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ADMINISTRATIVE LAW — AGENCY POLICY CHANGE — MONTANA DISTRICT COURT HOLDS STATE DEPARTMENT'S NATIONAL INTEREST DETERMINATION FOR KEYSTONE XL PIPELINE VIOLATED APA BY DISREGARDING PRIOR FACTUAL FINDINGS. — *Indigenous Environmental Network v. Department of State*, 347 F. Supp. 3d 561 (D. Mont. 2018).

With a new presidential administration comes a new wave of agency policy changes.<sup>1</sup> Post-election agency reversals often attract legal challenges on a theory that the policy change was “arbitrary [or] capricious” under the Administrative Procedure Act<sup>2</sup> (APA).<sup>3</sup> Such “rationality review”<sup>4</sup> litigation can put courts in a bind — charged with ensuring that agencies take a “hard look” at the facts and reach reasoned conclusions,<sup>5</sup> but vulnerable to criticism for applying normally lenient rationality review too onerously in order to block an incoming administration’s agenda.<sup>6</sup> In *FCC v. Fox Television Stations, Inc.*,<sup>7</sup> the Supreme Court rejected the proposition that agency policy changes must clear a higher bar than agency actions on a blank slate. Rather, an agency need only provide “good reasons” for a new action, as long as the agency does not disregard prior factual findings on which its earlier action hinged.<sup>8</sup> But whether an agency has disregarded such prior factual findings or has instead permissibly applied new normative judgments to the existing factual record is often a fraught question. On November 8, 2018, in *Indigenous Environmental Network v. Department of State*<sup>9</sup> (*IEN*), a Montana District Court vacated the Trump State Department’s determination that construction of the Keystone XL pipeline was in the national interest — a reversal of the Obama State Department’s prior determination.<sup>10</sup> The court’s holding that State’s new determination failed under *Fox*’s standard for rationality review of agency policy changes implicates the question of how — and when — judges should draw the line between agency disregard of prior factual findings and normative

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<sup>1</sup> See, e.g., *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 979–80 (9th Cir. 2015) (en banc) (Smith, J., dissenting) (collecting examples).

<sup>2</sup> Ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551, 553–559, 701–706 (2012)).

<sup>3</sup> 5 U.S.C. § 706(2)(A) (2012).

<sup>4</sup> Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1356 (2016).

<sup>5</sup> See Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 556 (2011).

<sup>6</sup> See, e.g., Editorial, *A Judicial Keystone Kop*, WALL ST. J. (Nov. 13, 2018, 7:04 P.M.), <https://www.wsj.com/articles/a-judicial-keystone-kop-1542153881?mod=searchresults&page=1&pos=5> [<https://perma.cc/XL34-2WDJ>].

<sup>7</sup> 556 U.S. 502 (2009).

<sup>8</sup> *Id.* at 515. Reliance interests in the prior policy can also justify heightened scrutiny. *Id.*

<sup>9</sup> 347 F. Supp. 3d 561 (D. Mont. 2018).

<sup>10</sup> *Id.* at 591.

reevaluation. Under *Fox*, agencies reversing course must engage meaningfully with prior factual findings that the agency made as part of a technocratic inquiry, especially one delegated by Congress. But where, as in *IEN*, the prior agency findings at issue are judgment-based rather than technical and are made pursuant to core executive powers, or are highly specific to a point in time, courts should be more willing to accept conclusory agency treatment of prior findings. Requiring more in such cases risks ossifying precisely the sort of value-laden decisions that a new administration should be able to readily reevaluate under *Fox*.

On September 19, 2008, TransCanada Keystone Pipeline, L.P. applied for a presidential permit to construct the Keystone XL pipeline, which would carry Canadian crude oil from Alberta to Nebraska.<sup>11</sup> So began a ten-year (and counting) permitting saga. Pursuant to Executive Order 13,337, the President has delegated authority to the State Department to determine whether certain cross-border projects are in the national interest — and if so, to issue a presidential permit.<sup>12</sup> The “national interest” hurdle is a product of executive power,<sup>13</sup> as opposed to, for example, a presidential finding required by statute.<sup>14</sup>

As State assessed the project,<sup>15</sup> Keystone’s national and international profile grew. In the media and amongst environmental activists, Keystone became associated with increased production of particularly “dirty” (carbon-intensive) oil at the Canadian tar sands.<sup>16</sup>

On November 3, 2015, State issued a Record of Decision (ROD) determining that approval of Keystone was not in the national interest.<sup>17</sup> State concluded that Keystone’s benefits did not “outweigh the fact that approval would undermine the United States’ successful foreign policy engagement in efforts to combat climate change.”<sup>18</sup> The 2015 ROD

<sup>11</sup> DEP’T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION 8 (2015), <https://keystonepipeline-xl.state.gov/documents/organization/249450.pdf> [<https://perma.cc/C7HW-5LZM>] [hereinafter 2015 ROD].

<sup>12</sup> Exec. Order No. 13,337 § 1, 69 Fed. Reg. 25,299 (Apr. 30, 2004).

<sup>13</sup> See *White Earth Nation v. Kerry*, No. 14-4726, 2015 WL 8483278, at \*7–8 (D. Minn. Dec. 9, 2015); *Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162–63 (D. Minn. 2010); *Sisseton-Wahpeton Oyate v. Dep’t of State*, 659 F. Supp. 2d 1071, 1078 & n.5, 1080–82 (D.S.D. 2009); ADAM VANN & PAUL W. PARFOMAK, CONG. RESEARCH SERV., R43261, PRESIDENTIAL PERMITS FOR BORDER CROSSING ENERGY FACILITIES 6–8 (2017), <https://fas.org/sgp/crs/misc/R43261.pdf> [<https://perma.cc/358E-U532>].

<sup>14</sup> Cf. Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. (forthcoming 2019).

<sup>15</sup> In 2011, State rejected TransCanada’s application and asked for supplemental information; TransCanada reapplied on May 4, 2012. 2015 ROD, *supra* note 11, at 8. Congress had set a deadline of sixty days for a decision on the permit, forcing State’s hand. *Id.*

<sup>16</sup> See, e.g., *id.* at 28, 31; Mary Grace Lucas, *Keystone Pipeline Foes Create “Human Oil Spill” at Rally; Hundreds Arrested*, CNN (Mar. 2, 2014, 6:34 PM), <https://www.cnn.com/2014/03/02/politics/keystone-pipeline-protest/index.html> [<https://perma.cc/44YJ-EJPK>].

<sup>17</sup> 2015 ROD, *supra* note 11, at 32.

<sup>18</sup> *Id.* at 30; see also *id.* at 29–30. Relying on a 2014 Supplemental Environmental Impact Statement, the ROD concluded that Keystone was unlikely to result in a significant increase in Canadian

made clear that State's decision hinged on the widely held *perception* that Keystone would significantly increase greenhouse gas (GHG) emissions, rather than State's own estimate of the project's climate impact.<sup>19</sup> The Paris climate summit — aimed at establishing a framework for reducing global GHG emissions — was scheduled to begin less than a month from the issuance of the 2015 ROD, making the permit denial particularly timely for diplomatic purposes.<sup>20</sup>

On January 24, 2017, President Trump formally invited TransCanada to reapply.<sup>21</sup> On March 23, 2017, State issued a new ROD determining that approval served the national interest.<sup>22</sup> On most issues — such as Keystone's impacts on GHG emissions, environmental and cultural resources, and the economy — the 2017 ROD closely tracked the 2015 ROD and relied on the same factual record.<sup>23</sup> But where the 2015 ROD devoted three pages to "Climate Change–Related Foreign Policy Considerations,"<sup>24</sup> the 2017 ROD had a single paragraph acknowledging State's 2015 determination that approval would "undercut" U.S. "credibility and influence" in climate diplomacy, and stating that "[s]ince then, there [had] been numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so."<sup>25</sup> The paragraph continued: "In this changed global context, [approval] at this time would not undermine U.S. objectives in this area."<sup>26</sup> The 2017 ROD did not mention the Paris Climate Accord, from which the U.S. withdrew about two months later.<sup>27</sup>

IEN and other groups sued in the District of Montana, seeking to invalidate the permit under multiple legal theories.<sup>28</sup> Plaintiffs argued

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oil sands production and emissions. *See id.* at 11, 29. The project's expected positive impact on the economy, relations with Canada, and (to a limited extent) U.S. energy security weighed in favor of approval. *See id.* at 29–30. The cultural and non-climate-related environmental impacts of Keystone as compared with those of oil transport alternatives (such as rail) likely to fill the gap in its absence yielded a "mixed picture," apparently not weighing strongly either way. *Id.* at 31.

<sup>19</sup> *See id.* at 29–31. State emphasized the importance of making visible sacrifices. *Id.* at 26–29.

<sup>20</sup> *See id.* at 28, 31.

<sup>21</sup> Memorandum on Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8663 §§ 2–3 (Jan. 24, 2017). He asked State to reach a permitting decision within sixty days. *Id.* § 3.

<sup>22</sup> DEP'T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION 31 (2017), <https://keystonepipeline-xl.state.gov/documents/organization/269323.pdf> [<https://perma.cc/HM9B-57CK>] [hereinafter 2017 ROD].

<sup>23</sup> *IEN*, 347 F. Supp. 3d at 584.

<sup>24</sup> 2015 ROD, *supra* note 11, at 26–29.

<sup>25</sup> 2017 ROD, *supra* note 22, at 29.

<sup>26</sup> *Id.* The paragraph concluded: "Moreover, [approval] would support U.S. priorities relating to energy security, economic development, and infrastructure." *Id.*

<sup>27</sup> President Donald J. Trump, Remarks Announcing United States Withdrawal from the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 2 (June 1, 2017).

<sup>28</sup> *IEN*, 347 F. Supp. 3d at 590–91. The court in *IEN* used headings for twenty-one discrete issues raised by plaintiffs.

the 2017 ROD was deficient under the National Environmental Policy Act<sup>29</sup> (NEPA), the Endangered Species Act<sup>30</sup> (ESA), and the APA.<sup>31</sup>

On November 8, 2018, Judge Morris enjoined construction of the pipeline and vacated State's 2017 national interest determination.<sup>32</sup> He rejected various plaintiff theories under NEPA and the ESA,<sup>33</sup> but ruled for plaintiffs on six issues: under the APA regarding State's reasoning for reversing course, on four issues under NEPA,<sup>34</sup> and on one issue under the ESA.<sup>35</sup> In earlier proceedings, the court had rejected the government's argument that the permit decision was unreviewable as action pursuant to inherent presidential authority.<sup>36</sup>

In finding State's explanation of its reversal defective, the court applied *Fox's* framework for conducting rationality review of agency policy changes. At issue was whether State had provided "good reason" for adopting its new decision.<sup>37</sup> Per *Fox*, when a "new policy rests upon

<sup>29</sup> Pub. L. No. 91-190, 83 Stat. 852 (1970).

<sup>30</sup> Pub. L. No. 93-205, 87 Stat. 884 (1973).

<sup>31</sup> *IE*N, 347 F. Supp. 3d at 590-91.

<sup>32</sup> *Id.* at 591.

<sup>33</sup> The court evaluated NEPA and ESA compliance using the APA's rationality review standard. *Id.* at 571. Under NEPA, the court rejected challenges related to State's purpose and need statement and its analysis of alternatives to Keystone, Keystone's rate of oil transportation, impacts on Canada, and public comments — finding the factual issues raised by plaintiffs to be immaterial or State's analysis to be reasonable. *Id.* at 572-75, 577, 579, 581. Under the ESA, the court held that the Fish and Wildlife Service (FWS) — on whose findings State relied — satisfied rationality review when it analyzed threats to the whooping crane without considering telemetry data and, with respect to various species, either proposed reasonable conservation measures, concluded no FWS consultation was required, or concluded no adverse effect was likely. *Id.* at 584-90. The court rejected extraterritorial application of ESA consultation requirements to Canada. *Id.* at 587-88.

<sup>34</sup> Regulations under NEPA require supplemental analysis if "significant new [environment-related] circumstances or information" related to a project arise. 40 C.F.R. § 1502.9(c)(1)(ii) (2018). Three plaintiff victories concerned failures by State to analyze developments since the 2015 ROD that the court deemed material. First, the significant drop in oil prices since 2015 could have changed State's analysis of Keystone's impact on Canadian oil sands production. *IE*N, 347 F. Supp. 3d at 576-77. Second, the 2017 ROD failed to consider the "cumulative impacts" on GHG emissions of Keystone combined with those of the Alberta Clipper, another pipeline permitted since the 2015 ROD. *Id.* at 579. Third, State relied on 2002-2012 oil spill data — omitting new data available for 2014-2017 — and failed to adequately react to a new study of tar sands crude oil spills. *Id.* at 581-82. Plaintiffs' fourth NEPA victory turned on the adequacy of State's review of risks to cultural resources. *Id.* at 580-81.

<sup>35</sup> Judge Morris held that State must consider new information regarding oil spills in analyzing threats to endangered species. *See IEN*, 347 F. Supp. 3d at 587.

<sup>36</sup> *See* Indigenous Env'tl. Network v. Dep't of State, No. CV-17-29-GF-BMM, 2017 WL 5632435, at \*3-9 (D. Mont. Nov. 22, 2017). The court leaned heavily on its finding that, in delegating to State, "President Trump specifically waived . . . any authority that he retained to make the final [permitting] decision." *Id.* at \*5. Absent such a waiver, President Trump could have personally — and unreviewably — reversed the 2015 permit denial. *See Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (holding that the President is not an agency within the meaning of the APA).

<sup>37</sup> *IE*N, 347 F. Supp. 3d at 583. To comply with the APA, an agency reversing its prior action must "(1) . . . display[] 'awareness that it is changing position;' (2) . . . show[] that 'the new policy is permissible under the statute;' (3) . . . 'believe[]' the new policy is better; and (4) . . . provide[] 'good reasons'" for adopting the new policy. *Id.* at 582-83 (quoting *FCC v. Fox Telev. Stations, Inc.*, 556 U.S. 502, 515-16

factual findings that contradict those which underlay [the agency's] prior policy . . . [a] reasoned explanation is needed for disregarding" those earlier findings.<sup>38</sup> If a policy change is rooted in *normative* judgments, by comparison, appellate courts have read *Fox* to permit agency reversal "even on precisely the same record."<sup>39</sup> The challenge, post-*Fox*, is distinguishing those two scenarios.

Here, the court held that the 2017 ROD had impermissibly disregarded the 2015 ROD's "prior factual findings related to climate change" — referring to the 2015 ROD's discussion of climate diplomacy.<sup>40</sup> While the court acknowledged that State could prioritize factors other than climate diplomacy, it concluded that the 2017 ROD unlawfully "ignore[d] the 2015 ROD's conclusion that 2015 represented a critical time for action."<sup>41</sup> The court found insufficient the 2017 ROD's paragraph addressing climate diplomacy, describing it as "conclusory."<sup>42</sup>

The government, TransCanada, and multiple plaintiffs appealed.<sup>43</sup> Then, on March 29, 2019, President Trump revoked the March 23, 2017 permit, and issued a new permit for Keystone without delegating a national interest determination to State.<sup>44</sup> Further litigation seems likely.<sup>45</sup>

*IEN*'s application of *Fox* presents a puzzle. In *Fox*, the Supreme Court signaled that courts conducting rationality review should uphold agency policy changes grounded in the application of new normative judgments to existing facts,<sup>46</sup> but must also ensure that agencies do not disregard prior factual findings underlying their earlier actions.<sup>47</sup> Summarized, the policy change at issue in *IEN* was that President Trump — about to withdraw from the Paris Climate Accord — decided that risks

(2009)). Only the fourth prong was at issue.

<sup>38</sup> *Fox*, 556 U.S. at 515–16.

<sup>39</sup> *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc); see also *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012).

<sup>40</sup> *IEN*, 347 F. Supp. 3d at 584.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* The paragraph "[f]ell] short of a factually based determination, let alone a reasoned explanation, for the course reversal." *Id.*

<sup>43</sup> Order [Granting Motion for Extension of Time to File Opening Briefs] at 4, *Indigenous Envtl. Network v. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018) (No. 17-cv-00029).

<sup>44</sup> President Donald J. Trump, Presidential Permit — Authorizing TransCanada Keystone Pipeline, L.P., to Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Boundary Between the United States and Canada, 2019 DAILY COMP. PRES. DOC. 1–3 (Mar. 29, 2019).

<sup>45</sup> See Matthew Daly, *Trump Issues New Permit for Stalled Keystone XL Pipeline*, WASH. POST (Mar. 29, 2019), [https://www.washingtonpost.com/politics/trump-issues-new-permit-for-stalled-keystone-xl-pipeline/2019/03/29/e9e784ee-525f-11e9-bdb7-44f948cc0605\\_story.html?utm\\_term=.5bb12c9a63fo](https://www.washingtonpost.com/politics/trump-issues-new-permit-for-stalled-keystone-xl-pipeline/2019/03/29/e9e784ee-525f-11e9-bdb7-44f948cc0605_story.html?utm_term=.5bb12c9a63fo) [https://perma.cc/SS3A-5EX8].

<sup>46</sup> Only, of course, if an agency's governing statute does not prohibit consideration of the factors weighed by the agency in its normative analysis — a separate inquiry not explored here. See, e.g., Gersen & Vermeule, *supra* note 4, at 1371.

<sup>47</sup> See Levin, *supra* note 5, at 565–66.

to climate diplomacy did not justify blocking Keystone. The puzzle: How did the court in *IEN*, applying *Fox*, find itself preventing the sort of policy-driven reevaluation by a new administration that *Fox* facilitates? Under *Fox*, courts should reserve heightened scrutiny for agency reversals that implicate prior factual findings made pursuant to technocratic inquiries, especially ones delegated by Congress. In such cases, courts should require clarity from agencies about how their new policies square with those findings. But where prior findings — like State’s 2015 conclusions on Keystone’s consequences for climate diplomacy — amount to nontechnocratic judgment calls committed to the Executive, or are inherently context-specific to a point in time,<sup>48</sup> courts can best implement *Fox*’s framework for rationality review of agency policy changes by crediting even conclusory agency statements that address such prior findings. Courts may thereby make the elusive line between normative reevaluation and disregard of factual findings by agencies easier to draw, and they will need to draw it less often.

In the Supreme Court’s deferential rationality review jurisprudence, *Fox*’s call for special scrutiny of an agency’s treatment of its prior factual findings is notable. In judicial review of agency action, an agency’s responsiveness to political control and its technocratic expertise usually both weigh in favor of deference.<sup>49</sup> Rationality review is typically lenient; agencies generally win at the Supreme Court,<sup>50</sup> and courts are especially deferential where agencies rely on technical expertise.<sup>51</sup> Agency reversals represent a special case: they may pit democratic responsiveness against respect for agency expertise (and Congress’s decision to delegate a technocratic inquiry) — if the agency ignores prior technocratic findings to achieve a values-driven outcome.

*Fox* sought to balance that tension. On the one hand, the Court rejected the proposition that policy changes must be held to a tougher rationality standard than blank-slate agency action. Applying a higher bar where an agency implements a new administration’s normative pri-

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<sup>48</sup> The claim here is that *Fox* does not require close scrutiny of agencies’ treatment of prior findings that were either time-bound or both judgment-based and made pursuant to inherent executive power. However, technocratic prior agency findings made pursuant to presidential authority — for example, President-mandated cost-benefit analysis — may be sufficiently analogous to technocratic mandates from Congress to require thorough agency examination under *Fox*, especially where the President-mandated inquiry interacts with a statutory scheme.

<sup>49</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); David A. Dana & Michael Barsa, *Judicial Review in an Age of Hyper-Polarization and Alternative Facts*, 9 *SAN DIEGO J. CLIMATE & ENERGY L.* 231, 238 (2018); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 35 (2009) (describing “widespread acceptance” that political control “legitimizes agency decisionmaking” because “many policymaking decisions” have an inherent normative dimension).

<sup>50</sup> Gersen & Vermeule, *supra* note 4, at 1362, 1369–70; see also *id.* at 1360–62.

<sup>51</sup> See *id.* at 1396–1401; Dana & Barsa, *supra* note 49, at 239.

orities would undermine the administrative state's responsiveness to supervision by the elected President.<sup>52</sup> *Fox* consolidated an important shift. Courts conducting rationality review were historically suspicious of normative reasoning creeping into technocratic inquiries — and agencies accordingly pretended only technocratic analysis was at work.<sup>53</sup> *Fox* invited agency frankness about normative reasoning.<sup>54</sup> But still, to deliver the rule-of-law values of rationality review, judges must ensure that an agency has not, in the words of Justice Kennedy's *Fox* concurrence, "simply disregard[ed] . . . factual determinations that [the agency] made in the past," just as a court would not permit an agency to "ignore inconvenient facts when it writes on a blank slate."<sup>55</sup> Hence *Fox*'s call for close scrutiny of agency disregard of prior factual findings.

Deciding when to trigger that heightened scrutiny can be tricky: whether an agency has disregarded its prior factual findings is often in the eye of the beholder. Take *Organized Village of Kake v. USDA*,<sup>56</sup> a post-*Fox* case in which the en banc Ninth Circuit split 6–5 in striking down a USDA policy reversal as arbitrary and capricious<sup>57</sup> — and on which, along with *Fox*, *IEN*'s analysis of State's policy change relied.<sup>58</sup> In *Kake*, the USDA issued a 2003 ROD reversing its prior determination in a 2001 ROD, relying on "precisely the same record."<sup>59</sup> In deciding not to exempt certain forestland from a rule banning road construction in protected areas, the 2001 ROD determined that the environmental risks outweighed economic considerations; the 2003 ROD, in contrast, concluded that socioeconomic costs to lumber harvest-dependent communities outweighed the "minor" risks to conservation objectives.<sup>60</sup>

The fact pattern proved to be a Rorschach test. The majority saw disregard of prior factual findings; the 2003 ROD referred to "minor"

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<sup>52</sup> See Levin, *supra* note 5, at 559–60 (arguing that Justice Scalia's majority opinion in *Fox* aimed to promote such political responsiveness); Watts, *supra* note 49, at 35–38; see also Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. v, xi (1982).

<sup>53</sup> See Watts, *supra* note 49, at 14–26.

<sup>54</sup> See Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1038 (D.C. Cir. 2012) ("*Fox* makes clear that this kind of reevaluation is well within an agency's discretion."). Beyond facilitating political control over agency policymaking, the benefits of *Fox*'s framework include: enhanced political accountability by incentivizing agency candidness about normative judgments; reduced incentives to fudge (and thus degrade) technocratic analysis to mask normative goals; and increased judicial deference, combatting ossification. See Watts, *supra* note 49, at 32–45.

<sup>55</sup> FCC v. Fox Telev. Stations, Inc., 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment); see also *id.* at 515–16 (majority opinion). In other words, an agency's prior technocratic findings are as important for it to consider as a factual inquiry that it is statutorily mandated to undertake when acting on a blank slate.

<sup>56</sup> 795 F.3d 956 (9th Cir. 2015) (en banc).

<sup>57</sup> *Id.* at 959, 967.

<sup>58</sup> *IEN*, 347 F. Supp. 3d at 583.

<sup>59</sup> *Kake*, 795 F.3d at 967. The dueling RODs were thus analogous to State's two RODs in *IEN*.

<sup>60</sup> *Id.* at 968.

conservation risks whereas the 2001 ROD had identified “high” risk.<sup>61</sup> A dissent accused the majority of “latch[ing] onto” the word “minor,” when “it [was] clear” that the 2003 ROD permissibly reweighed conservation and socioeconomic interests on the existing record.<sup>62</sup>

State’s 2017 ROD presented just such a Rorschach test: Did its paragraph on climate diplomacy say that (i) Keystone in fact no longer posed a serious risk to U.S. diplomacy aimed at promoting aggressive action on climate change, or that (ii) State now believed the project’s benefits outweighed any such risk (or that such risk was irrelevant given new U.S. diplomatic priorities)?<sup>63</sup> If the former, and State’s 2015 conclusions on climate diplomacy were “prior factual findings” requiring especially well-reasoned treatment under *Fox*, State’s paragraph would seem insufficient. The latter would be a permissible policy-based judgment, and clearly would provide the correct real-world account — given President Trump’s invitation to TransCanada to reapply and his subsequent withdrawal from the Paris Accord.<sup>64</sup> State could have simplified the case by making its normative reevaluation clear<sup>65</sup> or detailing new factual findings. But State declined to take the easy way out, instead penning its ambiguous paragraph.<sup>66</sup> Though State’s ambiguity invited skepticism, there are good reasons the court in *IEN* should have accepted the 2017 ROD’s conclusory treatment of State’s 2015 climate diplomacy findings and avoided tough line-drawing.

The 2015 ROD’s climate diplomacy conclusions are not the sort of prior factual findings that should trigger close scrutiny under *Fox* — for two reasons. First, State made a judgment-based determination delegated by the President pursuant to his constitutional powers, rather than a technocratic inquiry delegated by Congress. As Justice Kennedy emphasized in *Fox*, agencies endanger the separation of powers when they wander outside the “specific and detailed” mandates assigned to them by Congress — aggrandizing the power of the executive or administrative state at Congress’s expense.<sup>67</sup> Rationality review under the APA

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

<sup>62</sup> *Id.* at 979 (Callahan, J., dissenting); *see also id.* at 981 (Smith, J., dissenting) (principal dissent) (accusing majority, by the same logic, of “substitut[ing] its judgment for that of the agency”).

<sup>63</sup> It could also have meant some mix of the two, such as that the degree of risk had significantly changed (a new factual finding), but even the prior degree of risk would be outweighed by the project’s benefits, which includes a permissible normative reevaluation that should trump.

<sup>64</sup> Courts reviewing agency action, however, must discern the agency’s reasons based on the record. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

<sup>65</sup> It would have been easy to do so. For example: “The new administration does not believe that any third party’s perceptions of the project should be decisive and gives decisive weight to the project’s benefits of [X, Y, Z].”

<sup>66</sup> Perhaps State was skeptical that a court would credit explicit normative reevaluation even in the post-*Fox* era. *See Watts*, *supra* note 49, at 74. Or perhaps it was merely a rushed oversight.

<sup>67</sup> *FCC v. Fox Telev. Stations, Inc.*, 556 U.S. 502, 536 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Mistretta v. United States*, 488 U.S. 361, 374 (1989)).



guards against that risk,<sup>68</sup> which looms when an agency ignores the results of its delegated technocratic analysis. But where agencies act pursuant to inherent executive authority, such concerns do not exist.<sup>69</sup>

On this point, *State Farm*<sup>70</sup> is a helpful foil to *IEN*. In *State Farm*, Congress had charged the National Highway Traffic Safety Administration (NHTSA) with a technocratic mandate — to regulate to “meet the need for motor vehicle safety” — and NHTSA had issued a rule mandating air bags or automatic seatbelts in cars.<sup>71</sup> The NHTSA — under a new President — eliminated the rule with “[n]ot one sentence” addressing its extensive prior findings on the safety benefits of air bags.<sup>72</sup> NHTSA’s disregard of its prior findings is exactly the sort of arbitrariness against which rationality review under *Fox* guards.<sup>73</sup> The agency was empowered by Congress to govern in a particular sphere based on technical analysis; it made extensive findings, then ignored them.

Now contrast *IEN*. State acted pursuant to an executive order delegating authority to decide whether projects “serve the national interest.”<sup>74</sup> State’s 2015 determination — and *IEN*’s holding under *Fox* — turned on State’s assessment of foreign perceptions of the pipeline and the diplomatic risks of approval. Whereas in *State Farm*, triggering heightened scrutiny under *Fox* would serve to ensure that NHTSA acted within its technocratic mandate from Congress, in *IEN*, heightened scrutiny ended up burdening the President’s inherent authority to modify (or delegate modification of) a diplomatic determination.

Second, State’s 2015 climate diplomacy findings should not have triggered heightened scrutiny under *Fox* because they were time-bound. Unlike findings about air bags’ safety benefits — presumably roughly as true three years later as when first made, absent significant shifts in technology and usage — diplomatic findings are inherently time- and context-specific. State’s decision to send a diplomatic message by rejecting a controversial project one month before the Paris talks hinged on a point-in-time assessment of the perceptions of multiple foreign actors. It seems odd to require agencies to consider in detail prior factual findings of a sort that inevitably and rapidly become stale.<sup>75</sup>

<sup>68</sup> See *id.* at 537.

<sup>69</sup> Indeed, it is unlikely Justice Kennedy, who has acknowledged the President’s “unique role in communicating with foreign governments,” *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015), imagined his *Fox* concurrence would lead to judicial scrutiny of diplomatic analysis like State’s in *IEN*.

<sup>70</sup> *Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>71</sup> *Id.* at 33 (quoting 15 U.S.C. § 1392(a) (Supp. 1976)); see *id.* at 35–37.

<sup>72</sup> *Id.* at 48.

<sup>73</sup> The *Fox* majority, concurrence, and dissent alike viewed the NHTSA’s disregard of prior factual findings as archetypal arbitrariness. See *Fox*, 556 U.S. at 514; *id.* at 537–38 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 549–50 (Breyer, J., dissenting).

<sup>74</sup> Exec. Order No. 13,337, 69 Fed. Reg. 25,299 § 1(g) (Apr. 30, 2004).

<sup>75</sup> *IEN* itself characterized the prior factual finding at issue as the “2015 ROD’s conclusion that

Had the *IEN* court determined that State's 2015 climate diplomacy conclusions were not prior factual findings requiring rigorous treatment under *Fox*, the usual lenient form of rationality review would have applied. If the 2017 ROD — based largely on existing environmental and economic findings — satisfied that standard it should have been upheld. State should have been free in 2017 to treat the issue of climate diplomacy in a conclusory manner,<sup>76</sup> as it did — and as it could have if perceptions of Keystone had been raised in a public comment.<sup>77</sup>

There is much to be said for implementing *Fox*'s lenient rationality review framework for post-election agency reversals.<sup>78</sup> *Fox* allows for the readier injection of democratic responsiveness into agency policymaking, and allows courts to play a reduced role in policing agencies' politically salient normative judgments — absent *State Farm*-style disregard for technocratic findings.<sup>79</sup> Rationality review under the APA — aimed at preventing arbitrariness by technocratic agencies — should not ossify a prior decision to deny a pipeline permit for political reasons related to foreign perceptions of the pipeline. Courts can realize *Fox*'s promise by applying tough scrutiny only where the disregarded factual findings were made pursuant to a technocratic inquiry, especially one delegated by Congress. Where such findings *are* implicated, agencies making new value-based judgments on existing facts should make explicit that they are doing so — and courts may be well-advised to incentivize clarity by punishing agencies where they do not make their normative reasoning explicit,<sup>80</sup> as did the court in *Keake*. But where an agency dismisses a prior finding inseparable from a specific point in time, or that was a judgment call implicating inherent executive authority, a conclusory statement showing awareness and rejection or de-prioritization of the prior finding should suffice, as long as the agency provides other good reasons for its new course of action.

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2015 represented a critical time for action." *IEN*, 347 F. Supp. 3d at 584 (emphasis added).

<sup>76</sup> Cf. Gersen & Vermeule, *supra* note 4, at 1373 ("[R]ationality review neither requires, nor even permits, generalist judges to decide on their own initiative that a given factor that happens to strike them as important is a legally 'relevant factor' . . .").

<sup>77</sup> The standard for reviewing agency responses to public comments — especially speculative comments, like one predicting how perceptions of a pipeline approval will impact future climate diplomacy — is permissive. See *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993).

<sup>78</sup> See *supra* note 54; Levin, *supra* note 5, at 561–63.

<sup>79</sup> Further, over-tough scrutiny may incentivize the use of processes less subject to judicial oversight — as when President Trump revoked the 2017 permit and issued a new one in his personal capacity, with the potential and arguably unfortunate effect of skipping the judicially reviewable analysis State would conduct under NEPA and the ESA. See Daly, *supra* note 45 (quoting White House spokesman's claim that "this permit reinforces . . . that the presidential permit is indeed an exercise of presidential authority . . . not subject to judicial review under the [APA]"); cf. Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 487 (1997) ("[O]ssification of the rule-making process leads agencies to favor [acting] by . . . less appropriate [means].").

<sup>80</sup> See Watts, *supra* note 49, at 77.