appear to have no excuse, much less a strong excuse like that of the plaintiff in *Stone*, for bringing this action eight years after the initial suit by the State.

<sup>38</sup> NAACP v. NAACP Legal Defense and Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir.), *cert. denied*, 472 U.S. 1021 (1985). "[A]s in all other petitions for equitable relief, he



Tenth Circuit and most other courts hold that there are two requirements for the doctrine to apply: (1) unreasonable or inexcusable delay in bringing an action, and (2) prejudice to the defendant.<sup>39</sup> Laches is to be considered in light of the facts of the case,<sup>40</sup> and the decision to apply laches is left to the discretion of the trial court.<sup>41</sup>

In *Satsky*, the plaintiffs sought injunctive relief and indirectly requested modification of the consent decree.<sup>42</sup> They were asking the court to exercise its equity powers to modify the consent decree when they requested new impact studies and monitoring plans.<sup>43</sup> Modifying consent decrees is in essence using equity powers to reform or rescind an otherwise enforceable contract. Because modification is an equitable claim, the Supreme Court requires those seeking modification of a consent decree to demonstrate “[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions.”<sup>44</sup>

Applying the first element of laches to the *Satsky* case, unreasonable or inexcusable delay occurs only after the plaintiff knows or could have known of

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who seeks equity must do equity, and the court will be alert to see that its peculiar remedial process is in no way abused.” *Koster v. Lumbermans Mut. Casualty Co.*, 330 U.S. 518, 522 (1947).

<sup>39</sup> *In re Centric Corp.*, 901 F.2d 1514, 1519 (10th Cir. 1990) (quoting *Brunswick Corp. v. Spirit Reel Co.*, 832 F.2d 513, 523 (10th Cir. 1987)), *cert. denied*, 498 U.S. 852 (1990); *Van Bourg v. Nitze*, 388 F.2d 557, 565 (D.C. Cir. 1967).

<sup>40</sup> *Cornetta v. United States*, 851 F.2d 1372, 1379 (Fed. Cir. 1988).

<sup>41</sup> “We will not disturb a finding of laches unless the district court abused its discretion.” *In re Centric Corp.*, 901 F.2d at 1519. “A district court has discretion to dismiss an action for laches only if plaintiff ‘has unreasonably delayed in [filing suit] and the delay harmed the defendant.’ . . . [A] district court may abuse its discretion if it applies an equitable standard incorrectly.” *Bennett v. Tucker*, 827 F.2d 63, 68–69 (7th Cir. 1987) (citation omitted).

<sup>42</sup> *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993). Regarding the contention that the plaintiffs sought modification of the consent decree, see *supra* note 20 and accompanying text. Plaintiff also sought \$300 million for property damages even though “[t]he damages caused by intrusion of hazardous substances from the Eagle Mine onto the surrounding property were considered in the Consent Decree in *Paramount I.*” *Satsky v. Paramount Communications, Inc.*, 778 F. Supp. 505, 511 (D. Colo. 1991), *rev’d*, 7 F.3d 1464 (10th Cir. 1993). Further evidence that plaintiffs were really after a modification of the consent decree is their comment that “the consent decree is not worth the paper it’s written on.” *Paramount Argues Eagle Mine Suit*, *supra* note 4, at 1041.

<sup>43</sup> The citizens’ disdain for the consent decree is evidenced by the court of appeals’ comment that “[p]laintiffs contend that the activities which took place as a result of the consent decree had a disastrous effect upon the Eagle River and the surrounding community.” *Satsky*, 7 F.3d at 1467.

<sup>44</sup> *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932).

facts that established a cause of action.<sup>45</sup> Furthermore, the plaintiff cannot claim ignorance of the law in this regard.<sup>46</sup> In *Satsky*, the first complaint was filed by the State in 1983, more than seven years before the plaintiffs filed the class action suit. It is likely that at least some of the plaintiffs participated in the investigations and negotiations that led to the consent decree. In addition, the mine is in a rural area where it is probable that most of the class action plaintiffs were made aware of the proceedings by word of mouth or local media. Thus, it can be said that the plaintiffs knew of the facts giving rise to their causes of action well before 1990. Considering the statute of limitations on most tort-like causes of action is in the range of two or three years, it is fair to say that it was unreasonable or inexcusable for the plaintiffs to refrain from bringing suit until eight years after they had reason to know of their causes of action.

Turning to the second element of laches, the courts have recognized defense prejudice and economic prejudice as two broad types of prejudice to consider when analyzing laches issues.<sup>47</sup> Furthermore, "[w]hen the plaintiff's

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<sup>45</sup> "An inexcusable or unreasonable delay may occur only after the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his [or her] cause of action." *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991). The courts have applied laches to lapses of various lengths in many different contexts. *See, e.g., In re Centric Corp.*, 901 F.2d 1514 (10th Cir. 1990) (finding a 20-month lapse unreasonable in bankruptcy case); *NAACP v. NAACP Legal Defense and Educ. Fund, Inc.*, 753 F.2d 131 (D.C. Cir.) (finding a 13-year lapse to be unreasonable in an action for trademark infringement), *cert. denied*, 472 U.S. 1021 (1985); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961) (finding an 11-year lapse to be unreasonable in an action for trademark infringement and unfair competition), *cert. denied*, 368 U.S. 820 (1961); *Seven-Up Co. v. O-So-Grape, Co.*, 283 F.2d 103 (7th Cir. 1960) (finding a 13-year lapse to be unreasonable in an action for trademark infringement and unfair competition), *cert. denied*, 365 U.S. 869 (1961); *Bailey v. United States*, 171 F. Supp. 281 (Ct. Cl. 1959) (finding a lapse of four years and five months unreasonable in an action to recover back pay).

<sup>46</sup> Knowledge of the law is imputed, and claimed or legitimate ignorance of a right does not justify delay in filing suit. *Jones v. United States*, 6 Cl. Ct. 531, 533 (1984).

<sup>47</sup> Defense prejudice includes loss of records, destruction of evidence, fading memories, or unavailability of witnesses. Economic prejudice focuses on the monetary consequences of allowing the plaintiff to prevail. *Cornetta v. United States*, 851 F.2d 1372, 1378 (Fed. Cir. 1988). To place a figure on economic prejudice, the Supreme Court has held that the federal government would suffer economic prejudice if plaintiff prevailed on his claims for two years of back pay from the military. *United States ex rel. Arant v. Lane*, 249 U.S. 367, 372 (1919); *see also Bailey*, 171 F. Supp. at 281 (holding the monetary consequences of losing on a claim for four years and five months of back pay was sufficiently prejudicial to support application of laches).

conduct is unjustified, the defendant's need to show prejudice eases."<sup>48</sup> The prejudice can arise from outside circumstances—such as Paramount's agreement to be bound by the consent decree—during the period the plaintiffs were sitting on their rights.<sup>49</sup> It is helpful to note that the Tenth Circuit has said laches is just another name for equitable estoppel.<sup>50</sup> Thus, for prejudice to be sufficient to invoke the laches defense, the court must find that the defendant reasonably relied on the plaintiff's inaction and detrimentally altered its position.<sup>51</sup>

The consent decree at issue in *Satsky* was approved by the district court only after extensive public comment was received. In fact, Stuart and Wendy Satsky submitted comments which were considered by the court and the Colorado Department of Health.<sup>52</sup> However, it appears that no citizens brought claims against Paramount until two years after the consent decree was filed. It is arguable whether Paramount could "reasonably" rely on the constructive actions and lack of offensive action by the citizens to form a belief that signing a consent decree would end the case once and for all. Paramount clearly altered its position by agreeing to pay millions in cleanup costs and fines and binding themselves to a fifteen-year plan. Paramount now has implemented the remedial action plan for five years at a cost in excess of twenty-five million dollars and voluntarily incurred other costs.<sup>53</sup> The Supreme Court has held that forcing the federal government to reimburse two years of a discharged employee's pay was sufficient economic prejudice to invoke laches.<sup>54</sup> With this as a backdrop, it seems unquestionable that forcing Paramount to change directions and start over on a multimillion dollar cleanup plan which is one-third complete would be substantially more prejudicial. This prejudice, coupled with the lower level of prejudice that is required once unreasonable delay has been shown, warrants a finding that laches bars the citizens' claims to the extent they seek modification of matters resolved by the consent decree.

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<sup>48</sup> *In re Centric Corp.*, 901 F.2d at 1520.

<sup>49</sup> *Id.*

<sup>50</sup> *Central Improvement Co. v. Cambria Steel Co.*, 210 F. 696, 713 (10th Cir. 1913), *aff'd*, 240 U.S. 166 (1916).

<sup>51</sup> Something more than mere inconvenience is necessary. *Bennett v. Tucker*, 827 F.2d 63, 68–69 (7th Cir. 1987).

<sup>52</sup> Answer Brief of Appellee Paramount Communications, Inc., at 2, *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (No. 92-1037).

<sup>53</sup> *Id.* at 3 n.3. Paramount has voluntarily relocated drinking water wells for the town of Minturn. *Cleanup of Metal Contamination to Cost \$17M for Eagle River*, *State Env't Daily* (BNA) (Apr. 6, 1993).

<sup>54</sup> *See United States ex rel. Arant v. Lane*, 249 U.S. 367, 372 (1919).

V. ANALYZING *SATSKY* AS AN INTERVENTION CASE

Citizen groups and environmental "public interest" groups occasionally seek intervention in actions between the government and a polluter under Federal Rule of Civil Procedure 24 and "citizen suit" provisions in environmental statutes.<sup>55</sup> Rule 24 provides two methods of intervention: intervention of right<sup>56</sup> and permissive intervention.<sup>57</sup> Citizens and environmental groups seeking intervention in an action between the government and a polluter prefer the former method.<sup>58</sup> One reason for this preference is that judges might exercise the discretion provided in the latter method<sup>59</sup> to block intervention that would be counterproductive to resolution of the original claim.<sup>60</sup> A second reason these parties prefer intervention of right is that they believe they have interests that will be impaired or neglected unless they are made parties.<sup>61</sup> Thus, public interest groups intervene not to conserve judicial resources<sup>62</sup> but for the noble purposes of representing other citizens who are already represented by government attorneys,<sup>63</sup> implementing *their* beliefs of what constitutes proper environmental policy.<sup>64</sup>

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<sup>55</sup> See *infra* note 108 for further discussion of these "citizen suit" provisions.

<sup>56</sup> FED. R. CIV. P. 24(a).

<sup>57</sup> FED. R. CIV. P. 24(b).

<sup>58</sup> Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 283 (1990).

<sup>59</sup> "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV. P. 24(b).

<sup>60</sup> Vreeland, *supra* note 58, at 283.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* Note that Rule 24(a) is generally viewed as an equitable provision that allows outsiders to protect rights that will be affected by ongoing litigation, while Rule 24(b) is generally viewed as a judicial economy provision that allows a court to tie up the loose ends of an action in one more complex suit rather than several subsequent two-party actions. *Id.*

<sup>63</sup> In some cases, the government representatives will even urge the court to deny the environmentalist and citizen groups intervention because the government is adequately representing the nonparties' interests. See, e.g., *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 987 (2d Cir. 1984) (denying intervention to environmental groups from the United States and Canada after the United States, Province of Ontario, State of New York, and City of Niagara Falls "vigorously" asserted their adequacy of representation of citizens on both sides of the border).

<sup>64</sup> The Second Circuit, stating this conclusion in a politically acceptable manner while denying several environmental groups a right to intervene, said:

The government and the private intervenor may differ over both the standard of liability and the proper remedy. The diversion of time and resources as well as the risk that a

With the foregoing in mind—and little authority for doing so—it is beneficial to view *Satsky* as if it were an intervention claim by a citizen group.<sup>65</sup> It makes sense to do this because claims raised by the *Satsky* plaintiffs regard the same transaction and underlying facts as the claims represented by the State. What the plaintiffs in *Satsky* are seeking, in addition to compensation for alleged injuries, is a modification or reformation of the consent decree.<sup>66</sup> This new action is functionally equivalent to intervening late in the negotiations and seeking terms more favorable to the intervenor by threatening not to consent, thus, blocking entry of the consent decree which was worked out among other parties to the negotiations. Furthermore, this de facto form of

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court will err in evaluating the positions of the [EPA] Administrator and the intervenor on technological and scientific questions at the outer limits of a court's competence dictates the need to require a strong showing of inadequacy of representation before impairing the Administrator's control over the litigation.

*Hooker*, 749 F.2d at 989. A distorted environmental policy would exist if citizens and environmentalists were allowed to intervene at will in environmental disputes and implement an agenda different from that of the government. Thus, courts tend to require would-be intervenors to make a "very compelling showing" when one of the parties in a case is the government. *Id.* at 987; see 3B JAMES W. MOORE & JOHN E. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 24.07[4], at 24-76 to 24-79 (1993).

<sup>65</sup> Some courts have discussed barring a subsequent action by a nonparty to the original action for a failure to intervene. See, e.g., *Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968) ("[I]t might be argued that [a purportedly indispensable party] should be bound by the previous decision because, although technically a nonparty, he had purposely by-passed an adequate opportunity to intervene."); *Penn-Central Merger and N.W. Inclusion Cases*, 389 U.S. 486, 505-06 (1968) (discussing the opportunity to intervene and its preclusive effects); *National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 968-72 (3d Cir. 1984) (holding upon narrow facts that where a separate action filed seven months after entry of the consent decree attacking the terms of that decree was not maintainable where NWF knew of the negotiations, knew their interests were at stake, monitored the negotiations closely, chose not to intervene until late in the proceedings, and chose not to appeal a denial of intervention); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045 (3d Cir. 1980) (holding "an unjustified or unreasonable failure to intervene can serve to bar a later collateral attack. . . . [T]hese [plaintiffs] should not be allowed to escape the consequences of their own tardiness by recasting their motion for intervention as a complaint in a suit collaterally attacking the prior judgment."); *Western Shoshone Legal Defense & Educ. Ass'n v. United States*, 531 F.2d 495, 502 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976); see also 18 WRIGHT ET AL., *supra* note 22, § 4452, at 439 (characterizing the principle as "new and tentative"). *But cf.* *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 441 (1934) (stating that a nonparty has no duty to intervene); see also 18 WRIGHT ET AL., *supra* note 22, § 4452, at 446.

<sup>66</sup> Brief for Amici Curiae for the State of Colorado at 2-3, *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (No. 92-1037).

intervention relieves the citizens of their heavy burden of proving that the government is not an adequate representative.<sup>67</sup> Viewed as an untimely intervention claim, the *Satsky* case represents a more flagrant attempt to block a consent decree because it did not come on the eve of entry of the decree,<sup>68</sup> but more than two years later.

Applicants for intervention must demonstrate four things: (1) that they have a direct and substantial interest in the subject matter of the litigation, (2) that their ability to protect that interest may be impaired if they are not allowed to intervene, (3) that their interest will not be adequately represented by an existing party, and (4) that the motion to intervene is timely.<sup>69</sup> For purposes of analyzing *Satsky*, the first two elements can quickly be established by the plaintiffs' continued interest throughout the negotiations and the damage to their property that may go unreimbursed if they are not permitted to intervene. However, the *Satsky* plaintiffs have trouble meeting the third and fourth elements of the intervention doctrine.

In terms of adequacy of representation, citizen plaintiffs occasionally claim that the government sold them out and did not adequately represent their interests.<sup>70</sup> But these individuals come with interests that are often adverse to those of the State and adverse to those of at least a considerable number of citizens. The plaintiffs in *Satsky* deserve compensation for damages to their private property, but in terms of injunctive and punitive relief, they were adequately represented in the consent decree that embodied a remediation plan and extracted penalties for polluting that began in 1916. As one court was

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<sup>67</sup> It also avoids the situation where the government seeks to block the citizens from intervening. The plaintiffs in *Satsky* could not have had it better. First the State collected damages from Paramount for injury to property around the site, none of which was owned by the State. Then the State flip-flopped in its amicus brief saying "[t]he State did not purport to, nor can it, represent the purely private interests of its citizens who may be injured, in their persons or their property, by these releases." Brief for Amici Curiae for the State of Colorado at 5, *Satsky* (No. 92-1037). One is left to wonder whether the State would have taken the same position during the negotiations if the citizens had sought intervention. See *supra* notes 12-14 and accompanying text.

<sup>68</sup> See, e.g., *Gorsuch*, 744 F.2d at 965-66, 969-70 (upholding the denial of intervention as untimely where NWF was aware of case, chose to act "behind the scenes," and filed an amicus brief before making a motion to intervene a month before final judicial approval of a consent decree).

<sup>69</sup> *International Paper Co. v. Inhabitants of Jay*, 887 F.2d 338, 342 (1st Cir. 1989).

<sup>70</sup> See, e.g., *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 973 (2d Cir. 1984) (Environmentalists seeking intervention claimed that the United States, State of New York, and City of Niagara Falls "refused to deal seriously" with a proposal to abandon the city's existing drinking water plant and construct a new one at an uncontaminated location.).

quick to point out, “[t]he mere existence of disagreement over some aspects of the remediation necessary to abate the hazard does not demonstrate a lack of capacity on the part of the government . . . to represent its constituents fairly and faithfully.”<sup>71</sup> The presence of intervenors with an antagonistic attitude can slow the negotiations to a standstill because the intervenors will be satisfied with nothing less than an agreement to “overclean” their community. In *Satsky*, the experts at the EPA had conducted numerous tests and had reliable estimates as to what was required to make the area safe. Thus, the interests of the citizens are adequately represented when a consent decree commands cleaning of the environment down to levels determined by government officials.

As was discussed in Part IV regarding laches, timeliness of the attack on a consent decree also should have been a factor considered by the Tenth Circuit in *Satsky*. The cleanup operations at the Eagle Mine have been going on under the consent decree for five years. But now the plaintiffs want to change the rules of the game. They want to force Paramount to do more than it bargained for and more than the government demanded when it represented all citizens in its parens patriae capacity. Timeliness determinations require consideration of all the circumstances,<sup>72</sup> and three factors in particular: “how far the proceedings have gone when the movant seeks to intervene, prejudice which resultant delay might cause to other parties, and the reason for the delay.”<sup>73</sup> In applying the first factor to *Satsky*, the court would have to consider how far the cleanup has progressed rather than how far the proceedings have gone. As for the second factor, the prejudice caused by the delay would be to the taxpayers and citizens of Colorado. Paramount has spent five years and millions of dollars to remediate the site under State supervision, but if the plaintiffs can have the consent decree modified there will be further delay and more pollution while the parties retrace steps taken years ago. The added delay and pollution comes at the expense of all citizens being affected by the pollution.

Focusing on the third factor in the timeliness evaluation, there appears to be no clear reason for the delay in this situation. The plaintiffs waited in the wings to file suit, all the while knowing what was going on in the State’s case. It is left to speculation why the plaintiffs waited so long, but few “legitimate” reasons can be given for the delay. The facts and investigation of the situation were available for almost eight years by the time the plaintiffs finally filed suit. Furthermore, the plaintiffs had participated at public hearings and through the comment mechanism provided under CERCLA before entry of the consent

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<sup>71</sup> *Hooker*, 749 F.2d at 987.

<sup>72</sup> *NAACP v. New York*, 413 U.S. 345, 366 (1973); *Jenkins v. Missouri*, 855 F.2d 1295, 1316 (8th Cir. 1988).

<sup>73</sup> *Jenkins*, 855 F.2d at 1316 (quoting *Nevilles v. EEOC*, 511 F.2d 303, 305 (8th Cir. 1975)).

decree.

If the claims of the *Satsky* plaintiffs that seek modification of the consent decree are viewed essentially as claims for intervention, there is considerable reason to deny them from proceeding. Had the plaintiffs sought this relief through a motion to intervene a month before the decree was entered, the court would most likely have had to deny it because the plaintiffs could not show inadequacy of representation. In addition, the plaintiffs had no valid reason for their untimeliness. The resultant delay from allowing intervention would have caused substantial prejudice to the State and Paramount on the eve of entering the decree. The reality is that the plaintiffs did not intervene a month before the consent decree was signed; rather, they waited for two years while Paramount poured millions of dollars into a remediation plan that the plaintiffs participated in creating.

## VI. RES JUDICATA AND THE SATSKY CONSENT DECREE

As a general rule, res judicata applies to consent decrees to the extent the parties<sup>74</sup> intended the consent decree to be preclusive.<sup>75</sup> For res judicata to apply there must be: (1) a final judgment on the merits in a prior action, (2) claims of the prior action identical to the claims in the subsequent action, and (3) the same parties or their privies involved in both actions.<sup>76</sup> Consent decrees meet the first element of the res judicata doctrine with little difficulty because they are generally assumed to be valid final judgments on the merits unless the parties specify otherwise in the decree itself.<sup>77</sup> This is somewhat surprising because the *parties* have resolved the substantive issues in negotiations rather than an adversarial process, yet the *parties'* resolution of the issues—as

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<sup>74</sup> In most environmental consent decrees, as was the case in *Satsky*, there are three parties that may be affected by the res judicata effect of the consent decree: defendants, private citizens, and the government.

<sup>75</sup> "A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in and be enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757 (1992). "The basically contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties." 18 WRIGHT ET AL., *supra* note 22, § 4443, at 384.

<sup>76</sup> *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467 (10th Cir. 1993).

<sup>77</sup> "In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on any of the issues presented. Thus, consent judgments ordinarily support claim preclusion but not issue preclusion." 18 WRIGHT ET AL., *supra* note 22, § 4443, at 384-85; *see also supra* note 75.



opposed to the court's final ruling—is binding on future litigation.<sup>78</sup> Thus, while a judge does review the consent decree before entry, usually the parties determine whether they will be precluded in future actions.<sup>79</sup> The consent decree at issue in *Satsky* met this first requirement by stating “that settlement and entry of this Consent Decree is made in good faith to avoid expensive and protracted litigation and to finally settle and resolve all claims between the parties which have been raised by the State’s complaint.”<sup>80</sup>

#### A. *Satsky* and the Second Requirement of the Res Judicata Doctrine: Identity of Claims

In analyzing the second element of the res judicata doctrine, the Tenth Circuit follows the transactional approach of the Restatement (Second) of Judgments to determine what is a claim arising from the “same cause of action.”<sup>81</sup> Under this approach, when res judicata precludes any part of the subsequent plaintiff’s claim, it precludes *all* other rights that the plaintiff has against the defendant stemming from “the transaction, or series of connected transactions, out of which the action arose.”<sup>82</sup> In determining what is a

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<sup>78</sup> The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair . . . and appropriate under the particular facts and that there has been valid consent by the concerned parties.

*Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (quoting *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980)) (citing as authority in accord *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981)), *cert. denied*, 467 U.S. 1219 (1984); *Patterson v. Newspaper & Mail Deliverers’ Union*, 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc); *Franks v. Kroger Co.*, 649 F.2d 1216, 1224 (6th Cir. 1981)); *see also* 18 WRIGHT ET AL., *supra* note 22, § 4443, at 383.

<sup>79</sup> Webster, *supra* note 22, at 142 (stating that generally the court review of a consent decree amounts to slightly more than a “rubber stamp”).

<sup>80</sup> *Satsky*, 7 F.3d at 1468 (emphasis added and emphasis in original).

<sup>81</sup> *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1274 (10th Cir. 1989); *Satsky v. Paramount Communications, Inc.*, 778 F. Supp. 505, 508 (D. Colo. 1991), *rev’d*, 7 F.3d 1464 (10th Cir. 1993). This is the modern approach advocated by the RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). *See generally* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.4 (1985) (The authors explain that the transactional theory is based on maximizing judicial efficiency while maintaining justice. The authors go on to explain several other theories the courts have used, including a popular approach that looks at whether the nature of the right or the injury is the same in both actions.).

<sup>82</sup> *Lowell Staats*, 878 F.2d at 1274 (quoting RESTATEMENT (SECOND) OF JUDGMENTS

“transaction” and what is a “series,” the Restatement directs courts to be pragmatic and give weight to various factors such as relation in time, space, origin, or motivation; whether the issues form a convenient trial unit; and whether their treatment as a unit meets the expectations of the parties.<sup>83</sup>

The transactional approach to the res judicata doctrine is difficult to apply in most cases,<sup>84</sup> but in *Satsky*, the court did not even discuss the doctrine.<sup>85</sup> In the initial action between Colorado and Paramount, the State, suing to protect its quasi-sovereign interests, claimed CERCLA violations, CERCLA response costs, strict liability, and negligence.<sup>86</sup> The plaintiffs in *Satsky*, suing to protect their quasi-private interests, also claimed CERCLA violations, CERCLA response costs, strict liability, and negligence.<sup>87</sup> In both actions, the claims

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§ 24(1) (1982)).

<sup>83</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982); see also *Lowell Staats*, 878 F.2d at 1274.

<sup>84</sup> The difficulty is that the court must determine not just what was litigated previously but also what might have been litigated, and “[t]o ask what might have been litigated in a former action is, in Professor Cleary’s words, to ‘leave the workaday world and enter into a wondrous realm of words.’” FRIEDENTHAL ET AL., *supra* note 81, § 14.3 (quoting Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 343 (1948)). All that can be said with certainty is that “identical *complaints* raise the same cause of action and claims arising from different *transactions* or *occurrences* are distinct causes of action.” *Id.* (emphasis added).

<sup>85</sup> After stating that the three elements of res judicata are “(1) a final judgment on the merits in the prior suit; (2) the prior suit involved identical claims as the claims in the present suit; and (3) the prior suit involved the same parties or their privies . . .” and saying “we turn now to an examination of each element,” the court considers the “Final Judgment on the Merits” in part A of the opinion and “Identity of Parties” in part B and never considers identity of claims. *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1467–68 (10th Cir. 1993). This missing discussion is probably because the parties’ main contentions centered around the two issues of finality of the consent decree and privity of the parties. Furthermore, if there is no privity of parties, identity of claims is irrelevant. The court holds not that there is no privity, but that there might be privity on some claims and not others. The defect in the reasoning is that the court never considers how that holding affects the transactional approach, which in essence says that if some claims are barred, all claims coming from that transaction are barred. Fortunately, the Restatement and the commentators have provided insight in this area.

<sup>86</sup> See *id.* at 1467.

<sup>87</sup> *Id.* While the CERCLA claims should have been barred by res judicata, an additional reason to bar them is the holding of the Supreme Court that citizen suit provisions are intended to “supplement rather than supplant governmental action.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). The State of Colorado had brought a CERCLA action and settled it with a consent decree that required “extensive remedial activities, including removal, containment, and monitoring of the Eagle

arose from the same operative facts and circumstances that occurred at the Eagle Mine.<sup>88</sup> The contamination at issue in both actions is related in time, and identical in space, origin, and motivation.<sup>89</sup> Furthermore, the issues form a convenient trial unit because the same theories, evidence, and defenses are fundamental in both actions.<sup>90</sup> Thus, there is a strong reason to believe that when viewed pragmatically, the claims in both actions arose out of the same transaction.

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Mines site and surrounding area and water supplies.” *Satsky v. Paramount Communications, Inc.*, 778 F. Supp. 505, 511 (D. Colo. 1991), *rev'd*, 7 F.3d 1464 (10th Cir. 1993).

<sup>88</sup> There is some complexity here as well because the *Satsky* plaintiffs are claiming damages for contamination to date, which would include contamination before and after entry of the consent decree. Nonetheless, the contamination was an ongoing transaction, and entering of the consent decree should not end one transaction and create a second. If this were not so, the plaintiffs could say they were simply suing on the contamination that occurred after entry of the consent decree and *res judicata* would be irrelevant because those would be claims based on a different “transaction.”

<sup>89</sup> *See Aliff v. Joy Mfg. Co.*, 914 F.2d 39 (4th Cir. 1990). In *Aliff*, the court was dealing with a second action between the same parties to the first action that involved a contaminated building. The court held the plaintiff’s newly raised claims under CERCLA were barred by *res judicata*. In determining whether the claims arose from the same transaction, the court said:

There is no simple test to determine what constitutes the same cause of action for *res judicata* purposes. . . . [W]e believe *Aliff*’s CERCLA claim could have been brought in *Aliff I* because it arises from the same factual basis, namely the contaminated building. . . . *Aliff* possessed sufficient evidence to construct a CERCLA theory of recovery in *Aliff I*. . . . [T]he jury in the first trial considered the issues of contamination, the cleanup, and their effects on the value of the building.

*Id.* at 43.

These same elements were present in *Satsky*. The factual basis in *Satsky* was a contaminated mine rather than a building. If the plaintiffs had sought intervention, they had the evidence to bring their claims, and the State had already constructed several theories of recovery for their quasi-sovereign interests. Most importantly, the essence of the consent decree was to consider the contamination and the cleanup of the mine and surrounding areas and to weigh the effects of the contamination and cleanup on surrounding areas and the natural resources of the state.

<sup>90</sup> Note that the nuisance claims are different because the State could not sue for private nuisance, and the citizens could not sue for statutory nuisance. *See* W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 90 (5th ed. 1984). The plaintiffs can bring the CERCLA response cost claims, even though the State has brought such claims, as long as the costs are consistent with the national contingency plan. Comprehensive Environmental Response, Compensation and Liability Act § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988).

Herein lies the complexity of the case. The transaction approach says "a final judgment extinguishes *all rights* of the plaintiff [or their privies] . . . against the defendant with respect to *all or any part* of the transaction, or series of connected transactions out of which the action arose."<sup>91</sup> But in *Satsky*, the Tenth Circuit held that some of the plaintiffs' claims where the State had standing to sue are barred but other "purely private interests are not."<sup>92</sup> This flies in the face of the all-or-nothing nature of the transaction approach. The solution to this dilemma can be found in the comments to the Restatement, where the drafters state that the authority of government representatives to litigate on behalf of a few or all citizens is of two types: "exclusive authority" and "coexistent authority."<sup>93</sup> When the authority of the representative is exclusive, citizens have no standing to sue.<sup>94</sup> When the authority is coexistent, the complexity increases substantially. The threshold question to ask is whether the official's exercise of the coexistent authority "preempts" the citizens from pursuing otherwise available private actions.<sup>95</sup> If the authority is preemptive, whatever result the government reaches in its action is binding on the citizens.<sup>96</sup> If instead of being preemptive, the representative's authority is "supplemental" in relation to the individual's rights, the result obtained by the representative will not bind the citizen from bringing his or her own claim.<sup>97</sup> This is another way of describing what is essentially a continuum with purely public rights which citizens cannot exercise on one extreme, purely private rights which the government cannot exercise on the other, and rights that both citizens and government might have standing to raise in the middle.<sup>98</sup>

In trying to place claims of citizens at some point on the continuum, two

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<sup>91</sup> *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1274 (10th Cir. 1989) (emphasis added) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(2)).

<sup>92</sup> *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993); see also *supra* note 21 and accompanying text.

<sup>93</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. d (1982). Note that the transactional approach is reproduced at § 24. Comment (e) to § 24 deals with nonparties and refers to § 41. Section 41(1)(d) and comment (d) deal with preclusion of nonparties when represented by government representatives.

<sup>94</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. d (1982). An example would be a criminal law or civil law under which citizens have no cause of action.

<sup>95</sup> *Id.* An example of this type of situation would be the citizen suit provisions of many environmental statutes where citizen actions are preempted when the government is diligently pursuing a case against the defendant. See *infra* note 108 for further discussion of citizen suits.

<sup>96</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. d (1982).

<sup>97</sup> *Id.*

<sup>98</sup> See 18 WRIGHT ET AL., *supra* note 22, § 4458, at 513.

guideposts are suggested. First, in determining whether an individual right is bound by State action, “a great deal turns on measuring the intended importance of individual enforcement rights.”<sup>99</sup> Second, the tendency should be not to preclude “traditional common law claims or private remedies expressly created by statute” because of prior governmental action.<sup>100</sup>

*Satsky* has crash-landed across the continuum. The court said that “[t]he extent to which the plaintiffs are barred, turns on the nature of the rights asserted by them.”<sup>101</sup> Consider, for example, the interests claimed by the flyfishing associations and rafting companies. To the extent their claims are based on damage to natural resources, such as the fish population, they appear to be toward the public right extreme, because those interests are held by all citizens but actionable only by the State. But one can say the claims are based on lost profits because the companies lost fishers and rafters due to a reduced fish population, and now the interests appear closer to the private right extreme. However, one could just as easily say the interest of these groups is that they cannot eat the fish from the river because they might contain high levels of heavy metals, and that interest seems to fall somewhere in the middle. With this one small portion of the *Satsky* claims, one can see the complex and purely subjective nature of a court’s determination of the private rights involved in this case.

The focus of this Case Comment is primarily on the protection that should be given to a consent decree. In Colorado’s action that resulted in the consent decree, the State was acting in its *parens patriae* capacity to protect sovereign and quasi-sovereign interests.<sup>102</sup> Thus, any of the citizens’ claims that result in modification of the consent decree are seeking vindication of the same sovereign or quasi-sovereign rights and should be barred by *res judicata*. While the “preemptive” versus “supplemental” distinction does little to further this proposition, the guideposts are more helpful. Under the first guidepost, the citizens’ claims that would change the consent decree cannot be very important *individual* enforcement rights because the State has already enforced them through the consent decree. While there is a tendency against preclusion of common law claims under the second guidepost, the citizens’ claims based on

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<sup>99</sup> *Id.* at 514 (citing *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961), a case involving coincidental federal and individual interests in an antitrust case, for the proposition that intensely private rights should not be precluded by government action).

<sup>100</sup> 18 WRIGHT ET AL., *supra* note 22, § 4458, at 515 (citing as an example *Northern Va. Women’s Medical Ctr. v. Balch*, 617 F.2d 1045, 1050 (4th Cir. 1980), in which the clinic was allowed to restrain trespasses on its property even though the State had dropped criminal prosecutions for past trespasses).

<sup>101</sup> *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993).

<sup>102</sup> *See infra* note 109 and accompanying text.

CERCLA, negligence, nuisance, and strict liability have long been the theories used by the government in environmental cases. The State is not stealing individual's claims; rather it is simply more efficient to prosecute one negligence or nuisance claim rather than thousands. In the end, all that can be said is that the courts must be alert to apply *res judicata* when there are attempts to alter consent decrees through the use of seemingly private claims. This discussion highlights the difficulty that exists in determining when those seemingly private claims are really public.

### B. *Satsky and the Third Requirement of the Res Judicata Doctrine: Parties and Their Privies*

In cases involving governmental parties, determining "privity" for purposes of the third element of the *res judicata* doctrine has posed significant problems. "There is no definition of 'privity' which can be automatically applied to all cases involving the doctrines of *res judicata* . . . ."<sup>103</sup> Privity exists when the interests of a party are so connected with the interests of a nonparty that a decision for or against the party should control the rights of the nonparty.<sup>104</sup> To analyze privity problems, commentators suggest that the courts should determine whether the facts and circumstances underlying the initial action support a presumption that the nonparty's interest was adequately represented.<sup>105</sup> To determine whether there was adequate representation when the government is a party to the initial action, the role of *parens patriae* standing must be considered.

#### 1. *Parens Patriae Standing*

Under the doctrine of *parens patriae*, the State has standing to sue on behalf of all its citizens "to prevent or repair harm to its 'quasi-sovereign' interests."<sup>106</sup> But the State cannot sue on claims that are purely private and

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<sup>103</sup> *Satsky*, 7 F.3d at 1468 (quoting *Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1274 (10th Cir. 1989)).

<sup>104</sup> FRIEDENTHAL ET AL., *supra* note 81, § 14.13. When privity exists, it is presumed that the party adequately represented the interests of the nonparty because it was in the party's best interests to do so. *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 258 (1972). The Supreme Court has held that States have quasi-sovereign interests in the general health and well-being—both physical and economic—of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

held by individual citizens.<sup>107</sup> These descriptions of the *parens patriae* doctrine are useless in a case like *Satsky* because there are seemingly identical claims that both the government and the citizens have standing to bring.<sup>108</sup> In these cases where the government has acted on behalf of the public, the privity and identical claims elements of the *res judicata* doctrine are inextricably intertwined. Thus, when considering *parens patriae* privity one must examine where asserted claims fall on the continuum of private and public rights.

## 2. *Parens Patriae and Privity in Satsky*

In its amicus brief, Colorado said it acted in its quasi-sovereign capacity in the initial action.<sup>109</sup> Thus, it was also representing quasi-private interests of the citizens, such as an interest in the natural resources of the state and safe drinking water. When it comes to these “quasi” interests, the theories and beliefs of the State and the citizens are very similar. It is an arguable, if not necessary, conclusion that these interests are so connected that a decision for or against the State should control the rights of the citizens.<sup>110</sup> In other words,

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<sup>107</sup> *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 600 (stating that if a State is nothing more than a nominal party with no interests of its own, it does not have *parens patriae* standing); *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (stating that it is “settled doctrine that a State has standing to sue [in its *parens patriae* capacity] only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens”); *Satsky*, 7 F.3d at 1469. See *supra* part VI.A for a discussion of the difficulty in determining what is a private claim.

<sup>108</sup> For example, in *Satsky* and the original action by the State, theories of negligence and strict liability in tort were pursued by both the State and the class action plaintiffs. CERCLA, the law upon which the government often bases its claims against polluters, can also be used by citizens (in fact the *Satsky* plaintiffs claimed CERCLA violations). 42 U.S.C. § 9659 (1988). However, Congress has considered the problem of two identical claims being brought against a polluter and provided preemption and intervention as a matter of right for the government when a citizen commences such an action. 42 U.S.C. § 9659(d), (e), & (g) (1988). Note that a similar statutory scheme is followed in many other environmental laws. See, e.g., 15 U.S.C. § 2619 (1988) (Toxic Substance Control Act (TSCA) citizen suit provision); 33 U.S.C. § 1365 (1988) (Federal Water Pollution Control Act (FWPCA) citizen suit provision); 42 U.S.C. § 6972 (1988) (Resource Conservation and Recovery Act (RCRA) citizen suit provision); 42 U.S.C. § 7604 (1988) (Clean Air Act of 1990 (CAA) citizen suit provision).

<sup>109</sup> Brief for Amici Curiae for the State of Colorado at 11–12, *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (No. 92-1037). The State then adds, “A state’s quasi-sovereign interests are generally relied on as the basis for a state’s suit to abate environmental pollution.” *Id.* (citing *Louisiana v. Texas*, 176 U.S. 1 (1900)).

<sup>110</sup> See *supra* note 104 and accompanying text.

privity exists between the State and the citizens when the State acts in its *parens patriae* position representing quasi-sovereign interests because the interests of the State and the citizens are substantially the same.

When analyzing privity problems, the courts are directed to look at adequacy of representation in the initial action,<sup>111</sup> for equity requires that a nonparty not be bound when their interests were not adequately represented in the initial action.<sup>112</sup> However, when the State is a party to an action, there is a presumption of adequate representation of the citizens' claims that could be brought by the government as well.<sup>113</sup> When citizen groups seek intervention in government actions, courts often address the issue of adequate representation by the government.<sup>114</sup> The trend in that regard has generally been to find inadequacy of representation in only limited instances.<sup>115</sup> Thus, there is a strong presumption that the quasi-sovereign/quasi-private rights common to all citizens are adequately represented when the government takes action against a polluter.

Turning now to *Satsky*, the State appears to have adequately represented the citizens in its *parens patriae* capacity. There is also evidence that the privity requirement in the environmental context is to be tested by a lower standard

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<sup>111</sup> See *supra* note 105 and accompanying text.

<sup>112</sup> *United States v. Olin Corp.*, 606 F. Supp. 1301, 1304 (N.D. Ala. 1985).

<sup>113</sup> See 7C CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1909, at 324-37 & nn.19-28 (1982). The text of this section states:

[In] cases in which the interest of the absentee is identical with that of one of the existing parties or there is a party charged by law with representing the interest of the absentee, . . . representation will be presumed adequate unless special circumstances are shown. A typical example is a class action, in which all the members of the class have precisely the same interest. This principle applies when . . . a governmental body or officer is the named party. Thus, for example, *in the absence of a very compelling showing to the contrary*, it will be assumed that the United States adequately represents the public interest in antitrust suits, in school desegregation cases, and in a variety of other matters, [and] that *a state adequately represents the interests of its citizens . . .*

*Id.* (emphasis added).

<sup>114</sup> See *supra* part V; *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983-92 (2d Cir. 1984) (denying intervention to four environmental groups with members on both sides of the Niagara River in an action by the United States and the State of New York joined by the Province of Ontario against Hooker Chemicals and the City of Niagara Falls because the governmental units were adequately representing the interests of each group); *Olin Corp.*, 606 F. Supp. at 1306-07 (denying plaintiffs' claims that they were inadequately represented by the United States because of a conflict of interest on the part of the government, which represented various agencies, including those that owned the property that had been leased to Olin and subsequently contaminated).

<sup>115</sup> See *supra* notes 61-64 and accompanying text.



that is more apt to find privity to exist.<sup>116</sup> Finally, privity is generally understood as a matter of fact, and the district court determination is to be overturned only when clearly erroneous.<sup>117</sup> Under the traditional meaning of the word then, there is substantial privity between the State and the plaintiffs.

### C. Conclusion on the Res Judicata Doctrine

The Tenth Circuit appears to have replaced the privity-plus-identity-of-claims test for res judicata with what amounts to a test to determine whether the claims of the citizens are similar to the claims of the State. The problem with such a test is that determining what is a similar interest is almost entirely subjective. To ask the question begs the answer. For a prime example, one need look no further than *Satsky* itself. The district court generally thought the action of the citizens was based on several claims that were identical to the State's claims and barred them all. Meanwhile, the court of appeals thought otherwise. Regardless of how complex and subjective the gray areas of res judicata may be, courts should be alert to attempts to modify a consent decree and prevent such attempts unless there is a clear reason against such action.

## VII. CONCLUSION

In conclusion, *Satsky* is not a peculiar case presenting a unique fact pattern. Environmental defendants seeking finality in their actions must heed the warning that this case sends out. When it comes to a collateral attempt by citizens to modify a consent decree between the government and a polluter, the polluter should consider laches, the intervention analysis, and res judicata effects discussed in this Case Comment. Needless to say, the effectiveness of these defenses, especially the res judicata defense, is anything but clear.

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<sup>116</sup> David Sive, *Res Judicata and Collateral Estoppel in Environmental Litigation*, C637 A.L.I.-A.B.A. COURSE OF STUDY: ENVTL. LITIG. 1269, 1276-82 (discussing "virtual representation" and stating, "[i]n essence, it appears to be clear in the federal courts that one advocate of an environmental interest will not be permitted to stand by and sue on the same claims as those of another party who has sued, if the claims were adequately presented by the first party in the first action, even if the two parties are not privies in the traditional sense" (emphasis added)); see *Sierra Club v. Block*, 576 F. Supp. 959, 966 (D. Or. 1983) (applying virtual representation theory to bar private plaintiffs from litigating NEPA issues already determined in an agency action).

<sup>117</sup> *Hooker*, 749 F.2d at 990-92.

