

# Interesting Times

*Politics is war without bullets. By Dave Skinner*

**A**merica's food producers probably don't eat out much. But for those who have dined Chinese, odds are good someone got the fortune cookie reading, "May you live in interesting times." A blessing or curse? Well, it depends.

Fall 2013 was certainly interesting in Washington, D.C., becoming more so October 1, the scheduled day for the start of Obamacare enrollment. Republicans bent on killing the law shut down the government. After being skinned by the press and in polls, Republicans caved.

Trouble is, once the law was freed to live or die on its own, the ungrateful beast turned on its creators, with voter support of Obamacare (and its Democratic parents) falling off a cliff.

On November 21, rather than admit a mistake—what one Beltway pundit terms Obama's "unforced catastrophe"—Senate Majority Leader Harry Reid (D-NV) instead doubled down. He called on the Senate to exercise the "nuclear option" on filibusters. On a party-line vote of 52 to 48, with three dissenting Democrats, the U.S. Senate overturned 100-plus years of procedural precedent, eliminating the traditional requirement for 60 votes to end debate on presidential appointees and federal judgeships. Ending debate on Supreme Court nominees and actual legislation still require 60 votes...for now.

The partial elimination of the Senate filibuster will mean interesting times for all Americans. But a couple of other events hint that westerners are being set up to catch more than their share of fallout from Harry's nuclear option: On October 31, Interior Secretary Sally Jewell gave a talk at the National Press Club, and on November 8 the Environ-

mental Protection Agency publicly released a 331-page draft of "Connectivity of Streams and Wetlands to Downstream Waters."

## Sally Jewell Speaks

The National Park Service's newsworthy shutdown behavior last fall (including walling Honor Flight veterans away from their World War II Memorial) earned Jewell her first invitation to address the lunch crowd at the National Press Club.

Inside the Beltway, one must listen not only to what is said in speeches, but also what is unsaid. Jewell said nothing about grazing or mining or coal—in other words, no Babbitt-style 1994 "grazing reform" or 1872 Mining Law. Her discussion of oil and fracking was minimal, primarily that she'd recently "learned a lot about how companies were directionally drilling and have a smaller footprint" compared to during her short 1980's stint as a petroleum engineer.

Jewell said plenty about other topics. She ripped budget sequestration, explained the "baricades were there to protect the resources," slathered praise upon the 2009 Omnibus Public Lands Bill, and pounded Congress for not passing more wilderness bills. She further announced a Secretarial Order for landscape-level planning that would "strike the right balance for development and conservation," dog-whistling the "Blueprint for Balance" wilderness-for-leasing "Equal Ground" scheme former Interior Secretary Bruce Babbitt had introduced at the Press Club nine months prior. [See "Patterns on the Landscape," [www.rangemagazine.com](http://www.rangemagazine.com), Winter 2014.]

Secretary Jewell also lauded America's Great Outdoors program, without mentioning that she'd lobbied for AGO on behalf of the "outdoor industry" prior to her appoint-

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ment. Furthermore, despite Interior's troubles managing the assets it already controls, Jewell touted the Land & Water Conservation Fund, saying, "Congress should adopt President Obama's budget proposal to enact mandatory full funding of LWCF by 2015," no less than \$900 million per year without fail, forever.

Most critically, however, while the secretary did not refer to the Antiquities Act by name, she did declare President Obama "ready and willing to step up when Congress falls short." She said: "We would be working with the local communities," and "Certainly where there is a groundswell of support, we will focus our energies."

## Downstream Waters

It has long been generally understood that water-pollution prevention and enforcement is a state responsibility except in the case of



*Most folks would guess a seasonal high-desert wet spot like this, far from any navigable water, lacks a significant nexus triggering federal Clean Water Act oversight. Well, Downstream Waters guesses otherwise: “Wetlands in landscape settings that lack bidirectional hydrologic exchanges with downstream waters (e.g., many prairie potholes, vernal pools, and playa lakes) provide numerous functions that can benefit downstream water quality and integrity.” Therefore, “evaluations of individual wetlands or groups of wetlands could be possible through case-by-case analysis.” Or lawsuit by lawsuit.*

“navigable waters,” which can (not always) carry interstate commerce. But ever since the Clean Water Act (CWA) became law in 1972, the feds have taken an always expansive view of what is navigable, or connected, and therefore subject to direct federal regulation—especially where state regulations don’t satisfy federal desires.

Decades of running court battles have not settled jurisdiction. Making CWA matters even muddier, in 2009 the U.S. Supreme Court hopelessly split 4-1-4 in *Rapanos v. United States*. Four conservative justices ruled that water needed a “relatively permanent, standing, or continuously flowing” connection to navigable waters for the

EPA or U.S. Army Corps of Engineers to have jurisdiction. The four liberal justices basically ruled every drop, while one fence-sitting justice split the baby, calling for a “significant nexus” with navigable waters. EPA then jumped into the *Rapanos* muck with both feet, writing a 331-page *Downstream Waters* literature review, a document likely to set the stage for revised EPA rules on CWA jurisdiction.

After holding an EPA oversight hearing, Rep. Lamar Smith (R-TX) wrote an op-ed claiming *Downstream Waters* would “give the EPA unprecedented new authority over private property. And the agricultural sector would be particularly impacted.” EPA officials

denied that, of course, telling Fox News that the rule “specifically takes into account the more-narrow ruling” of CWA in *Rapanos*—that is, the baby-splitting and amorphous significant-nexus approach of the lone justice.

A National Wildlife Federation spokesperson asserted to Fox News that any new rule would be “almost entirely about clarification [so] all will be understood up front” without wondering if federal or state jurisdiction applies. But for at least two years, multiple Earthjustice member alerts have told what is really understood up front by Greens about *Downstream Waters*: “59 percent of America’s streams and 20 million acres of wetlands” not under direct EPA

oversight are “bare of protection”—blatantly ignoring state water protection agencies. In short, Downstream Waters presages a major expansion of regulatory power, which, as current U.S. Army Corps of Engineers’ regulations explain, would leave “significant nexus” determinations “ultimately dependent on judicial interpretation”—depending on the judge, of course.

### Harry Drops the Bomb

Obamacare’s passage proved that Democrats outshine Republicans as brilliant brass-knuckle politicians, able to pass enormously important legislation affecting millions of Americans on a purely party-line vote. Obamacare’s implementation proves something else: Democrats also outshine Republicans when it comes to writing enormously incompetent legislation. The result is, as Sen. Max Baucus (D-MT) let slip, a “train wreck” that may very well be impossible to salvage—even if both parties were onboard.

Does that matter to voters? It seems so. Once public attention focused on Obamacare, the president’s ratings tanked to a low point of 55 percent disapproval at the turn of the year and “generic Congress” polling that usually gives Democrats a fat edge over Republicans now has the GOP ahead. That’s not saying Republicans are

feeling voter love, or deserve any, but the Democrats “own” Obamacare. If it doesn’t work well by 2014 and/or 2016, voters in general will punish those responsible.

In the short term, the political energy sucked up by Obamacare leaves Congress almost nothing for other issues such as the deficit and economy. Neither side has the legislative initiative, and won’t until after the 2014 elections pick a winner.

What then? It’s often said that politics is war without bullets. In real war, when one’s armies can no longer advance, good generals act to protect the territory gained. How might the Democratic “generals” protect their gains? Um, how about administrative action, bureaucratic regulation, and, best of all, by packing America’s court system with lifetime appointments?

The West has seen this before: Bruce Babbitt’s April 2000 administrative establishment of the 27-million-acre National Landscape Conservation System, which of course covers all of Bill Clinton’s 19 national monuments, including a final six declared three days before Clinton left office. On top of that, there’s the Forest Service “Roadless Rule,” 58 million acres of in-fact-but-not-yet-law wilderness, implemented during Clinton’s final two weeks.

Might the West see more administrative

shenanigans? Sally Jewell seems cool with the idea. And who might be cool with more regulations to make them stick? As the *Washington Post* reported Nov. 21, 2013, the District of Columbia Circuit matters because when Americans “challenge various federal regulations in court, the cases often end up here.” Of 11 seats on the District of Columbia Circuit, eight are split evenly between Democratic and Republican appointees, with five of six semiretired senior judges Republicans. Filling the three vacancies with fresh Democrats would significantly impact the court’s ideological attitude toward existing government regulation, plus many to come.

On November 27, *Daily Caller*’s Michael Bastach reported that the EPA alone is currently drafting at least 134 “significant” regulations, including not just Downstream Waters, but over 70 dealing with “air and radiation”—including coal. Coal, of course, means electricity, upon which American producers disproportionately depend not just for light but for motors and heat.

Greens appear to have quite a stake in the nuclear option, as well. Laura Barron-Lopez of *The Hill* wrote November 23 that Greens “might be the biggest winners from Senate Democrats’ decision to gut the minority party’s filibuster rights on nominations.” Lopez explained that the EPA’s current push to implement regulations on global warming may “have a better shot at surviving legal challenges once Obama’s nominees are confirmed” for the District of Columbia Circuit.

Another *Hill* story the next day affirmed the first, that “Sierra Club [and the League of Conservation Voters] was part of a coalition of liberal groups and unions [pressuring Sen. Reid] to limit the use of the filibuster through a majority vote,” arguing that the nuclear option would “see courts and agencies filled with appointees who will protect President Obama’s key legislative achievements.”

Getting that warm green glow yet? Well, it might get a bunch warmer...

### The Fallout

Clearly, no matter your personal views, Obamacare always had the potential to be a complete game changer. Well, the game changed, just not the way some hoped. But one part of the game will never change: All politicians like to leave a mark, a legacy for after they’re gone. Those who created Obamacare will keep striving to make it succeed and, if they can, that will be their legacy, for better or worse. But if they fail, by golly, these same politicians

## Seen But Not Heard

It’s worth noting that one of Sally Jewell’s Press Club head-table guests was Meghan Kissell, Washington, D.C., office director of the Conservation Lands Foundation. As *RANGE* readers already know, CLF is the Durango, Colo.-based “nonprofit” established and funded by Swiss zillionaire Hans Wyss specifically “to protect, restore and expand the National Conservation Lands’ network of national monuments unilaterally created by President Bill Clinton and Bruce Babbitt during the last year of Clinton’s presidency.

Almost certainly, CLF-funded groups

are working hard, “through education, advocacy and partnerships,” to fabricate the groundswells Ms. Jewell needs for convincing President Obama to use executive action “if Congress doesn’t step up.” They’ll do so using CLF’s \$1.67 million-per-year, invitation-only “constituency development program” that in 2011 gave out \$623,000 in small grants to 27 groups such as Friends of the Missouri Breaks

(monument). The \$20,000 (36 percent of all income that year) CLF gave the Breaks’ “Friends” entitled two CLF staffers, Betsy Buffington and John Wallin, to seats on Friends’ board of directors.—DS

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will be looking to make their mark—someplace, on anything, and anywhere—while they still have the tools to do so.

Harry Reid probably remembers Sen. Joe Biden's protest when the Republicans considered nuking the filibuster in 2005: "You may own the field right now, but you won't own it forever," Biden said. "And I pray to God when the Democrats take back control, we don't make the kind of naked power grab you are doing." Reid will be 78 when his term expires in 2016. For an old political warrior facing "forever," regardless of whether his party wins the next election, a naked power grab that leaves a lifetime mark on the courts probably looks pretty good.

What about Sally Jewell? Did she become Interior secretary because it would look cool on her resume? No, she intends to leave her mark, in part by recruiting the right young urban minds to Interior careers through America's Great Outdoors [See "Wrong Wrong AGO," Spring 2012]. She has something more in mind, too. Jewell told her National Press Club audience, "[A]s we stand at this juncture, it's important to think about what conservation legacy we will leave for the next 50 years, for the next 100 years."

Finally, what about President Obama, whose clock runs out in 2016? What if he's rendered a rump president by an Obamacare-induced blowout in 2014 that sticks him with both a Senate and House full of intransigent Republicans? Then his options for an enduring legacy might be a little limited—to a "conservation legacy," a consolation prize he can create for himself through the Antiquities Act.

The sad reality is, neither Bill Clinton nor Bruce Babbitt ever suffered any downside from their abuse of the inland West as their personal political fallout zone. From 2001 until 2007, neither President George W. Bush nor Republicans in Congress were able to limit the Antiquities Act or roll back any of the many administrative and regulatory actions of the Clinton era.

So, from now until at least 2017, the West is left waiting to see where the fallout from Harry's nuke falls. Interesting times, indeed. Interesting times, again. ■

*Despite the ongoing national shortage of reloading components, Montana writer Dave Skinner is starting to hammer his wheelweight stash into lead foil. Just in case.*

## It's All About Science. Really.



TRUE LOVE: MAGEN DUJURENA AND CALF © LINDA DUJURENA

*"What happens when a generation who has little connection to our nation's public lands is suddenly in charge of taking care of them?"*

—Interior Secretary Sally Jewell, National Press Club, Oct. 31, 2013

Just four days after Harry Reid exercised his nuclear option in the Senate, the EPA on November 25 announced the appointment of Dr. Francesca Grifo as its new "scientific integrity official." EPA administrator Gina McCarthy (herself filibustered 136 days until approved in a July deal where Democrats promised to not nuke the filibuster) stated in the release: "Science is, and continues to be, the backbone of this agency and the integrity of our science is central to the identity and credibility of our work," and "Dr. Grifo brings a wealth of experience and knowledge to EPA."

From where? Grifo "comes to EPA from the Union of Concerned Scientists and has devoted her career to strengthening scientific integrity in the government." How, exactly? First, the UCS was founded by Massachusetts Institute of Technology professors and students as an antiwar, anti-nuke group in 1969. Now UCS is heavily into climate change, led the scientifically unproven anti-bovine growth hormone scare campaign, opposes genetic engineering, and has fought Endangered Species Act reform or repeal for years.

For example, in 2005, UCS played a role in stymieing California's Central Valley Congressman Richard Pombo's ESA reform bill, and supplied "scientific" support to the Green coalition that orchestrat-

ed Pombo's subsequent 2006 electoral defeat. Also in 2006, UCS played the leading role (in support of the Center for Biological Diversity) in accusing Julie MacDonald, Bush administration assistant Interior secretary, of "systematic interference with science" at the U.S. Fish & Wildlife Service, specifically in the listing, status and critical habitat designations for the northern spotted owl, Greater sage grouse, Gunnison sage grouse, white-tailed prairie dog, Gunnison's prairie dog, and Preble's meadow jumping mouse.

MacDonald was pilloried for the crime of trying to mitigate the economic impacts of listing and critical habitat designation (spotted owls or sage grouse, anyone?), with UCS leading the charge. Who led UCS's efforts? Francesca Grifo. Before Congress in 2011, Grifo called the ESA a "strong and significant environmental law." She related UCS's position that agencies implementing regulations should "insulate science-based decision making from political considerations"—while neglecting to say anything about whether the social and economic impacts of such decisions should be considered, of course.

How new political appointee Francesca Grifo goes about *insulating* her decisions about EPA policies from politics should be dang interesting.—DS