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Administrative Law—Judicial Review—State Engineer: Kelley v. Carlsbad Irr. Dist., 379 P.2d 763 (N.M. 1963)

Robert M. Sanderford

ADMINISTRATIVE LAW—JUDICIAL REVIEW—STATE ENGINEER*—Under present New Mexico water law

> [a]ny applicant or other party dissatisfied with any decision, act or refusal to act of the state engineer may take an appeal to the district court. . . . *The proceeding upon appeal shall be de novo* except evidence taken in hearing before state engineer may be considered as original evidence, subject to legal objection the same as if said evidence was originally offered in such district court, and the court shall allow all amendments which may be necessary in furtherance of justice, and may submit *any question of fact* arising therein to a jury, or to one [1] or more referees at its discretion.[1]

In a 1913 case, *Farmers Dev. Co. v. Rayado Land & Irr. Co.*,[2] the New Mexico Supreme Court first considered the question of scope of review by the district court under the *de novo* and new evidence provisions of the appeal section of the 1907 Water Law Act,[3] quoted above and which is still the law. The court concluded

> [t]he act in question . . . clearly shows that *in each instance, where a hearing is provided for, or required, the same shall be de novo, or an original hearing, where the engineer, Board of Water Commissioners or the court hears such competent proof as may be offered by the parties interested in the proceeding and forms his or its own independent judgment relative to the issues involved.* The Board of Water Commissioners does not, nor is it called upon, to review the discretion of the engineer. Upon appeal to it, it determines for itself, the question as to whether the application should be approved or rejected. It is not bound, controlled or necessarily influenced, in any way, by the action of the engineer. It hears, or may hear, additional evidence, and upon the record and such evidence as is properly before it, it decides the question presented. Likewise, in the District Court, the hearing is *de novo*. The court may consider such evidence as has been introduced before the board and engineer, and transcribed and filed with it, but it also hears additional evidence, and is not called upon to determine whether the engineer or the Board of Water Commissioners erred in the action taken and order entered, but must form its own conclusion and enter such judgment, as the proof warrants and the law requires. It does not review the discre-

* Kelley v. Carlsbad Irr. Dist., 379 P.2d 763 (N.M. 1963).

1. N.M. Stat. Ann. § 75-6-1 (1953) (surface water). (Emphasis added.) N.M. Stat. Ann. § 75-11-10 (1953) (ground water) refers to N.M. Stat. Ann. § 75-6-1 (1953).

2. 18 N.M. 1, 133 Pac. 104 (1913).

3. N.M. Laws 1907, ch. 49, § 66, amended by N.M. Laws 1923, ch. 28, § 1; now N.M. Stat. Ann. § 75-6-1 (1953).

> tion of the engineer or the board, but determines . . . whether . . . [the] application . . . should be granted. *The court, in order to form a conclusion upon the issues, . . . [is] necessarily required to determine, for itself, . . . all . . . questions which the engineer was required, in the first instance to determine. In such case the question recurs anew, as to whether the application shall be granted.*[4]

The court's construction in *Farmers Development* represents a plain reading of the appeal section and is in accord with the traditional interpretation of the term *de novo*.[5] The Utah Supreme Court, construing the Utah appeal statutes,[6] which are similar to the New Mexico statute, has consistently applied the same interpretation of *de novo* which the New Mexico court applied in *Farmers Development*.[7] Despite the absence of a new evidence provision in

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4. Farmers Dev. Co. v. Rayado Land & Irr. Co., 18 N.M. 1, 9-10, 133 Pac. 104, 106 (1913). (Emphasis added.)

A 1923 amendment to the 1907 Water Law Act, N.M. Laws 1923, ch. 28, § 4, abolished the Board of Water Commissioners. Appeal to the Board of Water Commissioners was eliminated in favor of a direct appeal from "any decision, act or refusal to act of the State Engineer" to the district court. But the 1923 amendment carried forward the provision for a trial *de novo* in the district court. N.M. Laws 1923, ch. 28, § 1; now N.M. Stat. Ann. § 75-6-1 (1953).

5. A de novo trial means 'anew; afresh; in the same manner; with the same effect; a second time'. . . . Power to try a case de novo vests a court with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court. . . . [*A*] *de novo judicial trial means a full civil trial on the facts as well as the law.*

Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681, 692 (1941). (Emphasis added.)

6. Utah Code Ann. § 73-3-14 (1953):

> In any case where a decision of the state engineer is involved any person aggrieved by such decision may within sixty days after notice thereof bring a civil action in the district court of a plenary review thereof.

Utah Code Ann. § 73-3-15 (1953):

> The hearing in the district court shall proceed as a trial de novo and shall be tried to the court as other equitable actions.

7. Formerly our statute authorizing the district court to review decisions of the State Engineer referred to 'appeals' from such decisions. Nevertheless, that statute was interpreted to mean a review de novo of the application as presented to the Engineer. The fact that the statute was amended to speak of 'plenary review' and 'trial de novo' seems to clearly indicate legislative approval of and accord with the above stated rule. *It is now so well settled as to not admit of argument that in such proceedings the 'trial de novo' specified in the statute comprehends a trial of all the pertinent issues to determine whether the appicant has met his burden of showing that the necessary conditions exist to warrant approval of his application.* In East Bench Irrigation Co. v. State, this court remarked that it meant a trial on all the issues which could have been raised under the application.

Shields v. Dry Creek Irr. Co., 12 Utah 2d 98, 363 P.2d 82, 84 (1961). (Footnotes omitted.) (Emphasis added.)

See also East Bench Irr. Co. v. State, 5 Utah 2d 234, 300 P.2d 603 (1956); Bullock v. Tracy, 4 Utah 2d 370, 294 P.2d 707 (1956); American Fork Irr. Co. v. Linke, 121 Utah 90, 239 P.2d 188 (1951); United States v. District Court, County of Salt Lake,

the statutes, the Utah court has construed them to permit the district court to receive and consider new or additional evidence.[8]

In *Kelley v. Carlsbad Irr. Dist.*,[9] Kelley applied to the New Mexico State Engineer for a permit to change the point of diversion from surface to ground water. A hearing was conducted by the State Engineer, and evidence was introduced by persons supporting and opposing the application. The State Engineer made findings of fact, concluded that the granting of Kelley's application would "constitute a new appropriation of ground water and would impair existing rights"[10] and rejected Kelley's application. Kelley appealed to the district court. The district court admitted evidence in addition to that which had been introduced before the State Engineer and upon which the State Engineer had based his decision. The district court came to a contrary conclusion and ordered the State Engineer to issue Kelley the permit for which he had applied. On appeal to the Supreme Court of New Mexico, *held,* Reversed and Remanded for a "proper review";[11] *Farmers Development* overruled as to its construction of the appeal statute[12]—the term *de novo* as contained in the appeal statute is not to be given its traditional meaning:

> § 75-6-1, supra, does not permit the district court, in reviewing a decision of the state engineer, to hear new or additional evidence. The review by the court is limited to questions of law and restricted to whether, based upon the legal evidence produced at the hearing before the state engineer, that officer acted fraudulently, arbitrarily or capriciously; whether his action was substantially supported by the

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121 Utah 1, 238 P.2d 1132 (1951), *rehearing denied,* 121 Utah 18, 242 P.2d 774 (1952); Lehi Irr. Co. v. Jones, 115 Utah 136, 202 P.2d 892 (1949); Whitmore v. Murray City, 107 Utah 445, 154 P.2d 748 (1944); Rocky Ford Irr. Co. v. Kents Lake Reservoir Co., 104 Utah 202, 135 P.2d 108 (1943); Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943); Eardley v. Terry, 94 Utah 367, 77 P.2d 362 (1938); *In re* Application 7600 to Appropriate 30 Second Feet of Water, 63 Utah 311, 225 Pac. 605 (1924).

Cf. Skelton v. Lees, 8 Utah 2d 88, 329 P.2d 389 (1958) (scope of review by the district court of a decision of the Director of the Department of Registration).

8. [W]here the application is for appropriation of water, the [district] court may receive and consider competent and admissible evidence dehors the record, findings, data or decision developed in the Engineer's office relating thereto, although the court may not transcend the issues raised by the application and consider evidence touching a matter foreign to the application, such as the issue of change of use.

American Fork Irr. Co. v. Linke, 121 Utah 90, 239 P.2d 188, 191 (1951).

9. 379 P.2d 763 (N.M. 1963).

10. Kelley v. Carlsbad Irr. Dist., 379 P.2d 763, 764 (N.M. 1963).

11. *Id.* at 765.

12. *Id.* at 764:

[T]o the extent that . . . [*Farmers Development*] permits the district court, on appeal from a decision of the state engineer, to hear new or additional evidence, and based thereon to form its own conclusion, that decision is expressly overruled.

evidence; or, whether the action was within the scope of the state engineer's authority. . . . In addition, the statute grants to the court authority to determine whether the action of the state engineer was based upon an error of law.[13]

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13. *Ibid.*

Article 3, Section 1 of the New Mexico constitution (separation of powers) has been construed to prohibit administrative bodies from performing judicial functions, *i.e.*, adjudicating, State *ex rel.* Hovey Concrete Prods. Co. c. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), and to prohibit courts from performing administrative functions. Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962), 3 Natural Resources J. 178 (1963).

In New Mexico a function is "administrative" if it involves the use of the administrative body's discretion. Floeck v. Bureau of Revenue, 44 N.M. 194, 100 P.2d 225 (1940) (revoking a liquor license); Chiordi v. Jernigan, 46 N.M. 396, 129 P.2d 640 (1942) (revoking a liquor license); Yarbrough v. Montoya, 54 N.M. 91, 214 P.2d 769 (1950) (rejecting an appication for a liquor license); Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960) (suspending a motor vehicle operator's license); Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 373 P.2d 809 (1962) (preventing waste and protecting correlative rights).

The court concluded in *Kelley* that the approval or rejection of an application to change the point of diversion from surface to ground water is an "administrative" act or function. The court said, 379 P.2d at 764:

> Even though the state engineer is required, under legislative mandate, to determine facts to which the law, as set forth by the legislature, is to be applied, in so doing he is nevertheless acting in an administrative capacity and such findings are not judicial determinations.

But see Tevis v. McCrary, 381 P.2d 208 (N.M. 1963), decided after *Kelley*, where the court held that one who does not appear as a protestant in a proceeding before the State Engineer, as provided for in N.M. Stat. Ann. § 75-11-3 (1953) (ground water), may sue a subsequent appropriator for impairment of an existing right. The court said, 381 P.2d at 209:

> The determination of priority of water rights and whether a junior appropriation does in fact impair a prior existing right is a judicial function, not administrative.

In *Kelley*, therefore, the supreme court, because of its construction of Article 3, Section 1 of the New Mexico constitution, was restricted to a choice of two possible conclusions. It could either (1) declare that

> [i]nsofar as . . . [N.M. Stat. Ann. § 75-6-1 (1953)] purports to allow the district court, on appeal from the . . . [State Engineer], to consider new evidence, to base its decision on the preponderance of the evidence or to modify the orders [acts or decisions] of the . . . [State Engineer], it is void as an unconstitutional delegation of power, contravening art III, § 1 of the New Mexico Constitution.

Continental Oil Co. v. Oil Conservation Comm'n, 70 N.M. 310, 325, 373 P.2d 809, 819 (1962); or (2) follow Johnson v. Sanchez, 67 N.M. 41, 351 P.2d 449 (1960), and interpret *de novo* to mean that the district court has authority to determine whether, upon the facts and law, the action of the State Engineer is based on an error of law, or is supported by substantial evidence, or is clearly arbitrary or capricious. And relying on Chiordi v. Jernigan, 46 N.M. 396, 129 P.2d 640 (1942), the court could hold that the new evidence which can be admitted is confined to questions of whether the State Engineer acted fraudulently, capriciously or arbitrarily in rendering his decision.

In *Kelley*, the court said it considered *Continental* to be "controlling on the question

Scope of review under the statute by the district court is thus restricted by *Kelley* to a determination, *inter alia,* of whether the State Engineer's decision "is supported by substantial evidence." This means the review is similar to a writ of certiorari to the district court.[14] If the *Kelley* rule is to be meaningful, the State Engineer must prepare a record of the hearing and base his decision thereon. Otherwise the district court will have little, if anything,[15] to review and finality will be imparted to acts of the State Engineer which the legislature intended to be carefully reviewed by the district court.[16] Also, the absence of a record tends to deprive the applicant or any other aggrieved party of his "day in court."

Although the *Kelley* rule may be based on sound administrative law principles,[17] it must be reconciled with the absence of any express statutory re-

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of scope of review." Kelley v. Carlsbad Irr. Dist., 379 P.2d 763, 764 (N.M. 1963). However, the results of the two cases are not the same. In *Continental,* the court held the *de novo* and new evidence provisions of the pertinent appeal statute, N.M. Stat. Ann. § 65-3-22(b) (1953), were unconstitutional. In *Kelley* the statute, N.M. Stat. Ann. § 75-6-1 (1953), was not declared unconstitutional; rather the court followed the *Johnson* approach. The result is implicit in statements in several earlier water law decisions: Heine v. Reynolds, 69 N.M. 398, 367 P.2d 708 (1962); Clodfelter v. Reynolds, 68 N.M. 61, 358 P.2d 626 (1961); Application of Brown, 65 N.M. 74, 332 P.2d 475 (1958); Spencer v. Bliss, 60 N.M. 16, 287 P.2d 221 (1955).

14. See, *e.g.,* N.M. Stat. Ann. § 21-1-1(81)(c) (1953) (petition for writ of certiorari to review a decision of the New Mexico Employment Security Commission by the district court).

15. N.M. Stat. Ann. § 75-6-2 (1953) only requires that

> [i]t shall be the duty of the state engineer, upon being served with notice of appeal as aforesaid, to forthwith transmit or produce before the district court to which appeal may be taken the *papers, maps, plats, field notes and other data in his possession affecting the matter in controversy,* or certified copies thereof, which copies shall be admitted in evidence as of equal validity with the originals. [Emphasis added.]

16. N.M. Stat. Ann. § 75-6-1 (1953). See note 1 *supra* and accompanying text.

17. The *Kelley* rule allows the district court to take full advantage of the "expertness" of the State Engineer's talents and "give weight to a merited finding of the State Engineer." Spencer v. Bliss, 60 N.M. 16, 28, 287 P.2d 221, 228 (1955). That this is necessary to sound administration of New Mexico's waters was recognized in *Spencer* where the court said:

> The administration of the public waters of the state, especially the underground waters is a task requiring expert scientific knowledge of hydrology of the highest order. The administration of surface waters alone, where the trained and experienced engineer may see and observe what he does, or should do, and what the agency he administers is doing, is beset by difficulties enough. But when the administration is turned to underground waters the engineer's troubles are multiplied a hundredfold. * * * * [I]t will be an unfortunate day and event when it is established in New Mexico, that the district courts must take over and substitute their judgment for that of the skilled and trained hydrologists of the State Engineer's office in the administration of so complicated a subject as the underground waters of this state.

Ibid.

quirements that the State Engineer (1) prepare a record of any hearing he conducts,[18] or (2) conduct a hearing prior to performing certain acts.[19]

This problem of reconciliation is not presented to the district court on remand in *Kelley* because the State Engineer voluntarily had prepared a record of

18. See note 15 *supra.*

19. The State Engineer *is not* required to conduct a hearing prior to performing the following acts: issuance or refusal to issue certificate for construction of works (surface water), N.M. Stat. Ann. § 75-5-9 (1953); issuance of license to appropriate surface water, N.M. Stat. Ann. § 75-5-12 (1953); grant or refusal to grant extension of time in which to complete construction of works or to apply surface water to beneficial use, N.M. Stat. Ann. § 75-5-13 (1953); approval or rejection of application to change place of use of surface water, N.M. Stat. Ann. § 75-5-22 (1953); approval or rejection of application to change purpose or point of diversion of surface water, N.M. Stat. Ann. § 75-5-23 (1953); issuance or refusal to issue a well driller's license, N.M. Stat. Ann. § 75-11-14 (1953); approval or rejection of application for permit to drill, repair, plug, or abandon an artesian well, N.M. Stat. Ann. § 75-12-4 (1953).

The State Engineer *is* required to conduct a hearing prior to performing the following acts: review of "the acts or decisions of the water master," N.M. Stat. Ann. § 75-3-3 (1953); approval or rejection of application to appropriate surface water to beneficial use—determination of whether there is any unappropriated surface water available for beneficial use, N.M. Stat. Ann. §§ 75-5-1 to -5 (1953); approval or rejection of State Highway Commission's application to change use, point of diversion or withdrawals of *any* water right "to be used for the construction, reconstruction, maintenance or repair of public roads, streets, highways and airports," N.M. Stat. Ann. § 75-5-32 (Supp. 1961); approval or rejection of application to appropriate ground water to beneficial use—determination of whether "the proposed use will not permanently impair any existing rights of others," N.M. Stat. Ann. §§ 75-11-1 to -3 (1953); approval or rejection of application to change location of water well or to change the use of ground water, N.M. Stat. Ann. § 75-11-7 (1953); suspension or revocation of water well driller's license, N.M. Stat. Ann. § 75-11-15 (1953); approval or rejection of application to drill and use a replacement well within one-hundred (100) feet of the original well, N.M. Stat. Ann. § 75-11-23 (Supp. 1961); approval or rejection of application to drill and use a replacement well over one-hundred (100) feet from the original well (but if the State Engineer finds an "emergency situation exists in which the delay caused by publication and hearing would result in crop loss or other serious economic loss," the State Engineer may approve the application and issue a permit prior to publication and hearing), N.M. Stat. Ann. § 75-11-24 (Supp. 1961); approval or rejection of application to drill and use a supplemental well (but if the State Engineer finds an "emergency situation exists in which the delay caused by publication and hearing would result in crop loss or other serious economic loss," the State Engineer may approve the application and issue a permit prior to publication and hearing), N.M. Stat. Ann. § 75-11-25 (Supp. 1961).

See also N.M. Stat. Ann. §§ 75-11-26 to -36 (Supp. 1961) which deal with the rights of persons to waters located by them in underground sources prior to the inclusion of their lands under which such waters are found in an underground basis by the State Engineer. These sections, *inter alia,* require applications for permits for development of such waters and provide for hearings *not on the record* upon application therefor by the State Engineer; provide for an appeal to the district court where a trial *de novo* is to be conducted; provide for the time within which such waters shall be put to beneficial use and for extension thereof; and provide for the protection of existing rights and subsequent stock waterings, stock wells and domestic wells.

the required hearing and based his decision thereon. But the problem will be faced by the district court in *McGee v. State ex rel. Reynolds,*[20] a water law case decided after, and on authority of, *Kelley.*[21]

In *McGee,* the State Engineer, after conducting his investigation, but without conducting a hearing, rejected McGee's application for an extension of time to make beneficial use of surface water under a previously issued license. The pertinent statute[22] does not expressly require a hearing. The district court, on appeal, conducted a trial *de novo,* admitted new evidence and approved the application. The State Engineer appealed. Although the supreme court noted the absence of a hearing,[23] it reversed and remanded "in order that the trial court may correctly review the order of the State Engineer."[24]

The district court, as yet, has not heard *McGee* on remand. It seems the only reasonable action the court can take is to return the case to the State Engineer with an order to conduct a hearing and make a record so that the court will have something to review. Otherwise the concept of review becomes a sham, for there is nothing to be reviewed.[25]

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20. 380 P.2d 195 (N.M. 1963).

21. The supreme court has recently reversed the district court's judgment in two other water law cases on authority of *Kelley.* See Ingram v. Malone Farms, 382 P.2d 981 (N.M. 1963); Durand v. Carlsbad Irr. Dist., 379 P.2d 773 (N.M. 1963).

22. N.M. Stat. Ann. § 75-5-13 (1953):

> The state engineer shall have the power to grant extensions of time in which to complete construction of works, to apply water to beneficial use, and for such other reasonable purpose as may in his opinion appear, under any water right application on file in his office, upon proper showing by the applicant of due diligence or reasonable cause for delay. Extensions of time not exceeding five [5] years beyond the time for construction allowed in the original permit, and in no case exceeding a total of ten [10] years after the date of approval of the application, may be granted by the state engineer for construction of works and application of water to beneficial use . . . .

23. "The record merely discloses that the State Engineer denied the application February 18, 1958 *without any hearing whasoever.*" McGee v. State *ex rel.* Reynolds, 380 P.2d 195 (N.M. 1963). (Emphasis added.)

24. *Id.* at 195-96.

25. The Utah Supreme Court's construction of the Utah appeal statutes conforms to the plain language of the statutes. See notes 6-8 *supra* and accompanying text. More important, such construction avoids the problem created by the *Kelley* rule of review which is presently facing the district court in *McGee* on remand. Two writers, commenting on the scope of review under the Utah statutes, have said:

> Certain administrative agencies are particularly well suited to judicial review by trial de novo in the district court. The office of the State Engineer, in regulating water matters, is a good example of such an agency. The statute controlling the office of the State Engineer provides that in appeals from his decisions a trial de novo shall be held in the district court. The staff of the State Engineer is at the disposal of the courts, and, as a practical matter, the judges draw freely upon members of that staff in obtaining testimony. Such trials de novo usually are not too complicated, and they appear to be necessary because *present statutory procedures do not require the State Engineer to conduct a hearing nor to take evidence, nor to make a record as to the facts upon which he*

Despite *Kelley* and *McGee,* the supreme court has not made clear the need for a hearing and a record. To establish a rational system, however, the district court must look in that direction. The only reasonable alternative, and perhaps the most effective, is a complete statutory revision which conforms with the *Kelley* rule.

ROBERT M. SANDERFORD

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bases his decision. Thus, it would not be possible for direct appellate review by the Utah Supreme Court through writ of certiorari because there would be no record to review. It is generally conceded that the office of the State Engineer is functioning effectively, and review by trial de novo in the district court has not been burdensome.

Clyde & Dewsnup, *The Aneth Spacing Order: A Case Study of Administrative Regulation,* 7 Utah L. Rev. 16, 33 (1960-61). (Footnotes omitted.) (Emphasis added.)

The Utah court has rejected the argument that the *de novo* provision of the appeal statute, Utah Code Ann. § 73-3-15 (1953), see note 6 *supra,* is unconstitutional. See United States v. District Court, County of Salt Lake, 121 Utah 1, 238 P.2d 1132 (1951), *rehearing denied,* 121 Utah 18, 242 P.2d 774 (1952).