NO ROAD TO CHANGE: THE WEAKNESSES OF AN ADVOCACY STRATEGY BASED ON AGENCY POLICY CHANGE

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SUMMARY

The Trump Administration has aggressively rolled back prior administrations' environmental regulations and natural resource policies, and critics of this agenda have turned to the judiciary. A remarkable string of federal court decisions has faulted the Administration for failing to follow the standard for agency policy change articulated in *Federal Communications Commission v. Fox Television Stations, Inc.* The aftermath of these decisions, though, has revealed legal and policy problems with that standard, including a lack of new procedures on remand; circumvention of public participation; an uncertain level of deference to agencies; the Administration's efforts to weaken the standard; and the possibility that district courts may be out of step with how the current U.S. Supreme Court might view the standard. As a result, both defenders of the regulations and deregulatory interests have reasons to be wary. This Article uses the example of a proposed road exchange agreement in Alaska's Izembek National Wildlife Refuge to illustrate and examine these problems. The Izembek story and other recent examples suggest that the surge in application of the *Fox Television Stations* standard may be short-lived, and that moving away from it could produce better environmental outcomes.

A remote national wildlife refuge in Alaska is now a testing ground for the legal sufficiency of the Donald Trump Administration's attempts to reverse the actions of its predecessors. Not the epic showdown over drilling in the Arctic National Wildlife Refuge, set in motion as part of passing a massive tax cut. Instead, this story is about the small-by-Alaska-standards Izembek National Wildlife Refuge on the Alaska Peninsula. On one side are wilderness advocates and wildlife organizations; on the other, the interests of a small town and a decades-long fight by two senators named Murkowski. The dispute is over a seemingly small object: a potential 11-mile gravel road, which would cut through a congressionally designated wilderness area to connect residents of King Cove to a larger airport to facilitate safer transportation to medical facilities. In exchange, the state would provide new lands for preservation.

At stake is more than just this one refuge. The Izembek road has long been seen not only as a threat to wildlife and the ecosystem, but also as a precedent-setting intrusion on hard-fought wilderness protections throughout the country. Now an additional set of implications are at play. The Trump Administration has faced a striking string of defeats on cases involving changes in agency position under the legal standard from *Federal Communications Commission v. Fox Television Stations, Inc.*,[1] including a ruling on its course reversal from the Barack Obama Administration's denial of an Izembek road exchange.[2] But a win by environmental advocates at the district court did not settle the matter, even though the U.S. Department of Justice (DOJ) surprisingly dropped its appeal of this case last summer.[3]

Behind the scenes—and unknown to the public until after dismissal of the appeal—the new Secretary of the Interior finalized a second road exchange agreement in secret a mere three months after the district court ruling.[4]

1. 556 U.S. 502, 515-16 (2009).
2. Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 381 F. Supp. 3d 1127, 49 ELR 20047 (D. Alaska 2019).
3. *See* Liz Ruskin, *Feds Withdraw Appeal of Izembek Refuge Road Decision*, Alaska Pub. Media, July 22, 2019, https://www.alaskapublic.org/2019/07/22/feds-withdraw-appeal-of-izembek-refuge-road-decision/.
4. *See* Scott Streater, *Bernhardt Secretly Signs Land Swap for Alaska Refuge Road*, E&E News, July 24, 2019, https://www.eenews.net/eenewspm/2019/07/24/stories/1060783877.

Like legal versions of Bill Murray's character in *Groundhog Day*,[5] the plaintiffs now find themselves stuck repeating their exact same actions as they revisit the same arguments before the same judge in the same court. The only new wrinkle is the question of whether or not the new agreement provides sufficiently good reasons for the change, where the old one did not.

The aftermath of the decision on the Izembek road illustrates several legal and policy problems with the standard for agency policy change in *Fox Television Stations* and the weaknesses of an advocacy strategy to fight the Trump Administration's rollbacks using that case. These problems include a lack of new analysis or procedures as remedies; responses to rulings that cut out public participation; a deferential reasonableness standard for agency change even when a supposedly more detailed justification is required; the possibility that political changes alone may supply the reasons for change and thereby gut the whole standard; and the concern that recent decisions at the district court level may not reflect the current view of the U.S. Supreme Court. This Article canvasses each of these problems, using Izembek as a case study of much larger trends.

I. The Long Fight Over a Wilderness Road

The Secretary of the Interior established the Izembek National Wildlife Range on the Alaska Peninsula in 1960 in a public land order.[6] As part of the sweeping Alaska National Interest Lands Conservation Act in 1980, the U.S. Congress redesignated the land as a national wildlife refuge, and established its purpose "to conserve fish and wildlife populations and habitats in their natural diversity," meet treaty obligations, allow for subsistence use, and protect water quality.[7] In that same law, Congress also designated the majority of the refuge as a wilderness area.[8] As with all wilderness areas, this designation prohibits a number of activities, including road construction.[9] Additionally, the protected habitat in the refuge is so valuable that it became one of the first Ramsar Convention Wetlands of International Importance in the United States in 1986.[10]

The town of King Cove is immediately adjacent to Izembek. This isolated community is only accessible by air or sea.[11] The driving economic force in this town of about 1,000 people, of which one-third are seasonal residents, is the Peter Pan Seafood Cannery.[12] A little fewer than one-half of the residents are Alaska Natives, and King Cove is a part of the Aleutians East Borough.[13] The only medical facility in the community, the King Cove Community Health Clinic, is run by the Eastern Aleutian Tribes and funded by Indian Health Services.[14] As a result, anyone who requires more extensive medical services must fly to either Seattle or Anchorage.[15] Unfortunately, King Cove only has a short, 3,500-foot gravel airstrip that can be dangerous during severe weather.[16] On the other side of Cold Bay—and cut off on land by Izembek—there is a much safer 10,000-foot paved airstrip, but getting to this airstrip is difficult during high seas or winter.[17]

The government began studying the problem of access for King Cove residents to the Cold Bay airstrip almost immediately following the creation of the Izembek Wilderness in the 1980s.[18] The Alaska Department of Transportation found in 1994 that air and water routes were both safer and more cost effective.[19] But the conflict continued at the federal level, with Sen. Frank Murkowski (R-Alaska) advancing the cause of the road.[20] Secretary of the Interior Bruce Babbitt in a *New York Times* piece countered that less-costly alternatives existed with fewer harms to the environment, questioned the motives of road advocates, and argued that holding the line against the first road built in a wilderness area was important to stave off dangerous precedent.[21]

Instead of a road, Congress designated a $37.5 million earmark to solve the problem. This money went to purchasing a hovercraft for crossing the bay at a cost of $9 million to construct and roughly $1 million a year to operate.[22] The hovercraft was mothballed in 2014 (after being repurposed to shuttle cannery workers and mail), and the controversy remained unsettled.

In an effort to resolve the issue with some sense of finality, Congress authorized a potential land exchange to build a road that "shall be used primarily for health and safety purposes . . . and only for noncommercial purposes" in 2009.[23] Before making any exchange, though, Congress required the U.S. Department of the Interior (DOI) to complete an environmental impact statement (EIS) in order to comply with the National Environmental Policy Act (NEPA)[24] and, crucially, required that DOI "shall determine that the land exchange (including the construc-

5. Groundhog Day (Columbia Pictures 1993).
6. Pub. Land Order No. 2216, 25 Fed. Reg. 12599 (Dec. 6, 1960).
7. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, §303(3), 94 Stat. 2371, 2390-91 (1980).
8. *Id.* §702(6).
9. 16 U.S.C. §1133(c).
10. *See* Ramsar Sites Information Service, *Izembek Lagoon National Wildlife Refuge*, https://rsis.ramsar.org/ris/349 (last published May 21, 2014).
11. *See* King Cove Corporation, *Home Page*, http://www.kingcovecorporation.com/ (last visited Feb. 7, 2020).
12. *See id.*
13. *See* U.S. Census, *King Cove City, Alaska*, https://data.census.gov/cedsci/profile?g=1600000US0239410&q=King%20Cove%20city,%20Alaska (last visited Feb. 18, 2020); Aleutians East Borough, *King Cove*, https://www.aleutianseast.org/index.asp?SEC=701F871D-442C-47F6-940E-E68682A0A516&Type=B_BASIC (last visited Feb. 7, 2020).
14. Eastern Aleutians Tribes, *King Cove*, https://www.eatribes.org/communities/king-cove/ (last visited Feb. 7, 2020).
15. *See* U.S. Fish & Wildlife Service, Izembek National Wildlife Refuge Land Exchange/Road Corridor Environmental Impact Statement—Executive Summary ES-6 to ES-7 (2013) [hereinafter Izembek EIS].
16. *See id.* at ES-7.
17. *See id.*
18. *See, e.g.*, U.S. Department of the Interior, Record of Decision—Izembek National Wildlife Refuge Land Exchange/Road Corridor 5 (2013) [hereinafter Izembek ROD] (describing history of road proposal).
19. *See* Bruce Babbitt, Opinion, *Road to Ruin*, N.Y. Times, June 25, 1998, https://www.nytimes.com/1998/06/25/opinion/road-to-ruin.html (providing study conclusions).
20. *See* Phil Taylor, *Alaska Village's $9M Hovercraft Goes Bust. So Now What?*, E&E News, Apr. 11, 2014, https://www.eenews.net/stories/1059997801.
21. *See* Babbitt, *supra* note 19.
22. *See* Taylor, *supra* note 20.
23. Omnibus Public Lands Act of 2009, Pub. L. No. 111-11, §6403(a)(1)(A), 123 Stat. 991, 1180.
24. *Id.* §6402(b); 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209.

tion of a road between the City of King Cove, Alaska, and the Cold Bay Airport) is in the public interest"[25] before agreeing to any exchange.

One reason for Congress' renewed interest in the project was the growing stature of Sen. Lisa Murkowski (R-Alaska), who had just become ranking member of the U.S. Senate Energy and Natural Resources (ENR) Committee.[26] While the EIS and public interest determination were ongoing, Senator Murkowski used that perch to hold up the nomination of President Obama's second Secretary of the Interior, Sally Jewell, until DOI committed to more meetings with residents of King Cove.[27] After her confirmation, Secretary Jewell visited the town herself and committed a political blunder by reportedly telling residents, "I've listened to your stories, now I have to listen to the animals."[28]

DOI completed the EIS for the proposed land exchange in 2013.[29] Secretary Jewell then issued a 20-page record of decision (ROD) finding that the road was not in the public interest and that viable alternatives existed that would not cause the same harms to the environment.[30] DOI's analysis tracked the findings and conclusions of the prior decades, but the outcome did not satisfy Senator Murkowski. In fact, to this day the Senate ENR website features a tracker with the number of days and medevacs "since Interior Secretary Sally Jewell put wildlife above American lives."[31] Despite this continued interest, the dust seemed to have settled on the issue—until the 2016 election.

II. DOI's Reversal, a Court's Rejection, and a Secret Agreement

The Trump Administration has reversed a number of policies to curry political favor. However, advocates have found remarkable success fighting these reversals in court, largely because agencies have failed to meet the standard for policy changes.[32] As set out by the Supreme Court in *Fox Television Stations*, an agency must show that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates."[33] Additionally, an agency must "provide a more detailed justification" when "disregarding facts and circumstances that underlay or were engendered by the prior policy."[34] District courts have ruled on these grounds in a number of environmental cases.[35]

The fight over the potential Izembek road is one example of this story. Senator Murkowski has played an outsized role during the Trump Administration as a swing vote in the Senate. In July 2017, she provided one of the "no" votes that doomed the Trump Administration's push to repeal Obamacare, and immediately prompted the ire of Trump on Twitter.[36] Quickly, though, the Administration changed its tack. Days later, Secretary of the Interior Ryan Zinke posted a photo to Twitter of himself joining Senator Murkowski for Alaskan IPAs.[37] In October, Trump sent over a copy of a *Washington Post* article on the Izembek issue with "Lisa—We will get it done" scrawled across it in black Sharpie.[38] This charm offensive was not enough, as Senator Murkowski seemed destined to provide another "no" vote that would doom Trump's signature tax package that fall. In order to secure that vote, Republicans tacked a provision onto the tax bill opening the Arctic National Wildlife Refuge to drilling.[39] The next month, Secretary Zinke signed an agreement authorizing the Izembek road exchange.[40]

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25. *Id*. §6402(d).
26. *See* Noelle Straub & Eric Bontrager, *House Sends Natural Resources Omnibus to Obama*, E&E News, Mar. 25, 2009, https://www.eenews.net/stories/76006.
27. *See* Juliet Eilperin, *REI's Sally Jewell Wins Confirmation as Interior Secretary*, Wash. Post, Apr. 10, 2013, https://www.washingtonpost.com/news/post-politics/wp/2013/04/10/reis-sally-jewell-wins-confirmation-as-interior-secretary/.
28. Barnini Chakraborty, *Feds to Alaskans: No Road for Humans, Lots of Land for Animals*, Fox News, Feb. 26, 2014, https://www.foxnews.com/politics/feds-to-alaskans-no-road-for-humans-lots-of-land-for-animals (last updated Jan. 12, 2017); *see also* Annie Feidt, *Proposed Alaska Road Pits Villagers Against Environmentalists*, NPR, Sept. 11, 2013, https://www.npr.org/sections/health-shots/2013/09/11/220598032/proposed-alaska-road-pits-villagers-against-environmentalists.
29. *See generally* Izembek EIS, *supra* note 15. The EIS found that impacts on the wilderness would be "major" and also identified habitat fragmentation as a significant concern. *Id*. at ES-42.
30. *See* Izembek ROD, *supra* note 18, at 2-4.
31. U.S. Senate Committee on Energy & Natural Resources, *King Cove Road Information*, https://www.energy.senate.gov/public/index.cfm/king-cove-road-information (last visited Feb. 7, 2020).
32. *See* Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration Is Constantly Losing in Court*, Wash. Post, Mar. 29, 2019, https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html.
33. Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).
34. *Id*. at 515-16. These circumstances are from a nonexclusive list the Court introduced with "for example." *Id*.
35. *See*, *e.g.*, Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., No. CV 17-8587-GW, 2019 WL 2635587, 49 ELR 20112 (C.D. Cal. June 20, 2019) (Cadiz water pipeline); California ex rel. Becerra v. U.S. Dep't of the Interior, 381 F. Supp. 3d 1153 (N.D. Cal. 2019) (oil and gas valuation rule); Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 381 F. Supp. 3d 1127, 49 ELR 20047 (D. Alaska 2019) (Izembek road); Indigenous Envtl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 48 ELR 20203 (D. Mont. 2018) (Keystone XL pipeline); Nat. Res. Def. Council v. U.S. Dep't of Energy, 362 F. Supp. 3d 126 (S.D.N.Y. 2019) (Test Procedures Rule delay); Air All. Houston v. Envtl. Prot. Agency, 906 F.3d 1049, 48 ELR 20149 (D.C. Cir. 2018) (delay of Chemical Disaster Rule); State v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054 (N.D. Cal. 2018) (delay of Waste Prevention Rule).
36. *See* Carl Hulse, *Lisa Murkowski, a Swing Vote on Health Care, Isn't Swayed*, N.Y. Times, July 26, 2017, https://www.nytimes.com/2017/07/26/us/politics/lisa-murkowski-health-care.html.
37. Secretary Ryan Zinke (@SecretaryZinke), Twitter (Aug. 3, 2017, 9:21 AM), https://twitter.com/SecretaryZinke/status/893099623685947392.
38. *See* Michael Doyle & Pamela King, *Zinke OKs Land Swap Allowing Road Through Alaska Refuge*, E&E News, Jan. 22, 20189), https://www.eenews.net/stories/1060071575/print (showing picture of *Washington Post* with note).
39. *See* Carl Hulse, *How Arctic Drilling, Stymied for Decades, Made Surprise Return in Tax Bill*, N.Y. Times, Dec. 9, 2017, https://www.nytimes.com/2017/12/09/us/politics/artic-national-wildlife-refuge-drilling-tax-bill.html (outlining political maneuvers to secure Senator Murkowski's vote on the tax bill by including a provision to open the Arctic Refuge to oil and gas drilling).
40. *See* Doyle & King, *supra* note 38. The relationship between President Trump and Senator Murkowski seems to swing wildly from close to antagonistic and back again. By fall 2018, President Trump declared that Senator Murkowski would "never recover" from voting against Justice Brett Kavanaugh's confirmation. Philip Rucker, *Trump Says Republican Sen. Lisa Murkowski "Will Never Recover" for Voting No on Kavanaugh*,

Almost immediately, a coalition of wilderness advocates filed suit in Alaska to block this exchange agreement.[41] A little over a year later, Judge Sharon Gleason of the U.S. District Court for the District of Alaska ruled that the Trump Administration had failed to meet the requirements of an agency policy change.[42] Judge Gleason applied the standard from *Fox Television Stations* and ruled that DOI had failed on two points. First, because the "Exchange Agreement does not address or acknowledge the 2013 ROD and its contrary findings . . . the Secretary did not display 'awareness that [he was] changing position.'"[43] Second, "by failing to address the 2013 ROD, the Secretary impermissibly 'discard[ed] prior factual findings without a reasoned explanation.'"[44]

Judge Gleason relied on two cases that expanded upon the *Fox Television Stations* standard. The first decision is *Organized Village of Kake v. U.S. Department of Agriculture*,[45] an en banc U.S. Court of Appeals for the Ninth Circuit opinion holding that the second Bush Administration did not follow the standard for an agency policy change when it exempted the Tongass National Forest in Alaska from the U.S. Forest Service's Roadless Rule in an effort to open up areas to logging.[46] The Ninth Circuit reaffirmed its prior holdings that actions with "unexplained conflicting findings about the environmental impacts" were arbitrary and capricious by finding this test consistent with the *Fox Television Stations* standard.[47] The court thus faulted the Forest Service for failing "to provide a 'reasoned explanation for disregarding' the 'facts and circumstances' that underlay its previous decision."[48]

Second, Judge Gleason cited as persuasive precedent a recent District of Montana decision rejecting a reversal by the State Department to grant a border-crossing permit for the Keystone XL pipeline.[49] In that case, Judge Brian Morris ruled that replacing a section in an EIS on "Climate Change-Related Foreign Policy Considerations" with a brief conclusory statement fell "short of a factually based determination, let alone a reasoned explanation, for the course reversal."[50] Judge Gleason called that case "comparable" to the road exchange, noting "the primary difference is that here, the Secretary did not provide even a 'conclusory statement' acknowledging its policy reversal, but rather 'simply discarded' its prior findings without any explanation."[51]

The March ruling in favor of environmental plaintiffs on Izembek did not settle the matter, though. While the case was up on appeal, things took a couple of surprising turns. First, DOJ dropped the appeal on July 22, seemingly ending the case.[52] Then, two days later, news broke that Secretary of the Interior David Bernhardt had signed a new exchange agreement in secret on July 3, prior to DOJ dropping the appeal.[53] Within three months of the district court's ruling rejecting the land exchange, DOI had agreed

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Wash. Post, Oct. 6, 2018, https://www.washingtonpost.com/politics/trump-says-gop-sen-murkowski-will-never-recover-for-voting-no-on-kavanaugh/2018/10/06/31ee8164-c9a0-11e8-b1ed-1d2d65b86d0c_story.html. Attention turned to her again during President Trump's impeachment trial in the Senate. Before the start of the senate trial, Senator Murkowski expressed concern over both President Trump's conduct and Senate Majority Leader Mitch McConnell's coordination on impeachment strategy with the White House. *See*, *e.g.*, Katie Mettler & Deanna Paul, *Sen. Lisa Murkowski "Disturbed" by McConnell's Vow of "Total Coordination" With White House Over Impeachment*, Wash. Post, Dec. 25, 2019, https://www.washingtonpost.com/politics/2019/12/25/sen-lisa-murkowski-disturbed-by-mcconnells-vow-total-coordination-with-white-house-over-impeachment/; Liz Ruskin, *Murkowski, True to Form, Breaks With GOP Colleagues on Ethical Questions About Trump*, Alaska Pub. Media, Oct. 17, 2019, https://www.alaskapublic.org/2019/10/17/murkowski-true-to-form-breaks-with-gop-colleagues-on-ethical-questions-about-trump/ (quoting Senator Murkowski's criticism over the withholding of foreign aid). The Trump Administration's sudden interest this fall in exempting the Tongass National Forest in Alaska from the Roadless Rule may have been at least partially motivated as an attempt to temper this criticism. *See* Nathan Rott & Elizabeth Jenkins, *Trump Administration Moves to Expand Logging in Nation's Largest National Forest*, NPR, Oct. 15, 2019, https://www.npr.org/2019/10/15/770410803/trump-administration-moves-to-expand-logging-in-nations-largest-national-forest. Ultimately, Senator Murkowski became a crucial vote against calling witnesses in the impeachment trial. *See* Burgess Everett & Marianee Levin, *Why 4 Key Republicans Split—and the Witness Vote Tanked*, Politico, Jan. 31, 2020, https://www.politico.com/news/2020/01/31/alexander-murkowski-collins-romney-impeachment-trial-110138. Although that vote has spared her the president's ire, at least for now, Senator Murkowski noted that President Trump's behavior after acquittal showed "[t]here haven't been strong indicators this week that he has" learned a lesson from the impeachment. Nicholas Fandos & Catie Edmondson, *As a Post-Impeachment Trump Pushes the Limits, Republicans Say Little*, N.Y. Times, Feb. 12, 2020, https://www.nytimes.com/2020/02/12/us/politics/trump-senate-republicans.html (quoting Senator Murkowski). It remains to be seen if Senator Murkowski's votes during the trial or her comments after it will change the Administration's relationship with Alaska.

41. *See* Nathaniel Herz, *Environmental Groups Sue Trump Administration Over Road Through Alaska Wildlife Refuge*, Anchorage Daily News, Jan. 31, 2018, https://www.adn.com/alaska-news/rural-alaska/2018/01/31/environmental-groups-sue-trump-administration-over-road-through-alaska-wildlife-refuge-2/.
42. Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 381 F. Supp. 3d 1127, 1143, 49 ELR 20047 (D. Alaska 2019).
43. *Id.* at 1140.
44. *Id.*
45. 795 F.3d 956 (9th Cir. 2015).
46. *Id.* at 968.
47. *Id.* at 969.
48. *Id.* at 968 (alteration omitted) (quoting Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009)).
49. Indigenous Envtl. Network v. U.S. Dep't of State, 347 F. Supp. 3d 561, 48 ELR 20203 (D. Mont. 2018).
50. *Id.* at 584. A recent case comment argues that these "climate diplomacy conclusions" do not fall into the category of "prior factual findings" and therefore should not trigger a heightened review because they were not "technocratic" and because they were "time-bound." Case Comment, *Administrative Law*—Indigenous Environmental Network v. Department of State, 132 Harv. L. Rev. 2368, 2375-77 (2019). However, *Fox Television Stations* does not require a particular type of "factual finding" that is limited to "technocratic" information, nor would that distinction have much meaning. An analysis of international treaties and negotiations requires technocratic abilities just like interpreting a scientific study. Additionally, the court faulted the State Department not only for analysis of diplomacy, but also its "conclusory analysis that climate-related impacts from Keystone subsequently would prove inconsequential." *Indigenous Envtl. Network*, 347 F. Supp. 3d at 584. Second, the finding about 2015 being a critical period to act in the State Department's original Keystone XL EIS did not become "stale" years later because climate change is an ongoing and even accelerating problem. If anything, that finding became more relevant over time. The most recent international climate talks collapsed due in part to the lack of U.S. leadership despite increasing evidence of climate threats. *See* Somini Sengupta, *U.N. Climate Talks End With Few Commitments and a "Lost" Opportunity*, N.Y. Times, Dec. 15, 2019, https://www.nytimes.com/2019/12/15/climate/cop25-un-climate-talks-madrid.html.
51. Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 381 F. Supp. 3d 1127, 1142, 49 ELR 20047 (D. Alaska 2019).
52. Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, No. 19-35451, 2019 WL 4017747, at *1 (9th Cir. July 22, 2019); *see also* Scott Streater, *DOJ Drops Izembek Appeal*, E&E News, July 22, 2019, https://www.eenews.net/eenewspm/2019/07/22/stories/1060774913.
53. *See* Streater, *supra* note 4.

to the same exchange without a public process, further study, or an appellate decision.

Instead, the new Secretary of the Interior issued a new agreement accompanied by a 20-page memo providing an explanation for the reversal from the 2013 EIS and ROD.[54] This memo purports to meet *Fox Television Station*'s requirement of a "reasoned explanation," as required by Judge Gleason's ruling.[55] Within weeks, the same coalition of plaintiffs from the prior case filed another suit in the District of Alaska challenging the replacement agreement.[56] The status of the land exchange agreement and a potential road through a wilderness area is again unsettled as the parties await another ruling in the same federal courtroom.

III. The Problems of *Fox Television Stations*

Over the past few years, the Trump Administration has faced "an extraordinary record of legal defeat" at the hands of its opponents, due largely to its failure to follow the law of agency policy change.[57] Environmental law organizations have touted their extraordinarily high success rates while also emphasizing the remarkable amount of work required to counter attacks on the environment.[58] Although some of the Trump Administration's losses may be due to so-called "regulatory slop,"[59] there is a sense that the courts are playing a broader role as a bulwark against deregulatory actions. However, developments in the Izembek road and other cases illustrate legal and strategic problems with the *Fox Television Stations* standard.

This section describes five problems related to process, transparency, reasonableness, political influence, and the long-term prospects for the standard. Based on these problems, we likely are in the midst of an aberration rather than the start of a lasting legal trend. Deregulatory interests in the current Administration are angling to weaken the *Fox Television Stations* standard, and a recent oral argument suggests the current Supreme Court may be willing to adopt their arguments. At the same time, the aftermath of recent decisions shows that the wins for pro-regulatory interests are not as enduring or substantive as wins on other standards. Therefore, both sides of the debate over the administrative state have reasons to abandon a focus on this standard.

A. The Process Problem

The *Fox Television Stations* standard is predominantly procedural.[60] However, an agency does not have to conduct any new procedures on remand for this standard. Instead, an agency only has to provide "a more detailed justification."[61] This outcome is similar to the response for a complaint dismissed without prejudice.[62] In that situation, a party bringing a lawsuit is free to refile as soon as they fix any deficiencies in their original complaint.

In contrast, rulings on other procedural violations force agencies to perform new procedures even if courts do not typically make them go all the way back to the drawing board. For instance, a ruling on NEPA grounds may result in analysis of a broader range of alternatives or for a particular impact, and a ruling on procedural Administrative Procedure Act (APA) grounds may result in an agency going through notice and comment. But an agency responding to a ruling on *Fox Television Stations* grounds only needs to provide a new memo with the missing explanation.

DOI's reaction to the Izembek road decision illustrates this problem. It took Judge Gleason 261 days to rule for environmental plaintiffs on their motion for summary judgment.[63] During that time, the status quo stayed in place on the refuge and road construction could not begin—despite the president declaring the road was almost done.[64] After the ruling, though, it took DOI only 96 days to enter into a new exchange agreement—a mere blink of an eye for administrative action.[65] Because the ruling failed to force DOI to undertake any new analysis, Secretary Bernhardt simply drafted a new memo in support of the exchange agreement in order to reinstate it.[66]

From a strategic standpoint, this lack of process means that any wins on agency policy change grounds are remarkably fleeting. When facing a broad range of deregulatory actions, as in the current Administration, the ability of an agency to quickly take a second bite at the apple can strain the limited resources and personnel of opponents responding to each rollback with a new round of litigation. Instead, advocates would benefit from relying on substantive standards or other procedural standards to slow rollbacks.

From a legal standpoint, the potential for an agency to simply provide a new explanation for an action gets right up to—and possibly crosses—the line drawn in *Securities*

54. *See* U.S. Department of the Interior, Findings and Conclusions Concerning a Proposed Land Exchange Between the Secretary of the Interior and King Cove Corporation for Lands Within Izembek National Wildlife Refuge, Alaska (2019), https://www.eenews.net/assets/2019/07/24/document_pm_02.pdf [hereinafter Bernhardt Memo].
55. *See id*. at 12-13 (discussing *Fox Television Stations* standard).
56. Complaint, Friends of Alaska National Wildlife Refuges v. Bernhardt, No. 19-cv-00216 (D. Alaska Aug. 7, 2019); *see also* Liz Ruskin, *New Izembek Land Swap? New Lawsuit, Too.*, Alaska Pub. Media, Aug. 7, 2019, https://www.alaskapublic.org/2019/08/07/new-izembek-land-swap-new-lawsuit-too/.
57. Barbash & Paul, *supra* note 32.
58. *See, e.g.*, *Three Years Battling the Trump Administration's Attacks on Our Health and Environment*, Earthjustice, Jan. 17, 2020, https://earthjustice.org/features/inside-trump-administration-public-health-environment (celebrating 83% victory rate across 40 decisions); *NRDC Files 100th Lawsuit Against the Trump Administration*, Nat. Resources Def. Council, Dec. 2, 2019, https://www.nrdc.org/experts/nrdc/nrdc-files-100th-lawsuit-against-trump-administration (highlighting 92% win rate over 61 cases).
59. *See* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 Duke L.J. 1651, 1669 (2019).
60. *See* Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009).
61. *Id*. at 515.
62. *See* Fed. R. Civ. P. 41.
63. *See* Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 381 F. Supp. 3d 1127, 1133, 49 ELR 20047 (D. Alaska 2019) (March 29, 2019, ruling on a motion for summary judgment filed July 11, 2018).
64. Liz Ruskin, *Trump Says King Cove Road "Almost Completed,"* Alaska Pub. Media, June 26, 2018, https://www.alaskapublic.org/2018/06/26/trump-says-king-cove-road-almost-completed/ ("This was a road that was—I guess it's been—they've been trying to build it for 30 years. We're going to get it done very quickly. It's almost completed.").
65. *See* Streater, *supra* note 4 (new agreement reached on July 3, 2019).
66. *See* Bernhardt Memo, *supra* note 54.

and Exchange Commission v. Chenery.[67] Under that foundational administrative law case, a court must review an agency's actions based on the reasons the agency gave rather than allowing new explanations. But the *Fox Television Stations* standard is unclear about *when* an agency must provide the "reasoned explanation." Could an agency offer only a thin rationale when it takes an action, only to provide the more reasoned explanation later during litigation if an action is challenged? In fact, something along those lines happened in *Fox Television Stations* itself, and the Court accepted an explanation offered by the Solicitor General that the Federal Communications Commission had not offered.[68] Courts would lower the barrier to agency policy change and diminish the principle of *Chenery* if they allow agencies to provide the "more detailed justification" during litigation. Agencies could then float trial balloon explanations without any penalty when those balloons pop.

The dispute over the Forest Service's Roadless Rule application to the Tongass National Forest in Alaska further illustrates how the Administration is using this approach to "fast track" administrative changes.[69] This rule limits the ability of loggers to reach certain tree stands, particularly old growth, by prohibiting new roads in roadless areas on national forests.[70] This summer, Senator Murkowski expressed support for an exemption for the Tongass[71]—the same policy reversal at issue in *Kake*.[72] Not long after, the Trump Administration started the steps to reverse this policy.[73]

The Trump Administration is attempting to undertake this change without reopening the time-consuming forest planning process.[74] As a result, the Administration expects to finalize the rule by June.[75] This change could then expand the scope of already planned timber sales in the Tongass,[76] and could also allow the regional forester to expand the exemption to other Alaska forests without any public process.[77] Despite only limited opportunity for public comment, opposition to this proposal has rolled in.[78] But the Trump Administration's efforts to limit NEPA review and public comment on the Tongass exemption show how it seeks to undermine the planning process when reversing course from prior administrations.

B. The Transparency Problem

The process problem causes the transparency problem. Public participation is at the core of environmental law and administrative process. However, the lack of process in the *Fox Television Stations* standard opens the door for agencies to provide a rationale for policy change outside of the public eye both in the first instance and on remand.

According to e-mails obtained by the Freedom of Information Act, DOI started the first Izembek road agreement by looking for ways to cut out the public so that refuge staff would simply act at the direction of Secretary Zinke.[79] Then DOI reached the second agreement with King Cove on July 3 in secret without the public, including the plaintiffs in the case, knowing about it until news broke three weeks later.[80] Nothing in *Fox Television Stations* stands in the way of agencies acting in secret like DOI did here, and ruling against DOI simply because it acted in secret would be vulnerable on appeal.

An even more troubling development on transparency occurred in the Keystone XL pipeline litigation. After the State Department lost in the District of Montana for failing to provide a reasoned explanation for disregarding prior factual findings on climate change when reversing a permit decision, the Department revoked the permit and the Ninth Circuit dismissed the appeal as moot.[81] In its place, the president directly issued a new permit for the pipeline.[82] Not only was this new permit shielded from any

67. *See* 332 U.S. 194, 196-97 (1947); *see also* Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 13 ELR 20672 (1983).
68. *See* Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 563 (2009) (Breyer, J., dissenting) (raising the concern of a *Chenery* violation).
69. *See* Marc Heller, *How the Trump Admin Plans to Fast-Track Tongass Logging*, E&E News, Oct. 22, 2019, https://www.eenews.net/greenwire/2019/10/22/stories/1061347931.
70. The Tongass National Forest also plays a significant role in climate change mitigation through carbon storage. *See* Bobby Magill, *"Hail Mary Pass" in Alaska's Tongass Forest Sets Up Carbon Clash*, Bloomberg, Dec. 9, 2019, https://news.bloombergenvironment.com/environment-and-energy/hail-mary-pass-in-alaskas-tongass-forest-sets-up-carbon-clash.
71. *See* Jacob Resneck, *Murkowski Now Supports a "Complete Exemption" for Tongass From Roadless Rule*, Alaska Pub. Media, Aug. 15, 2019, https://www.alaskapublic.org/2019/08/15/murkowski-now-supports-a-complete-exemption-for-tongass-from-roadless-rule/. This change brought her views in line with her predecessor in the Senate, her father Frank Murkowski. *See* Frank Murkowski, Opinion, *Why the Tongass National Forest Should Be Totally Exempt From the Roadless Rule*, Anchorage Daily News, Sept. 5, 2019, https://www.adn.com/opinions/2019/09/05/why-the-tongass-national-forest-should-be-totally-exempt-from-the-roadless-rule/.
72. Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 968-69, 45 ELR 20145 (9th Cir. 2015).
73. *See* Juliet Eilperin & Josh Dawsey, *Trump Pushes to Allow New Logging in Alaska's Tongass National Forest*, Wash. Post, Aug. 27, 2019, https://www.washingtonpost.com/climate-environment/trump-pushes-to-allow-new-logging-in-alaskas-tongass-national-forest/2019/08/27/b4ca78d6-c832-11e9-be05-f76ac4ec618c_story.html.
74. *See* Heller, *supra* note 69.
75. *See* Kelsey Brugger, *Trump Charts a Regulatory Path Through 2020*, E&E News, Nov. 20, 2019, https://www.eenews.net/greenwire/stories/1061601447/.
76. *See* Marc Heller, *Big Alaska Timber Project Could Swell Under Trump Rules*, E&E News, Feb. 13, 2020, https://www.eenews.net/greenwire/stories/1062342071.
77. *See* Marc Heller, *Greens Worry Trump Rule Goes Beyond Tongass*, E&E News, Nov. 1, 2019, https://www.eenews.net/greenwire/stories/1061435211.
78. *See* Marc Heller, *Lawmakers Review Trump's Plan for the Tongass*, E&E News, Nov. 12, 2019, https://www.eenews.net/eedaily/stories/1061525437/. One perhaps surprising opponent of exempting the Tongass National Forest from the Roadless Rule is hunting guide Keegan McCarthy, who hopes to bend the ear of Donald Trump Jr., during an Alaska hunting trip auctioned off during the recent Safari Club International convention. *See* Elizabeth Jenkins, *Donald Trump Jr. Is Headed to Juneau for a Hunting Trip. The Cost to Join Him: $150,000.*, Alaska Pub. Media, Feb. 10, 2020, https://www.alaskapublic.org/2020/02/10/donald-trump-jr-is-headed-to-juneau-for-a-hunting-trip-and-you-could-join-him/.
79. *See* Scott Bronstein et al., *Interior Secretary Pushing Controversial Road Project*, CNN, Dec. 10, 2017, https://www.cnn.com/2017/12/10/politics/alaska-izembek-road-zinke-invs/index.html ("[T]he secretary would like to see folks on the ground doing the survey in the next couple days. He did not seem to [sic] excited about the direction that it was going out for public comment.").
80. *See* Streater, *supra* note 4.
81. Indigenous Envtl. Network v. U.S. Dep't of State, No. 18-36068, 2019 WL 2542756, at *1 (9th Cir. June 6, 2019).
82. 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 (Mar. 29, 2019).

public oversight, but it forced a ruling in the new lawsuit on whether the new permit was even subject to judicial review before reaching the merits.[83] Because the president is not subject to the APA,[84] the president is also immune from the *Fox Television Stations* standard applying that law.

Instead, the questions in the new Keystone XL case have now shifted to the higher-stake realms of the limits of presidential authority and the constitutional separation of powers.[85] While the parties brief those issues for the court, the company pursuing the pipeline, TC Energy, continues to accrue other necessary federal approvals.[86] TC Energy initially informed the District of Montana that they would begin construction work as early as February 24.[87] More recently, though, TC Energy indicated that the future of the project is uncertain and hinges largely on the resolution of this lawsuit.[88] If the new permit withstands legal scrutiny, it could provide a means for the government to sidestep administrative process when changing positions if there is even a tenuous reason for direct presidential action.[89] This approach would decrease transparency and remove the need to base decisions on scientific or technical grounds when changing policies.

C. The Reasonableness Problem

Although *Fox Television Stations* does not require a "heightened standard" for agency policy change generally, an agency does have a higher bar to clear with a "reasoned explanation" when triggered by prior factual findings or "serious reliance interests."[90] Because that case was decided in 2009, there are few appellate-level decisions applying that standard for what qualifies as a "reasoned explanation."[91] Further, this more searching review is itself written in the language of agency deference.[92] Unfortunately, the only Supreme Court case applying this standard, *Encino Motorcars v. Navarro*,[93] does not answer the question of what clears this hurdle because the agency in that case failed to provide *any* explanation.[94]

Similar to *Encino Motorcars*, Judge Gleason faulted DOI in the first Izembek decision for failing to provide any explanation for the policy reversal. The new case will have to evaluate the 20-page Secretary Bernhardt memo with only limited higher court precedent on what counts as a reasoned explanation. Secretary Bernhardt's central argument in the new memo is that he rebalanced the weight of the factors considered by Secretary Jewell, as follows:

> Secretary Jewell placed greater weight on protecting "the unique resources the Department administers for the entire Nation." I choose to place greater weight on the welfare and well-being of the Alaska Native people who call King Cove home. I value the well-being of an entire community over the impacts derived from the change in ownership of these various parcels of property which are an incredibly small percentage of Alaska's Wilderness.[95]

The argument that the decision was based on a change in methodology, specifically reweighing statutorily permissible factors, seems designed to track the D.C. Circuit's decision in *National Ass'n of Home Builders v. Environmental Protection Agency*,[96] where the court upheld a policy

83. *See* Indigenous Envtl. Network v. Trump, No. 19-28-GF-BMM, 2019 WL 7421955, at *15 (D. Mont. Dec. 23, 2019) (ruling that there were "plausible claims to relief under the Commerce Clause, the Property Clause, and [a] 2004 Executive Order"). The court has scheduled argument for motions for preliminary injunction and for summary judgment on March 23, 2020. Scheduling Order, Indigenous Envtl. Network v. Trump, No. 19-28-GF-BMM (D. Mont. Feb. 3, 2020), ECF No. 84.
84. Franklin v. Massachusetts, 505 U.S. 788, 801 (1992).
85. *See Indigenous Envtl. Network*, 2019 WL 7421955, at *15. Interestingly, Judge Morris' latest order in the Keystone XL litigation draws heavily from Judge Gleason's reasoning on the Property Clause in another decision issued on the same day as the first Izembek road decision. *See id.* at **12-13 (discussing League of Conservation Voters v. Trump, 363 F. Supp. 3d 1013, 49 ELR 20051 (D. Alaska 2019), *appeal docketed*, No. 19-35461 (9th Cir. May 29, 2019)). In *League of Conservation Voters v. Trump*, Judge Gleason held that President Trump did not have the authority to revoke President Obama's withdrawal of certain lands in the Outer Continental Shelf from leasing. *League of Conservation Voters*, 363 F. Supp. 3d at 1030.
86. *See* Ari Natter & Jennifer A. Dlouhy, *Army Corps Gives Signoff For Keystone XL Pipe Construction*, Bloomberg, Jan. 24, 2020, https://news.bloombergenvironment.com/environment-and-energy/army-corps-gives-signoff-for-keystone-xl-pipe-construction (noting permission by Army Corps to use their lands in project right-of-way); Heather Richards, *Trump Admin OKs Keystone XL Path Across Public Land*, E&E News, Jan. 22, 2020, https://www.eenews.net/eenewspm/stories/1062151229/ (describing grant of 44-mile right-of-way over federal public land).
87. TransCanada Keystone Pipeline, LP, and TC Energy Corporation's Amended Status Report, Indigenous Envtl. Network v. Trump, No. 19-28-GF-BMM (D. Mont. Jan. 4, 2020), ECF No. 75.
88. *See* Rod Nickel & Shanti S. Nair, *TC Energy Eyes Further Hurdles, Not Ready to Commit to Keystone XL Pipeline*, Reuters, Feb. 13, 2020, https://www.reuters.com/article/us-tc-energy-results/tc-energy-eyes-further-hurdles-not-ready-to-commit-to-keystone-xl-pipeline-idUSKBN2071ND.
89. Environmental groups continue to bring additional legal challenges to the other necessary federal approvals for the Keystone XL pipeline, including a recent notice of intent to sue from the Center for Biological Diversity and Friends of the Earth regarding impacts on the endangered whooping crane and pallid sturgeon. *See* Niina H. Farah, *Greens Threaten Lawsuit on KXL's Impact to Cranes, Sturgeon*, E&E News, Feb. 14, 2020, https://www.eenews.net/greenwire/2020/02/14/stories/1062350851 (quoting Center for Biological Diversity litigation director Eric Glitzenstein saying, "We'll pursue all litigation avenues that are available to halt this horrendous project").
90. Fed. Commc'ns Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009).
91. The lack of Supreme Court decisions applying *Fox Television Stations* creates an uncertainty for the standard similar to uncertainty (and inconsistency) in the Court's application of *Chevron* in the years following that ruling. Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. Rev. 112, 133-34 (2011). The similarity of the deferential language of the *Fox Television Stations* to *Chevron* Step Two draws this comparison into even sharper relief.
92. *Compare Fox Television Stations*, 556 U.S. at 515 ("requirement that an agency provide [a] reasoned explanation"), *with* Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 844, 14 ELR 20507 (1984) ("reasonable interpretation made by . . . an agency").
93. 136 S. Ct. 2117 (2016).
94. *See id.* at 2127 ("But when it came to explaining the 'good reasons for the new policy,' *Fox Television Stations*, *supra*, at 515, 129 S. Ct. 1800, the Department said almost nothing."); *see also* Adrian Vermeule, *Encino Is Banal*, Yale J. on Reg.—Notice & Comment, June 23, 2016, https://www.yalejreg.com/nc/encino-is-banal-by-adrian-vermeule/ (arguing "Encino adds nothing and changes nothing" to administrative law). The Supreme Court also reiterated the *Fox Television Stations* standard in *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015), by noting "the APA requires an agency to provide more substantial justification" when there are factual findings or reliance interests, but the Court did not apply that standard.
95. Bernhardt Memo, *supra* note 54, at 20.
96. 682 F.3d 1032 (D.C. Cir. 2012).

change when the agency "did not rely on new facts, but rather on a reevaluation of which policy would be better in light of the facts."[97] Natural resource laws typically involve conflicting multiple uses, and environmental laws generally reflect compromises on the trade offs between industrial development and pollution control. If an agency only has to indicate which of these factors they are reevaluating or assigning different weights, the requirement for a more detailed explanation will be thin indeed.[98]

This issue is currently squarely before the Supreme Court in the case about the Trump Administration's reversal on the Deferred Action for Childhood Arrivals (DACA) program.[99] Although the current Court is generally seen as skeptical of agency deference,[100] the oral argument provided evidence that—at least in the context of DACA—the Court may be willing to defer to the executive branch's thin explanation for their reversal even though there were serious reliance interests. Notably, Justice Neil Gorsuch asked, "If it's a failure of adequacy of explaining, what more is left to be said?"[101] Although the Court could limit their holding in the DACA case in several ways, their decision could also open up more deference to agencies that change their positions with only minimal explanations. This outcome would make it easier to deregulate than to regulate, because an agency could bootstrap the earlier factual analysis to only a brief explanation and still receive deference.

D. The Political Problem

The political problem is a special case of the reasonableness problem, and it reflects a strategic choice by the Trump Administration that could blow a hole in *Fox Television Stations* large enough to make it irrelevant. The Administration is arguing that the change in the presidency by itself is sufficient as a "reasoned explanation" for a policy change. If this strategy is successful, it would render the *Fox Television Stations* standard essentially meaningless and make every single regulation subject to reversal at the drop of a hat when a new president comes into office. Despite these arguments, there are no decisions holding that a change in administration alone is sufficient for policy change.

It is unlikely that President Trump cares at all about the Izembek National Wildlife Refuge or that many of his voters have even heard of it. But the political calculus of why this issue has become an Administration priority is obvious. Senator Murkowski has been a crucial swing vote in the Senate, and focusing on this issue is part of a broader effort to secure her vote on key bills and nominations. A similar story played out with the reductions of Bears Ears and Grand Staircase-Escalante National Monuments, which were motivated at least in part to get Sen. Orrin Hatch (R-Utah) to shepherd through a massive tax cut in his role as chair of the Senate Finance Committee.[102] While neither of these favors might rise to the level of a corrupt quid pro quo—and administration priorities are often influenced by legislators—these dynamics show the transactional political motivations behind Trump Administration actions that might otherwise seem scattershot.

The Trump Administration is advancing the legal theory that an administration change is a sufficient explanation through other rulemakings. The proposed revised definition of "waters of the United States" for the Clean Water Act[103] makes the argument explicitly. In the discussion of the "reasoned explanation" factor, the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers argue:

> A revised rulemaking based on a desired change in policy is well within an agency's discretion and "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal" of its regulations and programs. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (*citing Fox*, 556 U.S. at 514-15 (Rehnquist, J., concurring in part and dissenting in part)).[104]

This misleading quotation, though, takes an observation made by the D.C. Circuit in dicta and turns it into a holding. In the cited case, the D.C. Circuit merely references the inauguration of a new president to counter a claim that

97. *Id*. at 1038.

98. *See* Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 118 Mich. L. Rev. 1355, 1392-93 (2016).

99. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., No. 18-587 (U.S. argued Nov. 12, 2019). The Ninth Circuit framed their APA analysis in the terms of *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.* and *Chenery*. Regents of the Univ. of Cal. v. Dep't of Homeland Sec., 908 F.3d 476, 504-11 (9th Cir. 2018). However, the case involves a policy change, and the parties made *Fox Television Stations* arguments in their briefs and at oral argument.

100. *See, e.g.*, Steven Davidoff Solomon, *Should Agencies Decide Law? Doctrine May Be Tested at Gorsuch Hearing*, N.Y. Times, Mar. 14, 2017 (contrasting then-nominee Gorsuch's views on agency deference with Justice Antonin Scalia's views).

101. Transcript of Oral Argument at 58, Department of Homeland Security v. Regents of the University of California, No. 18-587 (U.S. argued Nov. 12, 2019).

102. *See, e.g.*, *Tribune Editorial: Why Orrin Hatch Is Utahn of the Year*, Salt Lake Trib., Dec. 25, 2017, https://www.sltrib.com/opinion/editorial/2017/12/25/tribune-editorial-why-orrin-hatch-is-utahn-of-the-year/ (describing monument reductions as "a political favor the White House did for Hatch . . . in return for Hatch's support of the president generally and of his tax reform plan in particular").

103. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.

104. Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154, 4169 (Feb. 14, 2019); *see also id*. at 4195 ("The Supreme Court has recognized that new administrations may reconsider the policies of their predecessors so long as they provide a reasonable basis for the change in approach. *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012), citing *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009) (Rehnquist, J., concurring in part and dissenting in part)."). This citation is a part of the Administration's "statutory abnegation" strategy. *See* Glicksman & Hammond, *supra* note 59, at 1704 (discussing citations to the Justice William Rehnquist concurring opinion in *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*). However, it is also regulatory slop. The *Federal Register* citation is to a Justice Rehnquist concurring opinion in *Fox Television Stations*, a case decided four years after he died, rather than a correct citation to the *State Farm* concurrence cited in *Fox Television Stations*. Although the final rule corrected the case citation, the cited opinion still does not support the agency's claim. *See* U.S. EPA, The Navigable Waters Protection Rule: Definition of "Waters of the United States," at 81, https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepbulication.pdf (prepublication version). A majority of the Supreme Court has not adopted this viewpoint.

"EPA's change of heart [was] largely inexplicable."[105] This unremarkable explanation simply responds to a disingenuous argument from the petitioners.

In *Kake*, petitioners tried to make the same argument that the Trump Administration is now advancing. The Ninth Circuit rejected these arguments, stating:

> "*Fox* makes clear that this kind of reevaluation is well within an agency's discretion." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012). There was a change in presidential administrations just days after the Roadless Rule was promulgated in 2001. Elections have policy consequences. But, [*Motor Vehicle Manufacturers Ass'n of the United States v.*] *State Farm* [*Mutual Automobile Insurance Co.*] teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.[106]

The Trump Administration can find support in Judge Milan Smith's dissent in *Kake*, which countered that "[e]lections have legal consequences."[107] The *Kake* dissent also argued that the agency "changed policy course at the direction of the new president, prioritizing some outcomes over others. *Fox* fully envisions such policy changes. It directs courts to uphold regulations that result from such changes."[108] Both the majority and the dissent recognized that a change in the presidency caused the change in the Alaska Roadless Rule, but they differed in the legal significance of that change. But if courts accepted the dissent's view, favored by the Trump Administration, the result would be regulatory uncertainty and an open door for regulatory rollbacks on a massive scale.[109]

E. The Ghost Case Problem

These problems collectively raise the question of the continued relevance of *Fox Television Stations*. On one hand, the drawbacks of making *Fox Television Stations* arguments to oppose deregulatory actions are becoming apparent. Legal victories on these grounds are as fleeting as expletives on television, agencies can quickly pivot away from regulations for which it took years to develop strong factual support, and the Administration's responses have limited public input and possibly even judicial review. On the other hand, deregulatory zealots in the Administration are pushing for a very thin review under this standard, perhaps even so low as to require only reference to a presidential election. The Supreme Court, although wary of agency deference, has signaled that it may be open to these arguments.

From either a deregulatory or pro-regulatory perspective, there are reasons to move away from the *Fox Television Stations* standard. As a result, it seems likely that the flurry of decisions using this standard at the start of the Trump Administration is more likely to be a blip than a sea change. In the long run, Justice Stephen Breyer's dissent in *Fox Television Stations* may carry the day if courts take the "hard look" of *State Farm* rather than apply some standard specific to agency policy change to determine if an action is arbitrary and capricious. As he argued, in these circumstances, the agency's

> answer to the question, "Why change?" is, "We like the new policy better." This kind of answer, might be perfectly satisfactory were it given by an elected official. But when given by an agency, in respect to a major change of an important policy where much more might be said, it is not sufficient. *State Farm*, 463 U.S., at 41-42.[110]

Such a shift might not seem like much, but the implications would be significant. Instead of looking at process or politics, courts would focus on the substance of policy changes and agencies would need to do more than just file a memo to explain a reversal. Reframing arguments in the terms of the *State Farm* standard would also avoid lowering the bar for deregulatory actions based on reevaluating existing factors without any new analysis or data.[111] For environmental advocates, this approach would be preferable. For those attempting to gut the *Fox Television Stations* standard, this potential outcome could be an "out of the frying pan and into the fryer" moment.

IV. Conclusion

The 2013 decision to reject a land exchange agreement in the Izembek National Wildlife Refuge had the hallmarks of reasoned decisionmaking. Congress directed an agency to study the problem, and that agency decided after considering the required factors and responding to political pressure and the public. The reversal, in contrast, reflects little

105. *National Ass'n of Home Builders*, 682 F.3d at 1043.
106. Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 968, 45 ELR 20145 (9th Cir. 2015).
107. *Id.* at 979 (Smith, J., dissenting).
108. *Id.* at 982 (Smith, J., dissenting).
109. Justice John Paul Stevens warned of this regulatory uncertainty in his *Fox Television Stations* dissent. *Fox Television Stations*, 556 U.S. at 541-42 (Stevens, J., dissenting).
110. *Id.* at 567 (Breyer, J., dissenting). The Ninth Circuit's decision in the DACA case foreshadows this possibility. There, the court eschewed *Fox Television Stations* and instead applied *State Farm* and *Chenery* to its analysis of the agency policy change. *See* discussion *supra* note 94.
111. The selection of methodology can have a tremendous impact in the cost-benefit state. For instance, the Trump Administration withdrew several technical documents on the social cost of carbon. Exec. Order No. 13783, 82 Fed. Reg. 16093, 16095-96 (Mar. 31, 2017). Lowballing this estimate decreases quantified benefits of efforts to mitigate climate change and decreases quantified costs of actions that emit greenhouse gases. *See* Brad Plumer, *Trump Put a Low Cost on Carbon Emissions. Here's Why It Matters.*, N.Y. Times, Aug. 23, 2018, https://www.nytimes.com/2018/08/23/climate/social-cost-carbon.html. Although courts have struck actions where the Administration left climate impacts unquantified, they have also been wary of requiring the use of a social cost of carbon and left the methods up to agency expertise. *See* WildEarth Guardians v. Zinke, 368 F. Supp. 3d 41, 77-78, 49 ELR 20041 (D.D.C. 2019) (ruling that the Bureau of Land Management had to undertake a "more robust discussion of [greenhouse gas] emissions" in oil and gas leasing but that requiring the use of a social cost of carbon as requested by plaintiffs would be "flyspecking"). The Secretary Bernhardt Memo for Izembek does not involve such a technical methodology, though. Instead, it simply claims to rebalance unquantified statutory factors. Although changes to quantitative and qualitative methods present similar difficulties, changes to quantitative methods create a more thorough administrative record for courts to review while manipulation of qualitative factors, like Secretary Bernhardt claims to have done here, can easily obscure the real reasons for an agency change.

more than a cynical political calculus and an attempt to circumvent decisionmaking processes to fast-track decisions.

The Supreme Court attempted to avoid regulatory ossification in *Fox Television Stations* by declaring that policy changes do not require a more searching review except for in certain circumstances. However, the nonexclusive list of circumstances provided—factual findings and significant reliance interests—are common in major regulatory actions. As a result, the process has become ossified. Fixing the problems with *Fox Television Stations*, which could result in the case's demise, would likely further ossify the regulatory state.

But this ossification would be beneficial because it would be asymmetrical. If courts give a hard look to agency change based on the substance of changes, those policies with extensive factual records will be more likely to survive than reversals based on political expediency.[112] This asymmetry would make previously promulgated science-based policies "stickier" under a new deregulatory president. For environmental law broadly, it would keep agencies closer to science-based statutes. And in the Izembek National Wildlife Refuge, it would require a more faithful implementation of the Wilderness Act and the refuge's statutory purpose.

112. In the short run, this change could make it more difficult for a future administration to quickly reverse the reversals of the Trump Administration. In the long run, though, this change would incentivize administrations to direct agencies to collect more data, conduct more analysis, and apply the best available science in rulemakings because those rules would be less vulnerable to reversal. This argument relies on an assumption that those rules would also better protect the environment. Several environmental regulations from the Obama Administration, such as the Stream Protection Rule, the Clean Power Plan, and the Clean Water Rule, support this assumption because they were only promulgated after years of detailed technical analysis.