

## THE US PRESIDENT AND ARMY CORPS' AUTHORITY TO BREACH THE LOWER SNAKE RIVER DAMS<sup>1</sup>

Action by the Executive Branch – the US President and US Army Corps of Engineers (Corps)- is the most expedient pathway to immediate breaching of the lower Snake River dams.

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.

Pathways include one or more of the following:

- (1) a Presidential Executive Order;
- (2) a directive by the President 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.

### THE PRESIDENT'S EXECUTIVE POWERS

**Presidential Authority and Executive Orders.** In general, a President may, via executive order, direct the actions of executive agencies or government officials or set policies for the executive branch to follow. A President must have constitutional or statutory authority for an executive order. The question often comes up as to whether an executive order is within the scope of the President's constitutional or statutory authority, and therefore, valid. When acting with express or implied statutory authority, the President's executive action, such as via executive order, is presumed valid. In this case, because both the US Constitution and federal law provide the President authority to take actions in furtherance of breaching the lower Snake River dams executive action doing so is presumed valid.

**President's Authority as Commander in Chief pursuant to the US Constitution Art. II, § 2, cl. 1.** The President is Commander in Chief of the US Army and Navy and has broad authority in matters pertaining to national security. The National Security Act of 1947 and its 1949 amendments created the Department of Defense. The Corps is under the Department of Defense. The President 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. Climate change is considered a matter of national security and scientific evidence demonstrates that breaching the dams would mitigate impacts of

---

<sup>1</sup> This paper summarizes the law article by Elizabeth Dunne, Esq. in the Spring 2022 Golden Gate University Environmental Law Journal, in consultation with James Waddell – “*The US President and Army Corps' Discretion and Authority with Regard to Executive Action in Furtherance of Breaching the Lower Snake River Dams.*” The text to the full article can be found [here](#).

climate change. As such, the President may, as Commander in Chief, take executive action to breach the dams.

### **President’s Congressional Authority to Direct Breaching of the Lower Snake River Dams.**

In addition to the President’s constitutional authority, several federal laws support the President’s authority to take action to breach the lower Snake River dams.

- **The National Emergencies Act (NEA)** - The NEA grants the President the power to declare a national emergency. Numerous other national, state, and local governments have declared a climate emergency. The NEA provides a source of Presidential authority to address the climate and extinction crisis exacerbated by the dams.
- **The Endangered Species Act (ESA)** - The ESA mandates that the President and federal agencies conserve endangered species and their habitats. Each agency must ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of endangered or threatened species. Executive action to breach the dams aligns with Congress’ intent under the ESA because it is necessary to protect endangered species.
- **The Antiquities Act** – Under the Antiquities Act, the President can declare the lower Snake River and surrounding area to be a national monument. In a comparable example, President Obama issued a proclamation establishing the Bears Ears National Monument, recognizing the cultural significance of the landscape. Like Bears Ears, the lower Snake River area is culturally and spiritually significant, with the area flooded by Lower Monumental Dam being described as one of the most significant sites in North America. A proclamation establishing the lower Snake River national monument may include a specific directive to breach the dams and restore the ecosystem’s health.
- **Tribal Treaties and Environmental Justice** – Breaching the dams would help protect Tribes’ treaty rights and advance environmental justice. In the Affiliated Tribes of Northwest Indians’ 2021 resolution in support of breaching the dams, they noted their reserved rights to protect their cultural way of life, which includes fishing, hunting, and harvesting as well as holding religious and cultural ceremonies at their usual places. There are several examples of executive orders remedying civil rights violations.
- **The River and Harbor Act of 1945** – The River and Harbors Act is the original authorizing legislation for the dams. The Act gave the Corps broad discretion as to when or whether to build the dams and recognized the President’s authority in matters of national security. There was no mandate to construct the dams and there is no mandate to continue their operation.

### **ARMY CORPS’ DISCRETION AND AUTHORITY**

The Corps has the discretion to stop funding the dams, place them in “caretaker”, “non-operational”, or “mothballed status”, and secure them by breaching. This means the project would not be operating at all. When the Corps decides, often because of funding shortfalls and/or

cost-benefit analysis<sup>2</sup>, to no longer fund a project's operation by placing it in non-operational status, it must secure the project so it does not pose a safety hazard, damage the environment or become a nuisance. Placing the dams in non-operational status would mean that current operations to allow fish passage, such as increased spill, would not be available. As such, a necessary part of securing the project would be to breach the dams by removing the earthen embankments. This is the sole means to safely secure the project and allow fish passage.

The Corps frequently exercises its authority to cease the operation of projects without prior Congressional authorization. Moving projects into a non-operational status is a standard practice that does not fundamentally change the project's purpose – it is a cessation of operations, not a new or different purpose.

There are numerous examples of the Corps exercising its discretion to place projects in “caretaker” status and decommission them: the Savannah Bluff Lock and Dam, the Willamette Lock and Dam, the Kentucky River Navigation Project, the STURGIS, a former World War II liberty ship; and the decommissioning of Army nuclear reactors. In fact, the practice is so well accepted that a diligent search has not revealed any reported cases challenging the Corps' authority to place projects in “caretaker” status and decommission them.

Not only can the Corps place the dams in “caretaker” status and breach them, but it must do so to comply with the Endangered Species Act. The ESA requires all federal agencies to seek to conserve endangered and threatened species and to utilize their authorities in furtherance of that purpose. Courts have repeatedly found the Corps in violation of the ESA regarding its operation of the lower Snake River dams and have warned of the “possibility of breaching the four dams on the lower Snake River, if all else fails.”

In sum, the Corps possesses the authority and discretion to breach the lower Snake River dams, supported by legal precedent, obligations under environmental laws, and to respond to the climate and biodiversity crisis. Breaching the dams is not just a legal option, but a necessary step toward ecological restoration and justice.

---

<sup>2</sup> Indeed, Bonneville Power Administration, the federal agency that markets power from the lower Snake River dams, has discussed mothballing the turbine units. 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 hydropower projects, including the lower Snake River dams.