Male snail kite with apple snail (St. Lucie Audubon Society)

There's something for everyone to like (and to dislike) in the Eleventh Circuit's decision in Miccosukee Tribe v. United States. The case involved the Army Corps of Engineers' management of south Florida's extensive plumbing system. Compliance with the Endangered Species Act in operating the S-12 gates in the Central and South Florida project poses a challenge because the needs of two listed species are tough to reconcile.

The Everglades snail kite (pictured), described by the court as "a Goldilocks kind of bird when it comes to water levels," needs periodic indundation to support reproduction of the apple snails on which it feeds, but not high or prolonged flooding, which kills the trees in which it nests. The kite's critical habitat lies just north of the S-12 gates. Releasing water to help the kite can harm the Cape Sable seaside sparrow, an important population of which nests just south of the gates.

The Corps adopted a plan to keep the gates closed during the sparrow nesting season for several years. The Fish and Wildlife Service concluded that the plan would not jeopardize the kite or adversely modify its critical habitat. The Tribe, which disagreed, filed suit.

The Eleventh Circuit upheld FWS' "no-jeopardy" opinion in several, but not all, respects. Given that mixed result, its not surprising that the opinion holds nuggets that will appeal to litigators of all stripes.

The anti-regulatory crowd will love the court's dismissal of the notion that the ESA requires that species be given the benefit of the doubt in the section 7 consultation process. In 1979, Congress amended section 7, changing it from a seemingly absolute requirement that federal agencies ensure that their actions did not cause jeopardy to a softer mandate that

agencies ensure that their actions “are not likely” to cause jeopardy or adverse modification of critical habitiat. The conference committee report accompanying that amendment explained:

> This language continues to give the benefit of the doubt to the species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(A)(2).

Both environmental groups and FWS have interpreted that language to require that a tie go to the species, that is that the agency issue a jeopardy opinion if the evidence is evenly balanced. This opinion seems to reject that interpretation, explaining:

> In any event, no court decision has ever relied solely on Committee Report’s benefit of the doubt language to find that a biological opinion was arbitrary and capricious. The need to give a species the benefit of the doubt cannot stand alone as a challenge to a biological opinion.

The Pacific Legal Foundation, a frequent opponent of strong ESA implementation, has noticed that language. Its take is surprisingly moderate:

> To be sure, *Miccosukee* is not a repudiation of the presumption in favor of species, but it certainly defines the outer limits of that interpretive tool.

There is much in the opinion to make FWS smile. The court held that FWS’s Consultation Handbook is entitled to *Chevron* deference because it was adopted following notice and comment. The court also declared that it must give strong deference to the agency’s scientific predictions and conclusions, and used that deference to reject a series of objections to the agency’s treatment of the available evidence.

Finally, conservation advocates will find at least two things to like. First, the court rejected FWS’s argument that section 7 forbids only permanent modifications to critical habitat, noting that:

> Any biological opinion that plans to allow short-term habitat degradation—presumably, as part of a longer-term plan that anticipates the species' future recovery—must carefully consider the life cycles and behavioral patterns of the species to avoid crippling that recovery. It is not enough that the habitat will recover in the future if there is a serious risk that when that future arrives the species will be history.

Second, the court held that, in establishing the level of take that will trigger the reinitiation of consultation, FWS cannot use a habitat proxy unless it is impractical to gather population data. The court decided that the FWS's contrary interpretation, expressed in its handbook, failed step 1 of the *Chevron* analysis, because it was inconsistent with the statutory text. And where habitat markers can be used, they must be consistent with what is known of the species. So if it could rely on habitat changes to trigger reinitiation here, FWS would have to include a high water trigger, since high water is known to interfere with kite scavenging and nesting.