

The DC Circuit issued its opinion on Cushman Hydroelectric Project on August 22, 2006, Case No. 05-1054. The Cushman Opinion adds definition to the exercise of mandatory authorities. The following points are of significant importance to the Service and upheld by the Cushman Opinion:

1) FERC exceeded its statutory authority by placing a time restriction on the Department's conditions. The Federal Power Act gives FERC no discretion in this regard. According to the court, "FERC can no more dictate to Interior when Interior should complete its work than Interior can dictate to FERC when FERC should do so. Here, FERC took all the time it needed -- a full 24 years to -- issue a license to Tacoma. Interior, in contrast, produced its license conditions within about three years of receiving notice on August 1, 1994."

2) FERC's reliance on the Service biological opinions was not arbitrary and the biological opinions themselves were valid and reasonable. The court drew an important distinction between the Arizona Cattlegrowers case, which had rejected an incidental take statement where there was no evidence of existence of the species on the land for which the statement was prepared. The court found that at the Cushman project, "the listed are present in the general project area and the dispute relates to speculation about possible migratory patterns and survival rates. Although the agencies are unable to document activity of the species in every segment of the project, their conclusions are based on actual observations at very similar projects. The 'agencies have a very low bar to meet, ' and we think they have met it here."