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Allocating Water in the Klamath Basin: The Endangered Species Act and “Good Science”

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In recent years the primary mechanism for allocating water in the Klamath Basin has been implementation of the federal Endangered Species Act (ESA), 16 USC § 1531 *et seq.* The debate over the ESA in the Klamath has focused on whether “good science” supports the current allocation of water resources among competing interests. It is instructive to look closely at the ESA and “good science” debate to evaluate its usefulness in resolving the water allocation issues in the Klamath.

At the outset, it is important to be clear about what people mean when they talk about “good science” in the Klamath. To scientists, “good science” brings to mind the scientific method – hypothesis, experiments, and reporting results in the peer-reviewed literature. This is a slow, careful process, and it is not what people mean when they talk about “good science” in the Klamath. Rather, the “good science” debate in the Klamath stems from the ESA requirement that decisions about species be based on the “best available” science. It is a debate about the use of existing scientific information to support particular outcomes more than a critical analysis of the scientific method. For example, the federal agencies use scientific information to make legal and policy judgments about the allocation of water between fish and agriculture. In doing so, they rely on law, scientific information, assumptions and beliefs. Their judgments are driven as much by legal and policy issues as they are by science, and the result is a practical blend of law, science and policy. In 2001, these judgments lead to a complete shut down of the Bureau of Reclamation’s Klamath Project and calls for a return to “good science” in the Klamath.

A committee of the National Research Council (NRC) was charged with evaluating the science underlying these judgments. The NRC was seen by many as the arbiter of the water allocation debate through its analysis of science. But the NRC brought to its analysis all of the caution and conservatism that scientists typically bring to their work. It was no surprise, then, that the NRC looked at the ESA judgments made in the Klamath and found them to be deficient of scientific support. This reflects the difference between agency decision-making using science, which is required to work with the available data, and scientific review, which is intrinsically skeptical of hypotheses, data and conclusions.

So, what has “good science” contributed to the debate over water allocation in the Klamath? Very little. Our limited knowledge of the Klamath ecosystem, and the fact that data are generally not geared to answer policy questions, makes relating on-the-ground actions to environmental harms uncertain at best. Contributing to this difficulty is that allocating water among competing demands is a policy, not a scientific, question. Ultimately, the argument over

“good science” in the Klamath is a distraction, because while water allocation decisions may be informed by science, at their core they are about law, policy and values.

This conclusion does not suggest that law and policy can provide answers without “good science.” Often the laws that frame the arguments, as in the Klamath, point in different directions. The ESA expresses a clear policy choice for allocating water to fish. State water law favors out-of-stream uses. And while law and policy may resolve arguments, they don’t always represent truth. A legal or political decision that a species is or is not threatened with extinction may be contradicted by actual events. There is no real antidote to this other than “good science,” *i.e.*, careful application of scientific methods, fed back into the legal and policy process. There is considerable interest in linking law and policy to scientific methods more systematically using the concept of adaptive management. However, this is proving to be an elusive idea in practice, and in any case is likely to be a very slow antidote. For now, focusing on the broad policy concerns, while allowing the scientific process to accumulate knowledge in the background, likely is more productive than arguing about whether the science is good.