

GOLDEN GATE UNIVERSITY ENVIRONMENTAL LAW JOURNAL

VOLUME 14

NUMBER 1

SPRING 2022

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The subscription rate for the annual volume is \$25. International shipping carries an additional \$7.00 charge. To subscribe, contact William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, NY 14068, or call (800) 828-7571. Subscription inquiries can also be directed to the current Editor-in-Chief by emailing ELJ@ggu.edu. Back issues may be ordered directly from Hein, and can also be found in electronic format on our Digital Commons and from Hein Online. Claims for issues not received must be filed within six months of publication or they will not be honored without charge.

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Cite as: GOLDEN GATE U. ENVTL. L.J.
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THE US PRESIDENT AND ARMY CORPS' DISCRETION AND AUTHORITY WITH REGARD TO EXECUTIVE ACTION IN FURTHERANCE OF BREACHING THE LOWER SNAKE RIVER DAMS

*ELIZABETH DUNNE, ESQ.*¹

I. INTRODUCTION

This article takes an in depth look at the legal landscape applicable to the exercise of executive branch authority in the context of breaching the four dams on the lower Snake River. It demonstrates how executive authority can play an important role when it comes to addressing the climate crisis and biodiversity loss as well as in taking steps toward decolonization by dismantling structures strangling ecosystems that are the lifeblood of Native peoples.

Between 1957 and 1975, the US Army Corps of Engineers (“Corps”) constructed four dams on the lower Snake River (“LSRDs”) in what is present day eastern Washington. The Corps operates the LSRDs on behalf of taxpayers and Bonneville Power Administration (“BPA”) ratepayers.

The Snake River, the largest tributary of the Columbia River Basin, originates in what is present day Western Wyoming and travels 1,078 miles before merging with the Columbia River near Tri-Cities, Washing-

¹ Elizabeth M. Dunne, Esq. (she/her), a former judicial clerk for the Honorable Helen Gillmor in the U.S. District Court, District of Hawai'i and the Honorable B. Avant Edenfield in the U.S. District Court for the Southern District of Georgia, has been practicing law for over 20 years. J.D., Order of the Coif, Emory University School of Law, 2000. B.A. in Spanish, Philosophy, Education, *summa cum laude*, Rockhurst University, 1997.

* Many thanks to Kelly Shanahan, University of Nebraska College of Law, J.D. Candidate, Class of 2023 for her invaluable research assistance.

ton. The Columbia and Snake Rivers were once part of a vibrant ecosystem. Just two-hundred years ago, an estimated 10 to 16 million salmon and steelhead entered the Columbia River annually. Following dam construction, fewer than 60,000 wild fish return annually.

Naxiyamtáma (Snake River-Palouse) elder Carrie Jim Schuster, forcibly removed from her ancestral lands along the Snake River to build the dams, describes her relationship with a Snake River that once teemed with life, but now lies stagnant:

Back on the Snake River where I was raised we lived with the fish and animals. There were lots of beavers living all over. They made pools in the streams to cleanse the water, trees grew along the river banks and cooled the water for the salmon, and we had safe places to play. But now our rivers and streams have become nothing but lifeless reservoirs and concrete canals.²

The Nez Perce, or Nimiipuu, similarly have a longstanding relationship with the Snake River as expressed in stories, legends, and ceremonies. A recent expression of Nimiipuu's unity with, and respect for, the Snake River is seen in the Nez Perce General Council's recent passage of a resolution "recogniz[ing] that the Snake River is a living entity that possesses fundamental rights. . ." who shall be given a voice via "legal guardians whose duty it is to act on behalf of the rights and interests of the Snake River."³

In many ways, the four dams on the lower Snake River are the physical manifestation of a colonial mindset that idolizes human dominance over natural ecosystems. A mindset that perpetuates the myth of human superiority rather than fostering a balanced relationship between all living beings. This mindset continues to manifest in promises made by the latest fish passage technologies, baiting those who are not yet ready to see the abundance flowing from the vibrancy of restored ecosystems.⁴

The hope is that the analysis presented in this article will lend further clarity to a pathway for breaching the lower Snake River dams that honors the biological urgency presented by the impending extinction of Snake River salmon and steelhead populations, and, in turn of the Southern Resident Orca population who depend upon Chinook salmon to sur-

² River Song, Naxiyamtáma (Snake River-Palouse) Oral Traditions from Mary Jim, Andrew George, Gordon Fisher, and Emily Peone, collected and edited by Richard D. Scheuerman & Clifford E. Trafzer (2015) at Forward, p. xiv.

³ Resolution, SPGC20-02, available at <https://nezperce.org/wp-content/uploads/2020/09/SPGC20DRAFTMinutes.pdf>. (visited May 23, 2022).

⁴ This is not to shun all technological advances but to appropriately recognize their limitations and appreciate them as a complement to ecosystem restoration.

vive.⁵ In February 2021, 68 prominent scientists penned a letter to Northwest Governors, members of Congress and policymakers expressing the urgency and necessity of dam breaching to restore Snake River salmon populations.⁶ An urgency underscored by a 28 year former US Army Corps fisheries biologist, Chris A. Pinney, who dedicated the majority of his career to working on fish passage issues for the lower Snake and lower Columbia River dams.⁷ In an October 2021 court filing Mr. Pinney explained that “[i]n 1999, ‘[t]he Corps declined to [pursue a] recommendation to breach, even though the fisheries science pointed clearly to breaching in order to avoid Snake River [Endangered Species Act] - listed salmonid quasi-extinction within 24 years, which would be the year 2024 That is a little over two years from now, a timeframe that is consistent with the latest Nez Perce Tribal analysis finding that by 2025, over 77% of the ESA-listed Chinook populations will surpass the population level quasi-extinction threshold of less than 50 spawners within each population comprising the stock.’”⁸

For decades, coalitions of environmental organizations, salmon and orca advocates, Indigenous Peoples and Tribes, and former government officials have advocated for breaching the LSRDs to save critically endangered salmon, steelhead, and orca, address tribal treaty violations, and increase clean renewable energy at a savings to taxpayers and ratepayers. In addition to litigation strategies, dam breaching proponents are requesting that the executive branch take action to breach the dams. Yet, dam proponents frequently claim that the LSRDs cannot be breached without authorization from Congress.

Executive action has the advantage of flexibility and immediacy while Congressional authority is undoubtedly a longer, more complex, pathway. Understanding the legal landscape around executive branch authority elevates the conversation around dam breaching by alleviating misunderstandings about the need for Congressional authority to breach the dams. This redefined political setting opens new avenues for dam breaching advocates who may continue to build political support to pres-

⁵ See Declaration of Deborah Giles (Doc. No. 2412-7) and Declaration of Kenneth Balcomb III (Doc. No. 2412-9) in support of Amicus Curiae Brief of James Waddell in *American Rivers, et al. v. National Marine Fisheries Services, et al.*, Case No. 3:01-cv-00640-SI.

⁶ Margaret J. Filardo, Ph.D., et al., 2021 Scientists’ Letter: Snake/Columbia salmon and dam removal. (2021) <https://www.orcaconservancy.org/68-scientists-send-letter-to-nw-policy-makers-on-snake-river-salmon-and-dams>.

⁷ See Declaration of Chris A. Pinney (Doc. No. 2412-5) in support of Amicus Curiae Brief of James Waddell in *American Rivers, v. National Marine Fisheries Services.*, Case No. 3:01-cv-00640-SI.

⁸ Amicus Curiae Brief of James Waddell in *American Rivers v. National Marine Fisheries Services*, Case No. 3:01-cv-00640-SI, at 12, citing Declaration of Chris A. Pinney at ¶ 21.)

sure the executive branch, but without unnecessarily conceding the need for Congressional authorization.

This article addresses the authority of the executive branch – specifically, the US President and the Corps – to breach the LSRDs. Pathways for action by the executive branch include any or all of the following: (1) a Presidential Executive Order; (2) a directive by President Biden to the Corps (such as to the Corps’ Chief of Engineers, the Secretary of the Army, or the Assistant Secretary of the Army for Civil Works); or (3) a directive by the Corps’ Chief of Engineers (or the commander of the Corps’ Northwestern Division) to agency personnel.⁹

In examining both the President’s authority (Part I) and the Corps’ authority (Part II) to breach the dams, this memo concludes:

- (1) The Biden Administration can exercise executive authority to take action in furtherance of breaching the lower Snake River dams as Commander in Chief pursuant to the US Constitution Art. II, § 2, cl. 1, and in accordance with the National Emergencies Act, the Endangered Species Act, the Antiquities Act, the River and Harbor Act of 1945, and to remedy Tribal treaty violations and secure environmental justice.

The Corps has the discretion to stop funding the dams, place them in caretaker or non-operational status, and secure them by breaching. The Corps may also breach the dams in accordance with its discretion under the River and Harbor Act of 1945 and its obligations under the Endangered Species Act.

⁹ The pathways specific to the US Army Corps of Engineers are informed by consultation with James Waddell, who served for 35 years as a professional engineer with the Corps, whose assignments spanned many functions of the Corps, ranging from construction management in the field to senior policy work in the Corps Headquarters, the National Science Foundation, the Department of Energy, and the White House Office of Science and Technology Policy. Specific to the lower Snake River dams, Mr. Waddell served as the Deputy District Engineer for Programs at the Corps’ Walla Walla District for three years starting in 1999, during the development and decision-making process of that resulted in the Lower Snake River Juvenile Salmon Migration Feasibility Report/Environmental Impact Statement, Feb, 2002, available at <https://www.nww.usace.army.mil/Library/2002-LSR-Study/> (“Lower Snake River Dams FR/EIS”). Because there is flexibility in the precise pathway(s) chosen and in the language used to express such pathway(s), this memo generally refers to the President’s authority “to take action in furtherance of breaching the lower Snake River dams” with the intent of recognizing room for such flexibility.

II. THE PRESIDENT HAS THE DISCRETION AND AUTHORITY TO TAKE ACTION IN FURTHERNACE OF BREACHING THE LOWER SNAKE RIVER DAMS

A. PRESIDENT'S EXECUTIVE AUTHORITY

The President possesses both express and implied powers.¹⁰ The authority to issue executive orders is an implied power. An executive order is generally defined as “an order issued by or on behalf of the President, usually intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow.”¹¹

“The ability of Presidents to issue executive orders has developed through past practice and judicial decisions.”¹² The United States Supreme Court decision in *Youngstown Sheet & Tube Co. v. Sawyer* is the seminal case on executive authority.¹³ Consistent with the *Youngstown* case, recent court decisions considering the scope of the President's power teach that “[a] President's authority to act, as with the exercise of any governmental power, must stem either from an act of Congress, or from the Constitution itself, or a combination of the two.”¹⁴

Justice Jackson's concurring opinion in *Youngstown* has become the decisive judicial test for determining the legality of executive orders in

¹⁰ See Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 VAL. U. L. REV. 385, 430 (2007) (citing *In re Neagle*, 135 U.S. 1, 81 (1890) (holding that the President has implied and express executive powers that are in no way dependent on legislation for their existence); see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175-77 (1992).

¹¹ BLACK'S LAW DICTIONARY 610 (8th ed. 2004); See M. Patrick Moore & Kate R. Cook, *Executive Order: Strike of A Pen, Law of the Land?*, Boston B.J., Summer 2017, at 13, 14 (citing H. Comm. on Gov't Operations, 85th Cong., Executive Orders and Proclamations: A Study of a Use of Presidential Powers 1 (1957) (“Executive orders . . . are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly.”); see also Vivian S. Chu & Todd Garvey, Cong. Research Serv., RS20846, Executive Orders: Issuance, Modification, and Revocation (2014).

¹² Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 VAL. U. L. REV. 385, 387 (2007).

¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

¹⁴ *Medellin v. Texas*, 552 U.S. 491 (2008); *California v. Trump*, 379 F. Supp. 3d 928 (N.D. Cal. 2019) ; see *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 432, (1935) (President Roosevelt's executive order invalid, in part, because it did not contain any statement of constitutional or statutory authority.)

relation to Congressional action or inaction.¹⁵ Justice Jackson identified three categories under which to analyze the President's executive authority:

(1) First, when acting with express or implied legislative authorization, the executive exercises both the power vested in the executive and the authority of the legislature, and the executive's actions are presumed valid.

(2) Second, when the executive acts in the "zone of twilight" defined by Congressional silence or inaction on the issue, executive authority will be addressed on a case-by-case basis.

(3) Third, when the executive takes action that is contraindicated by Congress via express or implied disapproval, the executive's action is presumptively impermissible.¹⁶

With regard to taking executive action in furtherance of breaching the lower Snake River dams, as discussed below, President Biden's authority falls under the first category.¹⁷ He would be acting pursuant to his Constitutional authority and with express or implied legislative authorization. His actions would, therefore, be presumed valid.

¹⁵ *Medellin v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area"); see *Dames and Moore v. Regan*, 453 U.S. 654, 661 (1981) (applying the Jackson Test, which, "both parties agree brings together as much combination of analysis and common sense as there is in this area" and upholding executive order issued by President Reagan); *AFL-CIO v. Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (applying Jackson test in upholding an executive order issued by President Carter); Russell Dean Covey, Note, *Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout*, 105 YALE L.J. 1311, 1323 (1996) ("In his concurring opinion, Justice Jackson articulated a theory of Presidential power that retains force today"); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: POLICIES AND PRINCIPLES* 332-34 (2002) (describing the Jackson Test and stating, "[a]nalysis of Presidential power often starts with Justice Jackson's three part test . . . It should be noted that the dissenting Justices in *Youngstown* appeared to agree with this third approach [Justice Jackson's test] to inherent power, but disagreed as to whether Congress had acted").

¹⁶ *Dames and Moore v. Regan*, 453 U.S. at 637-38.

¹⁷ Suggested language for the exact wording of an executive order that would result in breaching the lower Snake River dams and that would best withstand any possible court challenges is beyond the scope of this memo. A recent federal district court decision - *Louisiana v. Biden*, No. 2:21-CV-00778, 2021 WL 2446010, at *3 (W.D. La. June 15, 2021) – currently on appeal, considered the validity of Section 208 of President Biden's January 27, 2021 Executive Order 14008 pertaining to a pause on oil and gas leasing. The court enjoined Section 208 from enforcement based on its interpretation of the Outer Continental Shelf Lands Act. As part of its decision to enjoy Section 208, the court considered whether the executive order's language constituted a policy statement or substantive rule, the latter of which may be subject to the notice and comment process under the Administrative Procedures Act. *Id.* at *19. Depending on the case's outcome on appeal, the case may merit consideration as part of the executive order drafting and/or adoption process.

B. THE PRESIDENT, AS COMMANDER IN CHIEF UNDER ARTICLE II OF THE US CONSTITUTION, HAS AUTHORITY TO DIRECT BREACHING OF THE LOWER SNAKE RIVER DAMS TO MITIGATE CLIMATE CHANGE IMPACTS AS A MATTER OF NATIONAL SECURITY

The President is Commander in Chief of the Army and Navy of the United States.¹⁸ The structure, history, and text of the Constitution suggest the Founders intended to entrust the President with the primary responsibility, and by extension, the power, to use the military in situations of emergency. In conferring such expansive authority, the Framers make clear that foremost among their concerns in committing this trust by the Constitution was the security of the nation. “The circumstances which may affect the public safety are [not] reducible within certain determinate limits, . . . it must be admitted, as a necessary consequence that there can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficiency.”¹⁹

The President thus has broad authority in matters pertaining to national security.²⁰ For this reason, “[c]ourts have a well-established history of according the utmost deference to executive decisions where national security is concerned.”²¹

¹⁸ See U.S. Const., Art. II, § 2, cl. 1.

¹⁹ *The Federalist* No. 23, at 122 (Alexander Hamilton) (Charles R. Kesler ed., 1999). The Emancipation Proclamation issued by President Lincoln is a notorious example of the use of the President’s powers as Commander in Chief. See Abraham Lincoln, Emancipation Proclamation, Proclamation No. 95 (January 1, 1863) (available at <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation/transcript.html>). Of course, a President may sometimes yield, or attempt to yield, his or her authority in the realm of national security for less worthy endeavors.

²⁰ See *Overseas Media Corp. v. McNamara*, 385 F.2d 308, 314 (D.C. Cir. 1967) (“It is—and must—be true that the Executive should be accorded wide and normally unassailable discretion with respect to the conduct of the national defense and the prosecution of national objectives through military means. The power of the armed services to make their dispositions of men and materiel, and to take measures for the safeguarding of each, does not admit of fragmentation.”); see also *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (the President has authority to deploy the armed forces “abroad or to any particular region.”); *Fleming v. Page*, 50 U.S. 603, 615 (1850) (“As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual.”).

²¹ *Oryszak v. Sullivan*, 565 F. Supp. 2d 14, 18–19 (D.D.C. 2008), *aff’d*, 576 F.3d 522 (D.C. Cir. 2009) (citing *See, e.g., Webster v. Doe*, 486 U.S. 592, 600, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988); *Egan*, 484 U.S. at 527, 108 S.Ct. 818; *CIA v. Sims*, 471 U.S. 159, 173, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985); *Regan v. Wald*, 468 U.S. 222, 243, 104 S.Ct. 3026, 82 L.Ed.2d 171 (1984); *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973); *United States v. Reynolds*, 345 U.S. 1, 10, 73 S.Ct. 528, 97 L.Ed. 727 (1953); *Totten v. United States*, 92 U.S. 105, 106, 23 L.Ed. 605 (1876)).

The National Security Act of 1947 and its 1949 amendments created the Department of Defense, and each military service became subject to the “authority, direction and control” of the Secretary of Defense and ultimately the President as Commander in Chief.²² The US Army Corps of Engineers is under the Department of Defense. The Corps’ mission “is to deliver vital public and military engineering services; partnering in peace and war to strengthen our nation’s security, energize the economy and reduce risks from disasters.”²³

As such, there is no question that President Biden has authority to issue directives to the Corps, as a branch of the military under the Department of Defense, in addressing issues of national security.

The next question is whether breaching the lower Snake River dams may be considered a matter of national security. The answer is yes. There is both ample support for climate change to be considered a matter of national security and ample scientific evidence demonstrating how breaching the lower Snake River dams would mitigate the impacts of climate change.

As President Obama stated in his Presidential Memorandum – “Climate Change and National Security”: “Climate change poses a significant and growing threat to national security, both at home and abroad.”²⁴

In his January 27, 2021 Executive Order, President Biden recognized:

The United States and the world face a profound climate crisis. We have a narrow moment to pursue action at home and abroad in order to avoid the most catastrophic impacts of that crisis and to seize the opportunity that tackling climate changes presents. Domestic action must go hand in hand with United States international leadership, aimed at significantly enhancing global action. Together, we must listen to science and meet the moment. . . . United States international engagement to address climate change—which has become a climate crisis—is more necessary and urgent than ever. The scientific community has made clear that the scale and speed of necessary action is greater than previously believed. There is little time left to avoid setting the world on a dangerous, potentially catastrophic, climate trajectory.²⁵

²² Pub.L. 235, 61 STAT. 496, 50 USC 402.

²³ See *Mission and Vision*, US Army Corps of Engineers (2021) <https://www.usace.army.mil/About/Mission-and-Vision/>.

²⁴ See <https://obamawhitehouse.archives.gov/the-press-office/2016/09/21/presidential-memorandum-climate-change-and-national-security>.

²⁵ Exec. Order No. 14008, 86 F.R. 7619, January 27, 2021. Indeed, 1,940 jurisdictions in 34 countries have declared a climate emergency. 15 national governments have declared a climate emergency, including the United Kingdom, Canada, France, South Korea, and Japan. The European

The language from President Biden's January 2021 Executive Order reflects the Biden Administration's stated commitment to organizing and deploying the full capacity of its agencies to combat the climate crisis and to implement a Government-wide approach that reduces the impact of climate change and conserves lands, waters, and biodiversity.²⁶ Most recently, in October 2021, the US Department of Defense and National Intelligence Council both released landmark reports that formally identify the climate crisis as a severe national security threat.²⁷

There is extensive scientific evidence demonstrating the importance of breaching the lower Snake River dams to mitigate climate change impacts.²⁸ As such, the President may exercise his authority as Commander in Chief with regard to matters of national security to take executive action in furtherance of breaching the lower Snake River dams.

C. THE PRESIDENT HAS BOTH EXPRESS AND IMPLIED CONGRESSIONAL AUTHORITY TO DIRECT BREACHING OF THE LOWER SNAKE RIVER DAMS

Consistent with the framework laid out in Part I.A. above, the President may, in addition to his Constitutional authority, rely on his authority as recognized by federal statutes in taking executive action in furtherance of breaching the lower Snake River dams. A non-exhaustive list of the acts of Congress that support the President's authority to take action with regard to breaching the lower Snake River dams includes: the National Emergencies Act, 50 U.S.C. § 1621 *et seq.*, the Endangered Species Act, 50 U.S.C. § 1531 *et seq.*, and the Antiquities Act, 54 U.S.C. § 320301 *et seq.* Exercise of such authority would help remedy tribal treaty violations and secure environmental justice. It is also consistent with the River and Harbor Act of 1945, the original authorizing legislation for the dams.²⁹

Parliament, representing 28 European member nations, has declared a climate emergency. The State of Hawaii declared a climate emergency in April 2021.

²⁶ E.O. 14008 of Jan 27, 2021 at pg. 7619.

²⁷ *Department of Defense Climate Risk Analysis*, Oct. 2021, available at <https://media.defense.gov/2021/Oct/21/2002877353/-1/-1/0/DOD-CLIMATE-RISK-ANALYSIS-FINAL.PDF>; *Climate Change and International Responses Increasing Challenges to US National Security Through 2040*, National Intelligence Estimate, Oct. 21, 2021, available at <https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2021/item/2253-national-intelligence-estimate-on-climate-change>.

²⁸ See for instance a letter written by 68 scientists advocating for the removal of the lower four snake river dams based on the negative environmental impacts of the dams on the Salmon, Steelhead, and Orca populations, available at <https://www.orcaconservancy.org/68-scientists-send-letter-to-nw-policy-makers-on-snake-river-salmon-and-dams/>.

²⁹ Pub. L. No. 79-14, 59 Stat. 10.

1. *The President May Rely on His Broad Authority Under the National Emergencies Act to Declare the Climate Crisis a National Emergency and Take Action in Furtherance of Breaching the Lower Snake River Dams to Mitigate the Climate Crisis.*

The National Emergencies Act authorizes the President to “declare [a] national emergency” to activate special emergency powers created by Congress.³⁰ Whether a national emergency exists is a “quintessential political question” beyond judicial review.³¹

The Biden Administration could join the numerous other national, state and local governments that have declared a climate emergency and pursuant to that recognition take specific actions to address the crisis, such as actions in furtherance of breaching the lower Snake River dams. In addition, or alternatively, the Biden Administration could declare a national emergency more specific to the species loss that will occur with the continued operation of the lower Snake River dams.

The National Emergencies Act thus provides a source of Presidential authority to address the climate and extinction crisis exacerbated by the lower Snake River dams.

2. *The President Has Congressional Authority to Take Action in Furtherance of Breaching the Lower Snake River Dams as Consistent With, and Necessary Under, the Endangered Species Act.*

The Endangered Species Act (ESA) requires all federal agencies to seek to conserve endangered and threatened species and to utilize their authorities in furtherance of that purpose.³² “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend towards species extinction, whatever the cost.”³³ Section 2 of the ESA further declares that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this

³⁰ 50 U.S.C. § 1621. *See generally* Emily E. Roberts, Declarations under the National Emergencies Act, Part 1: Declarations Currently in Effect (Congressional Research Serv., 2019), <https://fas.org/sgp/crs/natsec/LSB10252.pdf>.

³¹ *See* Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11, 31 (D.D.C. 2020) (“Although presidential declarations of emergencies—including this Proclamation—have been at issue in many cases, no court has ever reviewed the merits of such a declaration”).

³² 16 U.S.C. § 1531(c).

³³ *Tennessee Valley v. Hill*, 437 U.S. 153, 184 (1978).

Act.”³⁴ The term “Federal Agency” is defined as “any department, agency, or instrumentality of the United States.”³⁵ This broad definition encompasses the President directly and also as the head of federal executive agencies. Pursuant to the ESA, each agency must ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of the endangered or threatened species or result in the destruction or adverse modification of habitat of such species.³⁶ Additionally, the legislative history of the ESA “reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.”³⁷

The ESA thus expresses Congress’ implicit (if not explicit) approval of the exercise of Presidential executive authority to prevent the extinction of endangered species. The majority of scientists agree that breaching the lower Snake River dams is the best chance of saving endangered species, including salmon, steelhead, and the Southern Resident Orcas.³⁸ Indeed, the extent of the evidence is such that failing to take action to breach the dams runs directly contrary to the core purposes of the ESA. Accordingly, Presidential executive action taken in furtherance of breaching the lower Snake River dams is clearly aligned with Congress’ intent in enacting the ESA and the express directive, and corresponding authority granted, to the executive branch, including the President.³⁹

3. The President Has Congressional Authority to Breach the Dams as Consistent With the Antiquities Act.

Under the Antiquities Act, “[t]he President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.”⁴⁰

³⁴ 16 U.S.C. § 1531.

³⁵ 16 U.S.C. § 1532(7).

³⁶ 16 U.S.C. § 1536(a)(2).

³⁷ Tennessee Valley Auth., 437 U.S. at 185.

³⁸ See <https://www.orcaconservancy.org/68-scientists-send-letter-to-nw-policymakers-on-snake-river-salmon-and-dams/> (A letter written by 68 scientists advocating for the removal of the lower four snake river dams based on the negative environmental impacts of the dams on the Salmon, Steelhead, and Orca populations).

³⁹ See, e.g., *In re Neagle*, 135 U.S. 1 (1890) (affirming independent Presidential action to enforce the law).

⁴⁰ 54 U.S.C.A. § 320301.

Presidents have frequently used the Antiquities Act to establish national monuments.⁴¹ For instance, on December 28, 2016, President Obama established the Bears Ears National Monument via presidential proclamation.⁴² The Bears Ears proclamation recognized: “For hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States. Abundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts provide an extraordinary archaeological and cultural record that is important to us all, but most notably the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe.”⁴³

Like Bears Ears, the Snake River and surrounding lands, in particular the area in which the four lower Snake River are located, are culturally and spiritually significant to many Native American tribes.⁴⁴ The construction of Lower Monumental Dam flooded what has been described by archeologists as one of the most significant sites in North America. This recognition led President Lyndon Johnson to order the Corps to build a protective dike around what archeologists referred to as the “Marmes” archeological site.⁴⁵ Yet, the site flooded despite these efforts.

Exercise of Presidential authority to declare the lower Snake River a national monument is therefore consistent with the standards set forth in the Antiquities Act and is likely to survive any judicial review.⁴⁶ Moreo-

⁴¹ See <https://www.justice.gov/enrd/general-antiquities-act>: “Presidential Proclamations designating national monuments have been challenged in only a handful of cases; in each the court has upheld the President’s action. The Supreme Court has considered the Antiquities Act in three cases, each time confirming the broad power delegated to the President under the Act. *United States v. California*, 436 U.S. 32, 56 L. Ed. 2d 94, 98 S. Ct. 1662 (1978); *Cappaert v. United States*, 426 U.S. 128, 141-42, 48 L. Ed. 2d 523, 96 S. Ct. 2062 (1976); *Cameron v. United States*, 252 U.S. 450, 64 L. Ed. 659, 40 S. Ct. 410 (1920). Despite its age, the 1906 Antiquities Act is still used today by U.S. Presidents exercising their executive authority to elevate the protected status of lands and structures already under federal control. Approximately 158 monuments have been designated since 1906, many of which are managed by the National Park Service. <https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm>

⁴² See <https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>

⁴³ *Id.*

⁴⁴ See http://faculty.washington.edu/zerbe/PA_596/snake/Tribes.htm

⁴⁵ See R.W. Baunach, memorandum for Technical Engineering Branch files, 17 Sept. 1968, available in RG 7, Acc. No. T77-85-0022, WWD files, box 21, Seattle FRC. For additional background see *Seattle Times*, 27 Oct. 1968.

⁴⁶ “Courts are severely limited in their review of such congressionally authorized presidential actions.” *W. Watersheds Project v. Bureau of Land Mgmt.*, 629 F. Supp. 2d 951, 959 (D. Ariz. 2009) (citing *United States v. George S. Bush & Co.*, 310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 1259 (1940))

ver, presidential proclamations establishing national monuments often include specific directives as to the care and management of the lands.⁴⁷ A presidential proclamation establishing the lower Snake River national monument may therefore include a specific directive to breach the dams and restore the ecosystem's health.

4. *The President May Order Breaching of the Lower Snake River Dams to Remedy Tribal Treaty Violations and Secure Environmental Justice.*

The Affiliated Tribes of Northwest Indians recently passed a resolution in support of breaching the lower Snake River dams.⁴⁸ The resolution recognizes that “the United States used federal legislation and executive orders to take land from tribal peoples, and tribes ceded most of their land through treaties but reserved certain rights to protect their cultural way of life.” The inequities, breach of trust, and treaty violations remedied by breaching the dams is sufficient and compelling authority for the President to order dam breaching. Waiting for a specific Congressional or judicial remedy would unjustly allow the perpetuation of egregious wrongs. Each branch of government has the independent duty to ensure the protection of fundamental rights.⁴⁹

(internal citations omitted) (“It has long been held that where Congress has authorized a public officer to take some specified legislative action[,] when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.”). “[C]ourts can evaluate whether the President exercises his discretion in accordance with the standards set forth in the Antiquities Act, [but] . . . cannot review the President’s determinations and factual findings.” *Id.* (citing *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (“Although the Supreme Court has never expressly discussed the scope of judicial review under the Antiquities Act, . . . [t]he Court has highlighted the separation of powers concerns that inhere in such circumstances and has cautioned that these concerns bar review for abuse of discretion altogether.”); see also *Alaska v. Carter*, 462 F.Supp. 1155, 1160 (D. Alaska 1978) (“[T]he President is not subject to the impact statement requirement of [the National Environmental Policy Act] when exercising his power to proclaim national monuments under the Antiquities Act.”)).

⁴⁷ Bears Ears National Monument Proclamation (<https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>) (“For purposes of protecting and restoring the objects identified above, the Secretaries shall jointly prepare a management plan for the monument and shall promulgate such regulations for its management as they deem appropriate.”); Proclamation 658, by President Theodore Roosevelt established the Devils Tower National Monument see, <https://www.theodorerooseveltcenter.org/Research/Digital-Library/Record?libIDo293443> (In the proclamation Roosevelt created a 1,152 acre reservation around the monument to prevent further erosion).

⁴⁸ See <https://s3.documentcloud.org/documents/20792181/northwest-salmon-and-river-restoration-resolution-atni-mid-year-2021-v2.pdf>.

⁴⁹ See e.g., U.S. Const. amends. I, IV, V, VI, XV, XIX, XXIV, XXVI; Statement by President Joseph R. Biden, Jr. on the Day of Remembrance of Japanese American Internment, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/19/statement-by-president-joseph->

By way of comparison, executive orders played a key role in the beginning of the civil rights movement.⁵⁰ In 1948, President Truman issued an executive order mandating the desegregation of the United States Military.⁵¹ In 1957, President Eisenhower issued an executive order that called in the National Guard with the goal to facilitate the peaceful integration of Little Rock Central High School.⁵² In the 1960s, once Congress began to pass civil rights statutes, the need for executive orders to advance civil rights decreased.⁵³ Just as executive orders played a key role in the beginning of the civil rights movement, they may play a similar role in addressing the climate crisis and tribal treaty violations.

Presidential action in furtherance of breaching the dams is consistent with the Biden Administration's policy to secure environmental justice. In Executive Order 14008, President Biden states that "we must deliver environmental justice in communities all across America."⁵⁴ Section 219 further recognizes that "to secure an equitable economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern."⁵⁵ Under the Executive Order all federal "agencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the . . . climate-related and other cumulative impacts on disadvantaged

r-biden-jr-on-the-day-of-remembrance-of-japanese-american-internment/ ("America failed to live up to our founding ideals of liberty and justice for all, and today we reaffirm the Federal government's formal apology to Japanese Americans for the suffering inflicted by these policies.").

⁵⁰ Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 V?? U. L. R?? 385, 418, n. 134 (2007) ("[I]n his 1961 article entitled "The President Has the Power: Equality Now", THE NATION, 91-95 (Feb. 4, 1961), Dr. Martin Luther King, Jr.'s states, '[i]t is no exaggeration to say that the President could give segregation its death blow through a stroke of the pen.' *Id.* at 93. In attempting to persuade the incoming Kennedy Administration to act in the area of civil rights, Dr. King cited the inadequate measures the government had taken to advance civil rights prior to the 1960s. *Id.* at 92. As a remedy, Dr. King first suggested that the President pressure Congress for action, stating, '[t]he influence the President can exert upon Congress when, with crusading zeal, he summons support from the nation has been demonstrated more than once in the past.' *Id.* But beyond influencing the legislature, Dr. King argued for the bold use of executive orders in advancing civil rights, including orders to: (1) end discrimination in housing, (2) prohibit government contractors from discriminating, (3) end employment discrimination in executive agencies, and (4) end segregation in public hospitals. *Id.* Dr. King's strong emphasis on executive orders indicates that he found this to be the most likely area for government action. In other words, it was through executive orders and not Congressional legislation that Dr. King thought civil rights would progress.")

⁵¹ See E.O. 9981: Desegregation of the Armed Forces (1948).

⁵² See E.O. 10730: Desegregation of Central High School (1957).

⁵³ Alissa C. Wetzel, *Beyond the Zone of Twilight: How Congress and the Court Can Minimize the Dangers and Maximize the Benefits of Executive Orders*, 42 V?? U. L. R?? 385, 405-06 (2007).

⁵⁴ E.O. 14008 Sec. 201.

⁵⁵ E.O. 14008.

communities.”⁵⁶ Thus, executive action in furtherance of breaching the dams is consistent with the Biden Administration’s goal to undertake “robust actions to mitigate climate change while preparing for the impacts of climate change across rural, urban, and Tribal areas.”⁵⁷

The Tribes themselves are best able to speak to specific treaty violations, and thus, a detailed discussion of the treaty rights violated by the existence and operation of the lower Snake River dams is beyond the scope of this memorandum.⁵⁸ It is worth noting, however, that both the state and federal government have acknowledged the LSRDs’ impact. The Lower Snake River Dams Stakeholder Engagement Report, published by the Washington State Governor’s office, acknowledges that the dams affect tribal people in two main ways: (1) They affect the abundance and distribution of salmon and reduce salmon fishing opportunities and harvest available to tribal people and (2) they cut off access to tribal fishing, hunting, and harvesting of roots, plants, and berries, and prevent tribal people from holding religious and cultural ceremonies at their usual places.⁵⁹ The 2020 Record of Decision (“ROD”) for the Columbia River System Operations Environmental Impact Statement⁶⁰ similarly acknowledges that it is the tribal perspective that “breaching the dams will result in large improvements to certain salmonid populations, and this in turn would have beneficial effects to the overall function of the Northwest ecosystem and for tribal ways of life.”⁶¹

The need to remedy Tribal treaty violations and secure environmental justice thus provides additional authority for executive action in furtherance of breaching the lower Snake River dams.⁶²

⁵⁶ E.O 14008.

⁵⁷ *Id.*

⁵⁸ In *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017) the Ninth Circuit ordered Washington to fix fish passage barriers as necessary to protect tribal treaty fishing rights. During oral argument before the US Supreme Court a Justice inquired as to the implications of the decision for federal dams, such as those on the lower Snake River. The Court affirmed the Ninth Circuit by an evenly divided court, *Washington v. United States*, 138 S. Ct. 1832, 201 L. Ed. 2d 200 (2018).

⁵⁹ Lower Snake River Dams Stakeholder Engagement Report https://www.governor.wa.gov/sites/default/files/images/Lower%20Snake%20River%20Dams%20Report%20Draft%20for%20Public%20Review_122019.pdf?utm_medium=Email&utm_source=govdelivery.

⁶⁰ 85 FR 63834.

⁶¹ *Id.*

⁶² A Presidential Executive Order may also find authority as consistent with, and in furtherance of, international treaties, such as the Pacific Salmon Treaty, available at psc.org. A detailed discussion of the President’s authority under international treaties is beyond the scope of this memorandum.

5. *Presidential Action in Furtherance of Breaching the Lower Snake River Dams is Compatible with the River and Harbor Act of 1945 – the Legislation Authorizing the Lower Snake River Dams.*

In addition to the authority under the Constitution and statutes discussed above, presidential action in furtherance of breaching the dams is also consistent with the River and Harbor Act of 1945, the original authorizing legislation for the dams.⁶³ The Act authorizes the construction of various waterway projects in general terms.⁶⁴ The Act speaks to the authority of the Corps along with a few smaller directives to the War Department (dismantled in 1947) and the Secretary of the Interior.⁶⁵

In the River and Harbor Act, Congress gave the Corps broad discretion as to when or whether to build the dams.⁶⁶ The Act also contains a provision recognizing the President's authority in matters of national security.⁶⁷ The discretion expressed in both provisions supports the authority of the president to issue directives with regard to the lower Snake River dams.

First, the River and Harbor Act of 1945 did not mandate or require the construction of the lower Snake River dams. Rather, the Act gave the Corps broad discretion for "the construction of such dams as are necessary . . ." ⁶⁸. The Corps, in turn, has broad latitude in determining whether to continue to operate the dams or whether to place the dams in caretaker status for decommissioning.⁶⁹ The express language of the authorizing statute itself thus underscores the fact that there is no requirement that the Corps maintain and operate the dams.⁷⁰

Second, the Act similarly contemplates the exercise of broad executive discretion by the President. The Act contemplates that Congress would relinquish its authority to the President and the Secretary of Defense if a national security threat arises. Section 2 provides:

⁶³ Pub. L. No. 79-14, 59 Stat. 10.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ A more detailed discussion of the Act's language specific to the Corps' authority is provided in Part II below.

⁶⁷ Pub. L. No. 79-14, 59 Stat. 10.

⁶⁸ 59 Stat. at 21 (emphasis added).

⁶⁹ Moreover, when constructed, the dams failed to provide a means for juvenile fish to migrate safely downriver. Such failure was in direct contravention of Congressional intent as expressed in the authorizing legislation and calls into question the project's validity in the first place. H.R. Doc. No. 75-704 at 13 (1938). There can be no obligation to continue a project void *ab initio* (from the beginning). Indeed, the project's initial defects only further support the Corps' discretion and obligation to breach the dams.

⁷⁰ See *infra* Part I.C.5.

[N]o project herein authorized shall be appropriated for or constructed until six months after the termination of the present wars in which the United States is engaged unless the construction of such project has been recommended by an authorized defense agency and approved by the President as being necessary or desirable in the interest of the national defense and security, and the President has notified Congress to that effect.⁷¹

While this provision itself is no longer directly applicable post-construction, it illustrates the deference afforded to the President with respect to these infrastructure projects consistent with his authority in matters of national security. It also reflects the lack of necessity to construct the dams for national security reasons as neither an authorized defense agency nor the President ever recommended construction of the dams under this provision.

In sum, there was certainly no mandate to construct the dams, and there is no mandate to continue their operation. In fact, even after passage of the River and Harbor Act, it took several years, and extensive political maneuvering, before Congress appropriated funds to start the project. A determination as to the necessity and desirability of the dams some seventy years later is thus consistent with the discretion originally afforded to the executive branch at the time Congress authorized the dams.

The President's power to exercise his executive authority is at its apex when acting at the express or implied will of Congress and when acting to promote national defense and security. In taking action in furtherance of breaching the lower Snake River dams, the President may rely on the Constitution, the National Emergencies Act, the Endangered Species Act, the Antiquities Act, and the River and Harbor Act of 1945 as well as the obligation and commitment to address tribal treaty violations and secure environmental justice.

III. THE US ARMY CORPS OF ENGINEERS HAS THE DISCRETION AND AUTHORITY TO BREACH THE LOWER SNAKE RIVER DAMS

In the past decade, the Northwestern Division of the US Army Corps of Engineers ("Corps") has maintained that it does not have the authority to breach the lower Snake River dams absent Congressional

⁷¹ The River and Harbor Act of 1945, Pub. L. No. 79-14, 59 Stat. 10.

authorization.⁷² The Corps reiterated this position in the 2020 Columbia River Operating System Environmental Impact Statement, citing to the Corps Engineering Regulation (ER) 1165-2-119 Water Resources Policies and Authorities, Modifications to Completed Projects (Sept. 20, 1982) and ER 1105-2-100, Appendix G, Section III Post Authorization Changes. Based primarily on these guidelines, the Corps' Northwestern Division has taken the position that breaching the dams is inconsistent with their "authorized purpose" under the River and Harbor Act of 1945, the original legislation authorizing the project.⁷³

The Corps' headquarters in Washington, D.C., however, has never made any public statements adopting the Northwestern Division's position on the need for Congressional authority. Nor is it likely to do so since such a position runs contrary to the Corps' practice of exercising its discretion to decommission projects comparable to the lower Snake River dams without Congressional authorization. Indeed, the Corps regularly exercises its authority to "mothball" projects or place them in "caretaker" or "non-operational" status for decommissioning.⁷⁴

The position of the Corps' Northwestern division is legally unsupported and bad policy, for the following reasons:

- (1) The Corps has discretion to defund or abandon authorized projects. Placing a project in "caretaker" or "non-operational" status is

⁷² See Project Authorities Overview, dated Dec. 7, 2018, available at <https://www.nwd.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/1708265/project-authorities-overview/>.

⁷³ Pub. L. No. 79-14, section 2, 59 Stat. 10 (1945).

⁷⁴ EC 11-2-222, available at https://www.publications.usace.army.mil/Portals/76/Users/182/86/2486/EC_11-2-222.pdf?ver=2020-04-01-123227-627. The Amicus Brief of James Waddell and Declaration of James Waddell attached thereto filed on October 20, 2021 in *American Rivers et al. v. National Marine Fisheries Service et al.*, (D. Or. Case No. 3:01-cv-00640-SI) provides a detailed explanation of the well-established practice of placing projects in non-operational status and then taking such measures as necessary to secure such projects. Mr. Waddell explains: "Just because a dam or other infrastructure project has been built does not mean that the Corps is obligated to continue to seek sufficient funds to maintain it. To the contrary, the Corps must evaluate projects to determine whether their cost-benefit ratio justifies their continued operation. When a project is no longer justified, whether for economic or environmental reasons or both, the Corps will place it in caretaker or non-operational status. Part of placing a project in such status is to take necessary measures to secure it. Absent such discretion, the Corps would be beholden to Congress – waiting, perhaps decades, for legislative agreement – in order to avoid wasting billions of taxpayer dollars. This is simply not the case. The Corps frequently secures projects for which it has ceased operations and these same principles apply to breaching and securing the lower Snake River dams." (Waddell Decl. ¶ 14.) "Breaching the earthen berms is the only feasible means of protecting the concrete structure, spillways, locks etc. from continuous river flows for which they were not designed. For instance, spillway basins would erode in a matter of years and then cause structural failure of the spillways themselves. Breaching the dams by removing the earthen embankment is also the sole means of safely securing the project and allowing fish passage while in a caretaker or non-operational status." (Waddell Decl. ¶ 17.)

a routine business practice of the Corps that does not change the project purpose;

(2) The Corps' Northwestern Division relies on non-binding and inapplicable policy guidelines;

(3) The Corps has broad discretion and, in fact, the obligation to breach the lower Snake River dams in compliance with the Endangered Species Act.

A. PLACING A PROJECT IN "CARETAKER," "NON-OPERATIONAL," OR "MOTHBALL" STATUS IS A ROUTINE BUSINESS PRACTICE OF THE CORPS THAT DOES NOT CHANGE THE PROJECT PURPOSE.

The Northwestern Division's position hinges on the idea that breaching the lower Snake River dams could seriously affect authorized purposes of the project.⁷⁵ The question of whether a certain activity deviates from a project's authorized purpose, however, pertains only to a project's operation not to the placement of a project in non-operational status. It is true that the Corps may undergo an extensive analysis as to the scope of its authority to operate a project in a certain way.⁷⁶ No such analysis is required in this instance because the Corps would not be operating the project for another purpose. Rather, the Corps would be placing the LSRDs into a "caretaker", "non-operational" or "mothballed" status, meaning the project would not be operating at all. When the Corps decides, often because of fiscal shortfalls, to no longer fund a project's operation by placing it in caretaker or non-operational status, it must secure the project so that it does not pose a safety hazard, damage the environment, or become a nuisance.⁷⁷

The Corps defines placing a project into "caretaker" status as the identifier for projects for which the Corps has no intention of reactivating.⁷⁸ "Mothballing" is the designation that the Corps provides to

⁷⁵ See Project Authorities Overview, dated Dec. 7, 2018, available at <https://www.nwd.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/1708265/project-authorities-overview/>.

⁷⁶ See Memorandum for the Chief of Engineers, June 25, 2012, from Office of Chief Counsel re authority to provide for municipal and industrial water supply from the Buford Dam/Lake Lanier Project, Georgia, available at https://www.sam.usace.army.mil/Portals/46/docs/planning_environmental/acf/docs/2012ACF_legalopinion.pdf.

⁷⁷ See <https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/8301> (Section 216 disposition study for the Willamette Falls Locks); Declaration of James Waddell in support of Amicus Brief of James Waddell.

⁷⁸ EC 11-2-222, at 290, available at https://www.publications.usace.army.mil/Portals/76/Users/182/86/2486/EC_11-2-222.pdf?ver=2020-04-01-123227-627

projects that are “long term inactive.”⁷⁹ Projects are mothballed when “a decision has been made to suspend operations for an extended period of time and for which maintenance measures have been taken to prevent deterioration of essential systems.”⁸⁰ Either status (caretaker or mothballing) means that the project is not operating.

Placing the LSRDs in a non-operational status would mean that current operations to allow fish passage, such as increased spill, would not be available. Therefore, if the Corps were to place the LSRDs in non-operational status, a necessary part of securing the project would be to breach the dams by removing the earthen embankments. This method is the sole means of safely securing the project and allowing fish passage while in a non-operational status.⁸¹

The concept of transitioning projects to “caretaker” or “mothball” status is not new. It is a routine business practice of the Corps, particularly where a project’s cost-benefit analysis does not justify continued operation, and also because funding shortfalls prevent funding of all projects.⁸² The practice is so well accepted that a diligent search did not reveal any reported cases challenging the Corps’ authority to mothball projects or to transition projects to caretaker status.

Indeed, a Snake River project serves as an example. Congress authorized a five-foot navigation channel from the confluence of the lower Snake and Columbia River to Lewiston, Idaho, in the late 1800s, but the Corps abandoned it in the 1920s as economically unjustified. The Corps exercised its discretion in not maintaining the navigation channel on the Snake River for decades. Around 1938, the concept of navigation via a dam and reservoir system, rather than a navigation channel, was introduced. There was no act of Congress authorizing the Corps to abandon and defund the navigation channel project between the late 1800s and the 1920s and no challenge to the Corps’ authority in doing so.⁸³ More recently, during its BPA Federal Hydro Integrated Program Review (IPR) meetings, Bonneville Power Administration, the federal agency that mar-

⁷⁹ *Id.* at 294.

⁸⁰ *Id.*

⁸¹ *See* Declaration of James Waddell in support of Amicus Brief of James Waddell.

⁸² *See* <https://www.sas.usace.army.mil/Missions/Civil-Works/Savannah-Harbor-Expansion/SHEP-Fish-Passage/> (USACE highlights how the Savannah Bluff Lock and Dam was moved into caretaker status in 1986 when funding for the project was insufficient to sustain operation); Declaration of James Waddell in support of Amicus Brief of James Waddell.

⁸³ In relation to the 1936 Flood Control Act, the Brigadier General George B. Pillsbury, Assistant Chief of Engineers told Congress that the Corps worked to eliminate “all projects which do not appear to us to be necessary to prevent disaster,” that incidentally included requiring hydroelectric power benefits to be within the favorable cost/benefit ratio. *See*, Joseph Arnold, *The Evolution of the 1936 Flood Control Act*, pp. 72 (1988). Available at https://www.publications.usace.army.mil/Portals/76/Publications/EngineerPamphlets/EP_870-1-29.pdf.

kets power from the LSRDs, has discussed mothballing the turbine units.⁸⁴ While a much smaller step than mothballing the dams in their entirety, decisions to mothball portions of the project could have the cumulative effect of forcing the Corps to place the entire project in non-operational status. No law mandates BPA to continue to fund hydro-power projects, including the lower Snake River dams.

Another example of placing a project into a non-operational status is the Willamette Lock and Dam in Portland, Oregon. In 2006, the Corps placed the dam in caretaker status due to low use versus the cost of operations and maintenance.⁸⁵ In 2011, the dam was closed to traffic over seismic instability concerns and moved from caretaker status to non-operational status.⁸⁶ Similarly, the Corps placed another dam, the Kentucky River Navigation Project (locks 5-14), into caretaker status in October of 1981 after an analysis revealed a decrease in commerce traffic and a high operation cost.⁸⁷ The site has since been the subject of two separate lawsuits. Neither challenged the placement of the locks into caretaker status, but rather concerned (1) the signage of the dam as non-operational and (2) a contracts dispute over a possible sale of some of the dams.⁸⁸ Ultimately, the Corps determined that the original purpose of the dams, commercial navigation, was no longer being served by their operation and the locks have remained closed.⁸⁹

In 2018, the Corps decommissioned the STURGIS, a former World War II liberty ship that was converted to a floating nuclear plant in the 1960s.⁹⁰ The ship operated until 1976 when it was placed into a non-

⁸⁴ See, <http://www.bpa.gov/Finance/FinancialPublicProcesses/IPR/2016IPRDocuments/Fed%20Hydro%20IPR%202%20Notes.pdf>, page 1.

⁸⁵ <https://www.nwp.usace.army.mil/willamette/locks>.

⁸⁶ See US Army Corps, Portland District, Willamette Falls Locks Willamette River Oregon Section 216 Preliminary and Final Disposition Studies with Integrated Environmental Assessment, available at <https://usace.contentdm.oclc.org/digital/collection/p16021coll7/id/12229>. Upon decommissioning or placing a project in caretaker or non-operational status, the Secretary of the Army may conduct a disposition study as is the case with Willamette. See 33 U.S.C. § 549a (“The Secretary of the Army, acting through the Chief of Engineers, is authorized to review the operation of projects the construction of which has been completed and which were constructed by the Corps of Engineers in the interest of navigation, flood control, water supply, and related purposes, when found advisable due [to] the significantly changed physical or economic conditions, and to report thereon to Congress with recommendations on the advisability of modifying the structures or their operation, and for improving the quality of the environment in the overall public interest.”). The Corps can notify Congress of its decision to defund or abandon a project, but this process does not require Congressional authorization. See 33 U.S.C. § 549b.

⁸⁷ *Graves v. United States*, Civ. A. No. 84-62., 1986 WL 15748, at *1, *4 (E.D. Ky. 1986).

⁸⁸ *Id.*; *Kentucky v. United States*, 27 Fed. Cl. 173, 174 (1992).

⁸⁹ Gov’t Confs. Rep., *Kentucky v. United States*, Cont. Cas. Fe. (CCH) P 76427 (C.C.H.), 1992 WL 12925867.

⁹⁰ See <https://www.nab.usace.army.mil/Media/News-Releases/Article/1785799/army-corps-of-engineers-finishes-dismantling-of-historic-sturgis-vessel-former/>

operational status and stored with a reserve fleet.⁹¹ Beginning in 2012, the Corps began the process of decommissioning Army nuclear reactors in their deactivated nuclear power plant program of which the STURGIS was a part.⁹² Summer 2018 marked the completion of the STURGIS decommission with the safe removal of all components of the nuclear reactor and radioactive waste.⁹³ Recently, the Corps has begun the process of decommissioning the SM-1 former nuclear power plant in Fort Belvoir, Virginia, which it has been monitoring since the deactivation of the plant in 1973.⁹⁴ In June of 2021, the Corps announced the start of decommissioning and dismantlement.⁹⁵

Federal agencies, such as the Corps and Navy, must have the authority to take such actions to decommission projects. If this were not the case, then billions of dollars would be wasted annually while waiting for Congressional authorization and, as demonstrated by the above examples, would, in certain instances, place civilians in unnecessary risk with the need to continually monitor unstable and dangerous projects.⁹⁶

In sum, the lower Snake River dams are a prime target for placement in caretaker or non-operational status. A 1998 law review article, citing multiple Corps documents, describes the process in detail:

For example, the concrete portions of the four lower Snake River dams do not extend from canyon wall to canyon wall. A significant portion of each dam is comprised of earth and rock fill. Decommissioning or mothballing could be accomplished by removing these earth and rock fill portions of each dam, thus restoring a river channel that bypasses or detours around the concrete portion of the dam. The remaining concrete portion, containing the nonfunctioning turbines and navigation locks, could simply be made secure and “mothballed.” The river would resume its natural elevation, flowing around the re-

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See*, <https://www.nab.usace.army.mil/Missions/Environmental/SM-1/>.

⁹⁵ *Id.*

⁹⁶ The Corps business process regulation, ER 5-1-1, released on July 31, 2018, describes key tenants of the Corps’ decision making policy. *See* E.R. 5-1-1 at https://www.publications.usace.army.mil/Portals/76/ER_5-1-11.pdf?ver=2019- (the doctrine for Mission-Focused Execution on p. 2 reads: “USACE team members will make resource decisions based on what is best for the mission, the Nation, and the public, understanding impacts to all stakeholders. Leaders facilitate smart use of resources, technical competency, and innovation across the organization with a focus on mission execution. As public servants, all USACE employees have taken an oath to support and defend the Constitution and, by extension, the interests of the United States and its citizens. Accordingly, all USACE employees must make decisions based on the best interests of the Nation, the Army and the public. Recognition of this preeminent responsibility is critical to properly balancing the many interests that USACE faces in executing its missions.”).

maintaining portions of the dams. Power production and navigation would not occur, and the dams would pose no further impediment to migrating salmon.⁹⁷

Breaching the earthen berms is thus the only feasible means of protecting the concrete structure, spillways, locks etc. from continuous river flows for which they were not designed.⁹⁸ For instance, spillway basins would erode in a matter of years and then cause structural failure of the spillways themselves.⁹⁹

Congressional efforts to pass legislation requiring an act of Congress in order to structurally modify (*i.e.* breach) the dams is further acknowledgment that the Corps already has such discretion, unless expressly removed.¹⁰⁰

B. NON-BINDING AND INAPPLICABLE ARMY CORPS POLICY DOCUMENTS DO NOT PREVENT EXECUTIVE ACTION TO BREACH THE LOWER SNAKE RIVER DAMS.

The Corps cites Engineering Regulation (ER) 1165-2-119 Water Resources Policies and Authorities, Modifications to Completed Projects (Sept. 20, 1982) and ER 1105-2-100, Appendix G, Section III Post Authorization Changes (April 22, 2000) as evidence for its position that the Corps does not have authority to breach the dams without Congressional authorization.

These engineering regulations are publicly available internal guidance documents. They are not binding regulations published in the Code of Federal Regulations. The stated purpose of (ER) 1165-2-119 is “to coalesce guidance on the use of available authorities, as compared to the need for new project authorizations, for study and accomplishment of modifications to completed projects.” It is signed by James W. Ray, Colonel, Corps of Engineers, Chief of Staff, and dated September 20, 1982. Similarly, the stated purpose of ER 1105-2-100 (dated April 22, 2000) is to provide “overall direction by which Corps of Engineers Civil

⁹⁷ Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act As Applied to Endangered River Ecosystems*, 40 *Ariz. L. Rev.* 197, n.513 (1998); *see also* Declaration of James Waddell in support of Amicus Brief of James Waddell.

⁹⁸ Declaration of James Waddell in support of Amicus Brief of James Waddell.

⁹⁹ Declaration of James Waddell in support of Amicus Brief of James Waddell.

¹⁰⁰ *See* To Provide for Operations of the Federal Columbia River Power System Pursuant to a Certain Operation Plan for a Specified Period of Time, and for other Purposes, H.R. 3144, 115th Cong. (2018).

Works projects are formulated, evaluated, and selected for implementation.”¹⁰¹

Neither of these internal guidance documents discusses the process for placing projects in caretaker or non-operational status. In fact, ER 1165-2-119 supports the position that Congressional authority is not required to place the dams in caretaker, non-operational or mothball status and begin breaching as part of decommissioning. ER 1165-2-119 states that “[s]ignificant modifications to completed projects . . . require authorization from Congress.” It defines “significant modifications” as “modifications which involve new Federal construction or real estate acquisition in order to serve new purposes, to increase the scope of services to authorized purposes beyond that intended at the time of project construction, or to extend services to new beneficiaries (areas)”. Because placing a project in non-operational status does not increase the scope of purpose or extend services, it does not, therefore, fall under the definition of “significant modification”.¹⁰² Decommissioning ultimately, as per the regulation that the Corps cites to the contrary, does not need Congressional authorization.

Similarly, ER 1105-2-100 pertains to the process for formulating, evaluating, and selecting projects for implementation by the Corps, not the decommissioning of preexisting projects.

The Northwestern Division’s continued reliance on non-binding and inapplicable documents that do not reflect changing economic circumstances, the climate emergency, or the extinction crisis is untenable.

C. THE CORPS’ HAS THE DISCRETION AND AUTHORITY TO BREACH THE LOWER SNAKE RIVER DAMS IN ACCORDANCE WITH THE ENDANGERED SPECIES ACT.

As set forth above, the Corps has the discretion to place the dams in caretaker or non-operational status and breach them because doing so is not a significant modification to the project’s purpose or an alternation to the continued operation of the dams. There do not appear to have been any court challenges to such decisions. In contrast, where the Corps

¹⁰¹ See https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1105-2-100.pdf?ver=OJSERNnMS4-6VFwmhg5kEA%3d%3d.

¹⁰² In fact, ER 1165-2-119 expresses a preference for exercising the Corps’ discretion as opposed to seeking Congressional authorization. It explains that it is “a general policy of the Chief of Engineers that completed Corps projects be observed and monitored by the Corps to ascertain whether they continue to function in a satisfactory manner and whether potential exists for better serving the public interest To the extent possible, modifications to completed projects should be accomplished under existing authorities.” As discussed below, breaching the dams is within the Corps’ discretion under existing authorities.

makes significant modifications with regard to how a project is *operated*, a court reviewing such modifications will consider whether they are within the Corps' discretion. While inapplicable, even if a court were to undertake such an analysis, it is highly likely to find that the Corps has discretion to breach the dams.

In considering the scope of the Corps' authority over its projects, courts look to the statutory purposes under the original authorizing legislation and consider the extent of the Corps' discretion under that legislation as well as subsequent laws of general applicability.¹⁰³ Thus, relevant to this inquiry are a project's specific and general authorities.¹⁰⁴ Specific authorities are contained in the initial authorization for a project, sometimes referred to as the enabling legislation, and any subsequent legislation that modifies the original authorizing legislation.¹⁰⁵ General authorities are provided by legislation applicable to all Corps projects or to projects constructed after a given date.¹⁰⁶

The River and Harbor Act of 1945 is the specific, enabling legislation for the lower Snake River dams. Applicable general authorities include Section 4 of the Flood Control Act of 1944¹⁰⁷ and the Water Project Recreation Act of 1965¹⁰⁸ which authorize the Corps and Bureau of Reclamation to provide recreation facilities at their projects, and the Endangered Species Act of 1972.¹⁰⁹ In general, courts have recognized the Corps' broad discretion to operate projects in a way that benefits fish,

¹⁰³ *In re Consolidated Salmonid Cases*, 761 F.Supp.2d 802, 917 (E.D. Ca. 2011).

¹⁰⁴ *Id.* at 912.

¹⁰⁵ See, Memorandum from Earl Stockdale, Deputy General Counsel, U.S. Army Corps of Engineers (Civil Works & Env't), to Acting Assistant Sec'y of the Army 2, 3-8 (Apr. 15, 2002) [hereinafter Stockdale Memorandum] (on file with the Georgia State University Law Review) (Addressing the authorities for the Lake Lanier Project in the State of Georgia contained within the authorizing legislation).

¹⁰⁶ *Id.*

¹⁰⁷ Section 4 of the Flood Control Act of 1944 and the Federal Water Project Recreation Act of 1965 authorize the Corps and Bureau of Reclamation to provide recreation facilities at their projects. Section 4 of the Flood Control Act of 1944 applies to the Corps of Engineers: "The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized to construct, maintain, and operate public park and recreational facilities at water resource development projects under the control of the Department of the Army," 16 U.S.C. § 460d.

¹⁰⁸ The Water Project Recreation Act of 1965 states:

"It is the policy of the congress and the intent of this part (a) in investigating and planning any Federal navigation, flood control, reclamation, hydroelectric, or multiple-purpose water resource project, full consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation and for fish and wildlife enhancement and that, wherever any such project can reasonably serve either or both of these purposes consistently with the provisions of this part, it shall be constructed, operated, and maintained accordingly." 16 U.S.C. § 460/-12.

¹⁰⁹ The Endangered Species Act, 50 U.S.C. § 1531 et seq., is discussed further below.

even if adjustments to operations have some adverse impacts to other purposes.¹¹⁰

This section focuses on the Corps authority, and obligation, to act in compliance with the ESA. Courts have repeatedly found the Corps in violation of the ESA with regard to its operation of the lower Snake River dams and have even warned “of the possibility of breaching the four dams on the lower Snake River, if all else fails.”¹¹¹

The ESA requires all federal agencies to seek to conserve endangered and threatened species and to utilize their authorities in furtherance of that purpose.¹¹² “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend towards species extinction, whatever the cost.”¹¹³ Section 2 of the ESA declares that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”¹¹⁴ Pursuant to this policy, each agency must ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of the endangered or threatened species or result in the destruction or adverse modification of the habitat of such species.¹¹⁵ The legislative history of the ESA further “reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.”¹¹⁶

There are relatively few cases discussing the scope of the Corps’ authority, or obligation, to significantly modify a project’s operation where such modification is necessary to comply with the ESA, but arguably contrary to the purposes for which Congress originally authorized the project. The analogous cases that have addressed this issue, however, show that the ESA not only provides the Corps with discretion to breach the dams in this case, but since there is an imminent threat to endangered species, must be interpreted as requiring the Corps to do so.

In *Tennessee Valley Auth. v. Hill*, the United States Supreme Court considered the obligations of federal agencies to comply with the protec-

¹¹⁰ See *Clearwater County, Idaho v. U.S. Army Corps of Engineers*, No. 97-35014, 1998 WL 152741 (9th Cir. Apr. 2, 1998) (unpublished disposition) (finding fish and wildlife to be an authorized purpose of Dworshak Dam and allowing adjustments in operations to benefit fish, even if the adjustments had some adverse impact to other purposes).

¹¹¹ *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, No. CV 01-640-RE, 2005 WL 2488447, at *3 (D.Or. Oct. 7, 2005).

¹¹² 16 U.S.C. § 1531(c).

¹¹³ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

¹¹⁴ 16 U.S.C. § 1531.

¹¹⁵ 16 U.S.C. § 1536(a)(2).

¹¹⁶ *Tennessee Valley Auth.*, 437 U.S. at 185.

tions afforded to species listed under the Endangered Species Act.¹¹⁷ After the passage of the ESA in 1973 and after the discovery of the snail darter that same year, scientists determined that the snail darter population was critically low. The Secretary of the Interior listed the snail darter as an endangered species in 1975.¹¹⁸ After scientists began to study the fish more closely, they determined that the snail darter almost exclusively resided in the Little Tennessee River where it needs clean gravel substrate in cool water with low-turbidity.¹¹⁹ Following this discovery, the Secretary of the Interior declared the area of the Little Tennessee to be “critical habitat” for the snail darter and announced that, pursuant to section 7 of the ESA, all federal agencies needed to insure that their actions would not result in the destruction or modification of this particular critical habitat area.¹²⁰ The Secretary of Interior directed the notice to the Tennessee Valley Authority (TVA), which at the time was developing the Tellico Dam upstream from the critical habitat.¹²¹

Despite this direction by the Secretary of the Interior, Congress approved funds for TVA to continue to develop and build the Tellico Dam.¹²² Eventually, environmental organizations brought an action pursuant to the ESA seeking to enjoin the completion of the dam and impoundment of the reservoir based on the critical habitat and endangered listings of the snail darter.¹²³

Despite dismissal by the lower court, on appeal, the Supreme Court, with Chief Justice Burger writing the majority opinion, held that the ESA prohibited completion of the dam, where operation of the dam would either eradicate the known population of the snail darter, an endangered species, or destroy its critical habitat.¹²⁴ The Supreme Court came to this conclusion, even though the dam was virtually completed and even though Congress continued to appropriate large sums of public money on the project despite having been apprised of the project’s apparent impact upon the snail darter’s survival.¹²⁵

Dam breaching opponents have argued that because Congress authorized the dams’ construction, the Corps’ decision to breach the dams or a court’s injunction ordering breach would violate congressional intent. The Court in *Tennessee Valley Auth. v. Hill*, however, faced similar

¹¹⁷ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

¹¹⁸ *Id.* at 160–161.

¹¹⁹ *Id.* at 162.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 163–164.

¹²³ *Id.* at 164.

¹²⁴ *Id.* at 171–174.

¹²⁵ *Id.* at 189.

arguments raised by TVA. There, TVA pointed out that Congress had continued to appropriate millions of dollars for the completion of the dam. Yet the Court held, in no uncertain terms, that the duty of the action agency was first and foremost to comply with the clear mandates of section 7 of the ESA.¹²⁶ The Court recognized that,

[I]t may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million . . . even after congressional Appropriations Committees were apprised of its [the dam's] apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.¹²⁷

Therefore, the ESA affirmatively commands that federal agencies ensure that actions carried out by them will not jeopardize the continued existence of an endangered species. The *TVA* case teaches that the ESA overrides other conflicting Congressional goals, whether stated in authorizing legislation or otherwise, as well as Congressional decisions to appropriate funds for the building or continued operations of a dam.¹²⁸

While *Tennessee Valley Authority* remains good law, since that decision, courts have issued some opinions that accommodate the interests of industry and federal agencies by developing a framework that could be seen as diluting the ESA's significance in certain instances. The Eighth Circuit Court of Appeals decision in *In re Operation of the Mo. River Sys. Litig.* could be characterized as one of those opinions.¹²⁹ That said, the *Missouri River* case sets forth one framework under which courts may consider the scope of the Corps' authority to comply with the ESA in *operating* projects.¹³⁰ That framework, as applied to the lower Snake River dams supports the conclusion that the Corps must comply

¹²⁶ Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act As Applied to Endangered River Ecosystems*, 40 Ariz. L. Rev. 197, 269 (1998) ("The words of the Court in *TVA* leave no doubt as to the necessity of meaningful injunctive relief in face of a section 7 violation").

¹²⁷ *Id.* at 172–173.

¹²⁸ *Id.* at 173. See also *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (holding district court erred in not enjoining salmon habitat-damaging activity upon finding section 7 consultation violation); *Silver v. Babbitt*, 924 F. Supp. 976, 988 (D. Ariz. 1995) (The court issued a sweeping injunction prohibiting timber harvest activities across Southwest forests, noting, "(I)n cases involving the Endangered Species Act, Congress has removed from the courts their traditional equitable discretion of balancing the parties' competing interests.").

¹²⁹ *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618, 630 (8th Cir. 2005).

¹³⁰ It is questionable whether this framework accords with the *TVA* decision and the ESA's express language, and may therefore be challenged as diluting the ESA's import. But more funda-

with the ESA, even if it would mean operating the dams in a manner that eliminates their ability to fulfill a Congressionally authorized project purpose.

The Missouri River case involved consideration of whether the Corps had authority to operate the Missouri River's dam and reservoir system in a way that would eliminate river navigation during certain drought conditions. The court addressed the contention that "the ESA does not apply to the operation of the reservoir system because ESA compliance would interfere with downstream navigation, a project purpose that is mandated by statute such that the Corps has no discretion in meeting it."¹³¹ The court rejected this contention because of the discretion afforded the Corps under the Flood Control Act of 1944 ("FCA") to balance navigation with other interests.¹³² Specifically, the FCA did not impose a duty to maintain a minimum level of downstream navigation, but rather allowed the Corps to decide how to balance navigation with other interests. As such, the court held that "the operation of the reservoir system [was] subject to the requirements of the ESA."¹³³ Thus, where the Corps has sufficient discretion under the statute authorizing the project, it has the obligation to comply with the ESA.¹³⁴

More recently, in 2020, in *Northwest Environmental Defense Center et al. v. U.S. Army Corps of Engineers et al.*, the District Court of Oregon determined that the Corps' discretionary actions in operating and maintaining dams in the Willamette River basin without implementing reasonable and prudent measures to protect the salmon resulted in an unlawful taking under section 9 of the ESA.¹³⁵ In considering the Corps' liability under Section 9 of the ESA, the court expressly rejected the Corps' argument that it could not be liable for unlawful "takes" of endangered species caused by "the mere existence of dams that Congress authorized decades ago knowing that they would block passage."¹³⁶ The court's decision thus teaches that the Corps is not excused from compli-

mentally, as discussed above, the issue here is not project operation, but placement of a project in non-operational status.

¹³¹ *In re Operation of Missouri River Sys. Litig.*, 421 F.3d at 630.

¹³² *Id.* at 631.

¹³³ *Id.* at 631.

¹³⁴ See also *American Rivers v. Army Corps of Engineers*, 271 F.Supp.2d 230, 251–253 (D.D.C. 2003) (Concluding that under the Flood Control Acts the Corps has discretion, and thus, an obligation to manage rivers in compliance with the Endangered Species Act. This is based on the fact that under the ESA, governmental agencies are obligated to do everything they can to protect endangered and threatened species to the extent that another governing statute provides them with the discretion to do so).

¹³⁵ *Nw. Env't Def. Ctr. v. U.S. Army Corps of Engineers*, 479 F. Supp. 3d 1003, 1023 (D.Or. 2020).

¹³⁶ *Id.*

ance with the ESA simply because the legislation authorizing the dams did not account for the dams' impact on endangered species.

A 2021 opinion in that same case provided a more in depth discussion of the Corps' authority to modify project operations for the benefit of ESA listed salmonids.¹³⁷ The court, in line with the *Missouri River* framework, considered the extent of the Corps' discretion under the original authorizing legislation.¹³⁸ The *Northwest Environmental Defense Center* case involved dams in the Willamette River Basin authorized under the Flood Control Act of 1950. In considering the extent of the Corps' discretion to conduct operational measures to preclude hydropower generation for the benefit of listed salmonids, the court reasoned that the Corps had broad discretion to do so, although it could not eliminate hydropower generation in its entirety. The Court based its reasoning on the language of the 1950 Flood Control Act and HD 531.¹³⁹ This is in contrast to the River and Harbor Act of 1945 which authorized the lower Snake River dams, and the Flood Control Act of 1944 at issue in the *Missouri River* case. The *Northwest Environmental Defense Center* case thus further teaches that examining the particular congressional authorizing documents is crucial to analyzing the Corps' authority to implement measures necessary to comply with the ESA in operating Corps' projects.

The *Northwest Environmental Defense Center* case did not involve review of an action by the Corps to place the dams at issue in caretaker or non-operational status. As noted above, that is the appropriate analysis for considering breach of the lower Snake River dams since breach is a cessation of operations necessary to secure the project. That said, even if a court were to undertake a similar analysis of the lower Snake River dams authorizing legislation (the River and Harbor Act of 1945), that Act

¹³⁷ *Northwest Environmental Defense Center et al. v. U.S. Army Corps of Engineers et al.*, 3:18-CV-00437-HZ, 2021 WL 3924046, at *12 (D. Or. Sept. 1, 2021)

¹³⁸ As discussed above, this framework may be challenged as inconsistent with the language and intent of the ESA and as deviating from the US Supreme Court's holding in *TVA*.

¹³⁹ *Northwest Environmental Defense Center, et al. v. U.S. Army Corps of Engineers et al.*, 3:18-CV-00437-HZ, 2021 WL 3924046, at *12 (D. Or. Sept. 1, 2021) ("In sum, the 1950 FCA and HD 531 are intended to serve as a general guide for operating the WVP, provide an 'exception' to the power storage requirement when there is insufficient water to support fish life, expressly recognize that further studies were needed to find solutions for the dams' impacts on salmonids, provide that the rule curves should not be considered final if further research indicated changed operations were needed, and grant broad discretion to the Chief of Engineers to make operational modifications he or she finds advisable. Because the deep drawdowns Plaintiff seek do not appear to be foreign to the original purpose of the project, are 'substantially in accordance with the plans recommended in' HD 531, and do not equate to an abandonment of the purpose of the WVP's power storage, the Court will order this relief.").

demonstrates the Corps' broad discretion, not only for drawdown, but also for breach.

The River and Harbor Act of 1945 authorized construction of the lower Snake River dams. The River and Harbor Act of 1945 affords the Corps much broader discretion than the Flood Control Act of 1950 discussed in *Northwest Environmental Defense Center* and even than the Flood Control Act of 1944 discussed in the *Missouri River* case. With regard to the Snake River, the Act gave the Corps discretion for “the construction of such dams as are necessary, and open channel improvement for purposes of providing slack water navigation and irrigation in accordance with the plan submitted in House Document Numbered 704, Seventy-fifth Congress, with such modifications as do not change the requirement to provide slack-water navigation as the Secretary of War may find advisable after consultation with the Secretary of the Interior and such other agencies as may be concerned. . . .”

House Document 704 recommended a comprehensive and coordinated plan for the Columbia and Snake Rivers for the “combined interests of navigation, irrigation, and the development of hydroelectric power.” Importantly, House Document 704 also emphasized the need to provide for fish and wildlife. Immediately after recommending the additional dams, the report states: “Provisions should be made for the passage of fish”, while the report’s syllabus similarly reminds that “[a]dequate provision should be made at all dams for passage of fish, . . .”¹⁴⁰

Under the River and Harbor Act of 1945, the Corps enjoys broad discretion and therefore must comply with the ESA. First, the River and Harbor Act of 1945 did not mandate or require the construction of the lower Snake River dams, but rather left it to the Corps’ discretion to construct such dams “as are necessary”. The Act thus provided the Corps with broad latitude in determining whether to construct the dams. It, in turn, has broad latitude in determining whether or how to continue to operate the dams.

Second, the Act contains language - “with such modifications as do not change the requirement to provide slack-water navigation *as the Secretary of War may find advisable after consultation with the Secretary of the Interior and such other agencies as may be concerned* — expressly deferential to the heads of federal agencies. Such language further indicates Congress’ intent to confer broad discretion on relevant federal agencies, including the Corps.

¹⁴⁰ H.R. Doc. No. 75-704 at 13 (1938).

Third, similar to the FCA as discussed in the *Missouri River* case, the River and Harbor Act of 1945 identified a number of potentially competing interests, including the welfare of fish and wildlife. The Act, via incorporation of House Document 704, expressly contemplates adequate provisions for fish passage. Just as the FCA did not specify a particular level of river flow or length of navigation season, neither the Act, nor House Document 704, specify the type or extent of such fish passage provisions, thereby leaving the Corps with broad discretion to make that determination. The Corps certainly can, and at this point must, come to terms with dam breaching as the only viable fish passage option that will satisfy its obligations under the ESA. For these reasons, if the Corps were to implement breaching of the lower Snake River dams to comply with the ESA, it is highly unlikely that the court would find it beyond the scope of the Corps' authority.

Finally, the Ninth Circuit Court of Appeals decision in *National Wildlife Federation v. U.S. Army Corps of Engineers* does not foreclose the breach of the LSRDs.¹⁴¹ In *National Wildlife Federation v. U.S. Army Corps of Engineers*, the Ninth Circuit Court of Appeals considered if the Corps' decision to continue to operate the lower Snake River dams was arbitrary and capricious in light of plaintiffs' argument that the operation of the dams caused water temperature exceedances in violation of state water quality standards incorporated into the Clean Water Act (CWA).¹⁴² At issue was a 2001 Record of Consultation and Statement of Decision (ROD) in which the Corps acknowledged that the *construction and existence* of the dams may contribute to a shift in the temperature regime of the Snake River, but concluded that the operation of the dams was not causing temperature exceedances.¹⁴³ The Corps took the position that there were no operational changes it could undertake to significantly decrease river water temperatures.¹⁴⁴ Plaintiffs challenged the Corps' conclusion that there was nothing more that it could do to reduce water temperature in the lower Snake River.¹⁴⁵ The Court agreed with the Corps, upholding its "view that there [were] no additional feasible steps it could take to decrease water temperatures on the lower Snake River, consistent with the mandate of Congress to build the dams and Congress's purposes for them."¹⁴⁶

¹⁴¹ Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers, 384 F.3d 1163 (9th Cir. 2004).

¹⁴² *Id.*

¹⁴³ *Id.* at 1169.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1172.

¹⁴⁶ *Id.* at 1180. More recent events have called the veracity of this position into question as the Corps has since been required by the Washington State Department of Ecology to manage the

This case does not foreclose the Corps' ability to exercise its discretion to breach the dams in compliance with the ESA.¹⁴⁷ First and foremost, the parties neither presented arguments about, nor did the Court discuss, the Corps' ability to place projects in caretaker or non-operational status. Nor was breaching the dams at issue. Rather, plaintiffs argued that the Corps could have adopted a "natural river operation" method of operating the dams, which they argued was "merely a method of operation."¹⁴⁸ As discussed above, the framework for analyzing continued operation of Corps' projects is inapplicable to the Corps' decision to place projects in non-operational or caretaker status.

Second, the case is distinguishable because it involved a challenge under the Clean Water Act, not the Endangered Species Act.¹⁴⁹ Under the Youngstown framework, it is clear that the Congressional intent of the specific act matters. While the court did discuss the Corps' authority under the River and Harbor Act, it did so in this limited context - focusing exclusively on how the River and Harbor Act interacted with the CWA, with no analysis of the ESA or any other applicable statutes. Under the Supreme Court's TVA decision, there is no question that the court can order compliance with the ESA even where Congress authorizes and continues to fund a Corps' project. The Eighth Circuit's Missouri River decision further illustrates the depth of analysis courts have undertaken in considering the Corps' obligation to comply with the ESA. Such extensive review and analysis is wholly absent from the NWF decision.¹⁵⁰

Third, the court reviewed the Corps' ROD under the Administrative Procedure Act (APA) and applied a "highly deferential" standard of review.¹⁵¹ The question before the court, therefore, was whether the Corps acted arbitrarily or capriciously in determining to not select "natural river operation" as a viable means of addressing excessive water temperatures in violation of the CWA. The court, thus, started from a place of giving

dams to reduce water temperatures but has yet to acknowledge that breaching the lower Snake River dams is required.

¹⁴⁷ *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163 (9th Cir. 2004).

¹⁴⁸ *Id.* at 1173.

¹⁴⁹ *Id.* at 1178 ("we do not interpret the compliance provision of the CWA as requiring that the dams authorized by Congress be removed.").

¹⁵⁰ Instead of considering the extent of the Corps' discretion under the River and Harbor Act of 1944 (the original authorizing legislation), the court considered whether the "state water quality standards functioned as a *repeal* of the Congressional legislation that authorized the construction of the four dams in question." *Id.* at 1178 (emphasis added). Whether general legislation, such as the CWA or ESA, repeals the legislation authorizing the Corps' project at issue is not the proper inquiry. Such a framework creates an impossible standard and runs directly contrary to the ESA's express language and the Supreme Court's holding in *TVA*.

¹⁵¹ *Id.* at 1174.

great deference to the Corps. If the Corps had, instead, selected the “natural river operation” alternative, the court may very well have affirmed that decision under the highly deferential standard.

D. THE WATER RESOURCES DEVELOPMENT ACT PROCESS DOES NOT APPLY

Generally, a Water Resources Development Act is legislation that authorizes the US Army Corps of Engineers civil works activities. The Congressional Research Service has published a primer on Water Resources Development Acts, updated September 2021.¹⁵² The primer provides an overview of how the WRDA process works. It explains how “WRDA provisions generally add to or amend existing USACE authorizations and provide congressional policy direction to the agency. Drivers for enactment of a new WRDA typically include nonfederal and congressional interest in new studies and projects as well as adjustments to existing projects, programmatic authorities, and policies.” WRDAs are authorization bills.¹⁵³

The *Seattle Times* has reported that Senator “Murray will work to secure in the 2022 Water Resources Development Act an authorization of an analysis of the four Lower Snake River dams that will evaluate the costs and impacts of breaching them alongside other options.”¹⁵⁴ This raises the question of whether a study, or any other kind of authorization, under a WRDA is necessary (as opposed to optional) prior to breaching the dams.

The answer is no. For the same reasons as set forth above, breaching does not require authorization or deauthorization under the WRDA process. The WRDA process does not supplant the Corps’ authority to place projects in caretaker or non-operational status. Nor does it supplant the analysis that courts apply to determine whether the Corps has sufficiently broad discretion under a project’s original authorizing legislation to comply with the ESA.

Senator Murray speaks to seeking authorization for an analysis of the lower Snake River dams in a WRDA. Yet, funding the costly and time-consuming process of another feasibility study is redundant and unnecessary. Both the 2002 FR/EIS and the 2020 CRSO EIS studied

¹⁵² Available at <https://crsreports.congress.gov/product/pdf/IF/IF11322>.

¹⁵³ *Army Corps of Engineers: Water Resource Authorization and Project Delivery Processes*, updated April 19, 2019, Congressional Research Service, available at <https://sgp.fas.org/crs/natsec/R45185.pdf>

¹⁵⁴ *Gov. Inslee, Sen. Murray pursue dam-breaching assessment on Lower Snake River*, available at <https://www.seattletimes.com/seattle-news/politics/lawsuit-over-dams-on-hold-as-gov-inslee-sen-murray-pursue-breaching-assessment-on-lower-snake-river/>

breaching the lower Snake River dams. These studies were pursuant to the federal agencies' obligations under the ESA and/or National Environmental Policy Act (NEPA). Feasibility studies authorized under WRDAs similarly involve an environmental analysis under NEPA. There is no reason for, or requirement that, the Corps undertake a repetitive study. Indeed, feasibility studies authorized by WRDAs are generally for *new* projects, not post-construction adjustments.¹⁵⁵

A 2019 report made by the Congressional Research Service for congressional committees on how the WRDA functions illustrates the inapplicability of the WRDA process. The process is oriented around the need for authorization for project construction. According to the 2019 report: "The standard process for a USACE project requires two separate congressional authorizations—one for studying feasibility, and a subsequent one for construction—as well as appropriations for both."¹⁵⁶ Each step of the process focuses on bringing a new project into fruition, with the Corps retaining ultimate decision-making authority throughout about whether to advance the project. Authorization of a new project is not at issue.¹⁵⁷

It is possible that proponents of the WRDA process may say that the WRDA process applies because breaching the dams is the equivalent of an entirely new ecosystem restoration project. Such a position is not well taken. While a WRDA may include a more extensive river ecosystem restoration project beyond the simple removal of the dams' earthen berms, that does not mean that the act of breaching must be included in a WRDA. Additional ecosystem restoration could be a new, independent project, but that does not make the WRDA process applicable to breaching.¹⁵⁸ More extensive ecosystem restoration may certainly complement dam breaching, but as illustrated by the 2002 EIS, it is not necessary.

¹⁵⁵ See, for instance, <https://www.usace.army.mil/Missions/Civil-Works/Project-Planning/WRRDA-7001-Proposals/>, describing the process under which the Secretary of the Army submits an annual report to Congress on future water resources development under Section 7001 of Water Resources Reform and Development Act of 2014, 33 U.S.C.A. § 2282d.

¹⁵⁶ *Army Corps of Engineers: Water Resource Authorization and Project Delivery Processes*, updated April 19, 2019, Congressional Research Service, available at <https://sgp.fas.org/crs/natsec/R45185.pdf>, at Summary.

¹⁵⁷ *Id.* at p. 3 (noting the Corps' use of discretionary appropriations in general). A detailed discussion of breach funding mechanisms not requiring Congressional appropriations is beyond the scope of this memo. It is worth noting, however, that BPA is required to fund salmon recovery and there are pathways to fund breaching without appropriations because BPA can rely solely on funds from ratepayers.

¹⁵⁸ See, for instance, <https://www.nae.usace.army.mil/Missions/Public-Services/Continuing-Authorities-Program/Section-1135/>, describing the environmental restoration projects under the authority provided by Section 1135 of the Water Resources Development Act of 1986, initiated by non-federal sponsors.

In sum, the Corps need not wait for further Congressional authorization before it can implement breaching to comply with the ESA, for financial reasons, or both. Characterizing the breach of the lower Snake River dams as requiring Congressional approval through a WRDA is legally incorrect, will result in more needlessly duplicative studies, and is a significant waste of taxpayer dollars and agencies resources.

IV. THE US ARMY CORPS OF ENGINEERS HAS THE DISCRETION AND AUTHORITY TO BREACH THE LOWER SNAKE RIVER DAMS

The authority of the US Army Corps of Engineers is well-defined. The Corps has the discretion to breach the lower Snake River dams pursuant to their normal standards of operation and under the obligations imposed upon them by the Endangered Species Act. The Corps frequently exercises its authority to cease operation of projects without receiving prior Congressional authorization. The Corps is able to take such action because the act of moving projects into a non-operational status is a routine practice that does not alter a project's purpose from the original authorizing legislation. When arguing to the contrary, the Corps cites two outdated and non-binding Engineering Regulations that are inapplicable to breach of the LSRDs. Finally, in light of the overwhelming evidence demonstrating the failure of all other alternatives to prevent the extinction of endangered species, there is a strong argument that the Corps not only can, but must, breach the dams to avoid ESA liability.