

DERRICK V. REYNOLDS, 1964-NMSC-085, 74 N.M. 181, 392 P.2d 13 (S. Ct. 1964)

**R. S. DERRICK, Appellant, Appellee,
vs.
S. E. REYNOLDS, State Engineer of New Mexico, Appellant**

No. 7391

SUPREME COURT OF NEW MEXICO

1964-NMSC-085, 74 N.M. 181, 392 P.2d 13

April 27, 1964

Proceeding for review of a decision of the state engineer denying application for permit to change partial point of diversion. The District Court, Chaves County, George L. Reese, Jr., D.J., rendered a decision from which an appeal was taken. The Supreme Court, Carmody, J., held that it was error to permit introduction of new or additional evidence in district court.

COUNSEL

Earl E. Hartley, Atty. Gen., Santa Fe, Charles D. Harris, Sp. Asst. Atty. Gen., Roswell, for appellant.

JUDGES

Carmody, Justice. Noble and Moise, JJ., concur.

AUTHOR: CARMODY

OPINION

{*181} {1} The state engineer raises the single question attacking the scope of review permitted in the district court upon an appeal from a denial of an application for a permit to change partial point of diversion.

{2} We note that this error was not raised in the trial court, but appellee, by failing to file any brief, has not questioned the right of appellant to change his position; therefore in this situation we will consider the merits because "it appears that a wrong principle of law was applied below." Ferran v. Jacques, 1961, 68 N.M. 367, 362 P.2d 519.

{3} The trial court's judgment reversing the order of the state engineer was entered approximately two months before our decision in Kelley v. Carlsbad Irrigation District, 1963, 71 N.M. 464, 379 P.2d 763. Nevertheless, additional evidence having been

considered by the trial court, Kelley is controlling. We have consistently followed the Kelley case in *Durand v. Carlsbad Irrigation District*, 1963, 71 N.M. 479, 379 P.2d 773; *McGee v. State ex rel. Reynolds*, {*182} 1963, 72 N.M. 48, 380 P.2d 195; *Cross v. Erickson*, 1963, 72 N.M. 73, 380 P.2d 520; and *Ingram v. Malone Farms, Inc.*, 1963, 72 N.M. 256, 382 P.2d 981.

{4} On this authority, it was error to permit the introduction of new or additional evidence on appeal from the state engineer's decision. Therefore, the case must be reversed and remanded to the district court, in order that a proper review may be given.

{5} It is so ordered.