Denver Law Review

Volume 69 | Issue 1 Article 6

February 2021

# Use of Agency Deliberations By Reviewing Courts

Jan G. Laitos

# USE OF AGENCY DELIBERATIONS BY REVIEWING COURTS

JAN G. LAITOS*

## I. INTRODUCTION

In a court challenge to a state administrative agency action, may the attack be based on the decisionmaking deliberations of the agency members, and may a reviewing court overturn the agency decision on the basis of the deliberations? These issues were recently posed to the Colorado Court of Appeals in a 1991 case, *Board of County Commissioners of Park County v. Water Quality Control Commission* (*Park County*).[1] The Colorado district court in *Park County* overturned a rulemaking action of the Water Quality Control Commission (Commission), basing its decision largely on the Commission's deliberations.[2] In upholding the district court's ruling, the court of appeals held that when a trial court reviews agency rulemaking, it may "consider [the agency's] deliberations, in conjunction with the rest of the record . . . ."[3]

The question presented to the Colorado Court of Appeals was a matter of first impression in Colorado. Because no appellate court decisions from other states address the issue, the *Park County* case is important precedent and influential in the practice of state administrative law. The ability to use agency deliberations to attack agency action should be helpful to lawyers who practice before state agencies. Prior to *Park County*, attorneys based their challenges on the record before the agency. After *Park County*, an attack on an agency rule may be based on extra-record transcripts of agency deliberations.

The *Park County* rule will also affect the manner in which multi-headed state boards and commissions conduct their deliberations. Unfortunately, the most likely effect of *Park County* will be to discourage free and open debate among agency members during deliberations. If an agency member knows that comments made during deliberations may be used as grounds for appealing the agency's decision, an agency member may choose to refrain from speaking during deliberations. If there are deliberative discussions, the statements may either be extremely guarded and self-censored, or carefully articulated in order for

* Professor of Law, University of Denver College of Law. The author was a member of the Colorado Water Quality Control Commission, the agency involved in the *Park County* case discussed below, from 1985-1991.

The author wishes to acknowledge the valuable assistance of Priscilla McLain and Elena Eisenberg, students at the University of Denver College of Law, in the preparation of this paper.

1. 809 P.2d 1107 (Colo. Ct. App. 1991), *cert. denied*, 1991 Colo. LEXIS 853 (Dec. 3, 1991).

2. *See id.* at 1109.

3. *Id.*

attorneys to better attack (or defend) the eventual agency decision. The absence of meaningful deliberations and the use of self-censored deliberations or deliberations designed strictly for judicial review, seem inconsistent with what is probably the key purpose of deliberations—to permit a multi-headed agency to freely examine facts, law and policy with the goal of reaching a consensus prior to making a decision.

This Article considers the question of whether agency deliberations may, or should, be used by courts reviewing the validity of agency rulemaking actions. This question is answered in part by the Colorado Administrative Procedure Act (APA), a statute similar to APAs adopted by other states. Of particular importance are the provisions of the APA addressing: (1) the materials comprising the official agency rulemaking "record;"[4] (2) the requirement that the record include a statement of basis and purpose outlining the agency's reasons for adopting a particular rule;[5] (3) the extent to which the record constitutes the exclusive basis for judicial review of agency action;[6] and (4) the grounds provided reviewing courts for setting aside agency action.[7] The question is also answered by considering the deferential standard of review that has evolved in Colorado and other jurisdictions for courts reviewing agency rulemaking actions.[8] The Article addresses these matters after briefly summarizing the facts of the *Park County* case and the reasoning used by the district court and court of appeals to justify the use of deliberations.

The Article argues that the *Park County* holding and rationale appear wrong, both as a matter of law and in light of the reality of administrative decisionmaking. As a matter of law, permitting reviewing courts to use agency deliberations is grossly inconsistent with well-established norms governing judicial review of agency action. These norms include: (1) traditional exclusive reliance on the written record presented to the agency; (2) statutory recognition of the agency's reasons for adopting a rule being contained only in the official agency statement of basis and purpose; (3) the extremely deferential judicial standard of review used when considering agency actions; and (4) the philosophy behind the well-established mental process rule. As a matter of administrative agency decisionmaking and contrary to the court of appeals' view, agency deliberations are not analogous to legislative history. Moreover, courts should not consider agency deliberations to be a reliable source of agency intent.

## II. THE *PARK COUNTY* CASE

The facts in *Park County* appear quite frequently in state multi-headed agency proceedings, particularly when these agencies are engaged in rulemaking and the purpose of the rule is to establish an envi-

4. COLO. REV. STAT. § 24-4-103(8.1)(b) (1988).
5. COLO. REV. STAT. § 24-4-103(4)(a)(c) (1988).
6. COLO. REV. STAT. § 24-4-103(8.1)(c) (1988).
7. COLO. REV. STAT. § 24-4-106(7) (1988).
8. *See infra* notes 45-52 and accompanying text.

ronmental standard. State agencies typically set environmental standards without the benefit of perfect information.[9] When the available data is incomplete or of questionable reliability, a multi-headed agency must decide how, or whether, to use the data in establishing standards. This usually entails considerable debate among agency members during deliberations.

Such was the case when the Commission held a hearing and conducted deliberations regarding water quality standards for various metals found in a segment of the South Platte River within Park County, Colorado. The hearing was held because the City of Denver (Denver) asked the Commission to make the water quality standards for these metals more lenient in order to reflect the ambient levels of those metals found in the segment.[10] Denver had previously compiled water quality data for the metals in question in conjunction with its investigation of the proposed Two Forks dam and reservoir project.[11] During the hearing, the Colorado Water Quality Control Division and the Colorado Division of Wildlife argued against using Denver's data to make water quality standards more lenient.[12] Since Denver's data was at or near the detection limits for the metals, these agencies were concerned that the data was "skewed" and would result in an inflated water quality standard when incorporated into the Commission's mean-plus-standard-deviation methodology.[13]

---

9. *See generally* Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 MICH. L. REV. 917 (1990); Alyson C. Flournoy, *Legislating Inaction: Asking the Wrong Questions in Protective Environmental Decisionmaking*, 15 HARV. ENVTL. L. REV. 327 (1991); Vern R. Walker, *The Siren Songs of Science: Toward a Taxonomy of Scientific Uncertainty for Decisionmakers*, 23 CONN. L. REV. 567 (1991).

10. In March, 1987, the Colorado Water Quality Control Commission held a triennial review hearing concerning water quality standards and classifications for the South Platte River Basin as required by COLO. REV. STAT. § 25-8-202(1)(f) (1989). In the course of that review, the City and County of Denver (Denver), acting by and through its Board of Water Commissioners, proposed that certain changes be made in specified numeric standards for water quality in the mainstream of the North Fork of the South Platte River. Denver proposed a change in the numeric standards for lead, cadmium and silver for Segment Four of the North Fork to reflect ambient levels actually found in Segment Four. Volume II of Record at 270, 273, 354, Park County v. Water Quality Control Comm'n (Park County Colo. Dist. Ct. Nov. 27, 1989) (No. 88CV75) [hereinafter Record]. *See also Park County*, 809 P.2d at 1108.

11. Denver compiled and developed extensive water quality data on Segment Four as part of the Environmental Impact Statement for the Two Forks project. The data convinced Denver that the existing numeric standards for the three metals did not reflect ambient water quality in the segment. The data also convinced Denver that the Commission's standards did not accurately reflect then-existing ambient water quality when the standards took effect in 1981 because there were no new human-made sources of pollution to account for any change since that time. Record, *supra* note 10, at 354, 358. *See Park County*, 809 P.2d at 1108.

12. Record, *supra* note 10, at 693, 811. *See also Park County*, 809 P.2d at 1110 ("All parties to the rule-making proceeding agreed that the data concerning cadmium and lead were severely skewed rather than normally distributed.").

13. Record, *supra* note 10, at 693, 811-813. The mean-plus-standard-deviation methodology is a statistical technique sometimes used by rule-making agencies in determining standards based on empirical data. The methodology assumes the presence of normally distributed data. Using the methodology, a numerical standard is established by adding one standard deviation to the mean (average) of all the data points. The standard deviation will vary according to the scattering of the data. The more widely scattered the data is

After closing the record, the Commission began to deliberate. Transcripts of the Commission's deliberations reveal that several commissioners were troubled by the data.[14] Concerns were expressed about selecting representative years for the data base, treatment of data at detection limits and the water quality standards that might result when the mean-plus-standard-deviation was calculated from the data.[15] One commissioner stated that the lack of "normal" data would produce a metals standard that was "real arbitrary."[16] Nonetheless, by a vote of 7-1, the Commission adopted new relaxed standards based largely on the data supplied by Denver.[17] This new standard was accompanied by a "statement of basis and purpose," which was adopted by the Commission.[18]. The APA requires agencies to submit the statement with every agency rule, indicating the reasons officially adopted by the agency for the rule.[19]

The Commission's new standards were then challenged before a Colorado trial court, which ruled that the standards were both "unsupported by substantial evidence in the record" and "arbitrary and capricious."[20] The trial court referred to comments during deliberations where individual commissioners voiced concerns about the adequacy of the data, concluding "it appears . . . that the additional data used to support the proposed change [in the standards] was highly suspect."[21]

The Colorado Court of Appeals agreed that the trial court may consider agency deliberations in reaching its decision.[22] The court of appeals offered two reasons for this conclusion. First, the court decided that the "mental process" rule, which otherwise prohibits inquiry into a decisionmaker's reasoning, is inapplicable when the agency is not acting

---

from the fiftieth percentile (*e.g.*, between ten and ninety percent), the larger the standard deviation. The less scattered the data (*e.g.*, between forty-five and fifty-five percent), the smaller the standard deviation. *See also Park County*, 809 P.2d at 1108 (construing Department of Health Regulation No. 3.8.8(V)(7), 5 COLO. CODE REGS. §§ 1002-8 (1989)).

14. Agency deliberations are open to the public under the Colorado "Sunshine Law." COLO. REV. STAT. § 24-6-402 (1988).

15. Record, *supra* note 10, at 155-202.

16. *Id.* at 189.

17. Opening Brief at 3, Board of County Comm'rs v. Water Quality Control Comm'n, 809 P.2d 1107 (Colo. Ct. App. 1991)(No. 90CA0077).

18. COLO. REV. STAT. § 24-4-103(4)(c) (1988).

19. *Id.*

20. Park County v. Water Quality Control Comm'n, No. 88CV75, at 4, 7 (Park County Colo. Dist. Ct. Nov. 27, 1989).

21. *Id.* at 4. A close reading of the trial court's decision reveals an important ambiguity. The trial court stated that "the record" does not support the Commission's action, and the court expressly relied on the Commission's "deliberations" to justify its conclusion that the standards were unsupported by the evidence and arbitrary and capricious. *Id.* at 3-4.

However, a transcript of the deliberations was erroneously included in the record filed with the trial court. It is unclear from the trial court's decision whether its "record" included the deliberations. If the record included the deliberations, then the trial court may have erred in assuming that the official agency record includes the deliberations. If the record did not include the deliberations, then the trial court may have assumed, perhaps erroneously, that deliberations may be used apart from the record to review agency action.

22. *Park County*, 809 P.2d at 1109 ("Therefore, it was permissible for the trial court to consider the Commission's deliberations . . . in conducting its review.").

in a quasi-judicial proceeding.[23] Since the Commission was engaged in rulemaking, the mental process rule was not a bar to the use of Commission deliberations.[24] Second, the court of appeals reasoned that agency deliberations concerning an administrative rule are analogous to legislative history concerning a statute. The court concluded that since legislative history is available to reviewing courts, transcripts of agency deliberations should also be accessible on review.[25]

## III. Analysis of Judicial Review of An Agency Action

The Colorado APA permits a reviewing court to set aside agency action that is either "arbitrary or capricious" or "unsupported by substantial evidence when the record is considered."[26] Conceptually, a trial court has three choices when deciding whether to use these two grounds to reverse an agency action. The trial court may: (1) rely only on the administrative record; (2) base its decision entirely on deliberations without reference to the record; or (3) consider the agency's deliberations in conjunction with the record.

### A. *Judicial Review Based Only on the Record*

#### 1. Traditional Exclusive Reliance on the Record

Reviewing courts rarely overturn agency actions.[27] However, when they do, and when the basis for the court's decision is a finding of agency action deemed "arbitrary and capricious" or "unsupported by substantial evidence," the finding is inevitably based on judicial examination of the record before the agency. If a court characterizes an agency action as arbitrary and capricious, the result is usually due to the agency's disregard of the evidence presented at the hearing, and thereby

23. *Id.* ("Although Colorado has adopted the 'mental process rule' prohibiting inquiry into a decision-maker's mental process . . . this rule is inapplicable if the administrative action does not result from a quasi-judicial proceeding.").

24. *Id.* The case cited in the court of appeals' opinion to support this proposition, Hadley v. Moffat County Sch. Dist. RE-1, 681 P.2d 938 (Colo. 1984), held that the mental process rule is inapplicable when two conditions are present: (1) the agency's action is not quasi-judicial, and (2) there are specific allegations of agency misconduct. *Id.* at 944-45. The second condition, agency misconduct, was not raised in the *Park County* case.

25. *Park County*, 809 P.2d at 1109. Again, the case cited by the court of appeals to support this proposition, Colorado Dep't. of Social Serv. v. Board of County Comm'rs, 697 P.2d 1 (Colo. 1985), involves a different issue altogether. The court held that "post-passage testimony of a legislator concerning [a statute] should not be admitted into evidence on the question of legislative intent." *Id.* at 21.

26. Colo. Rev. Stat. § 24-4-106(7) (1988). The *Park County* trial court used both grounds in its decision overturning the Commission's standards. *Park County*, 809 P.2d at 1108 ("the trial court ruled . . . that the [Commission's] new standards are unsupported by the record and are arbitrary and capricious.").

The APA also permits courts to hold unlawful agency action that is "otherwise contrary to law." Colo. Rev. Stat. § 24-4-106(7) (1988). These are actions that are in excess of statutory authority or inconsistent with proper procedures. *See, e.g.*, Gonzales v. Industrial Comm'n, 740 P.2d 999, 1001 (Colo. 1987).

27. Courts generally employ an extremely deferential standard of review regarding agency actions. *See infra* notes 45-52 and accompanying text.

made part of the record.[28] If a court concludes that an agency decision must be set aside, it is because the court believes that the evidence in the record does not support the agency's action.[29]

Reliance on the record would seem to preclude judicial use of agency deliberations to overturn agency actions. The APA specifically lists what "the agency rulemaking record shall contain,"[30] and agency deliberations are *not* included. Since by non-inclusion the APA excludes deliberations as part of the record, and since the record is the traditional basis for judicial overturning of agency action, it follows that extra-record deliberations should not be used as the basis for setting aside an agency action.

### 2. The Agency's Statement of Basis and Purpose as Part of the Record

Although the APA fails to include deliberations as part of the agency record, the APA expressly states that the agency's record shall include the agency's statement of basis and purpose.[31] This statement, required to be submitted with each agency rule, provides the reasoning process of the agency in adopting the rule.[32] The statement of basis and purpose is a consensus summary of the reasons why agency members decided to take a particular action. The statement is adopted by agency vote before the rule becomes final.

In *Citizens for Free Enterprise v. Department of Revenue*,[33] the Colorado Supreme Court explained that the statement of basis and purpose requirement was added to the APA to provide reviewing courts a basis for testing the agency's reasoning. The court stated:

> Absent a statement of basis and purpose, a court can only guess at the reasoning process that led to the adoption of the administrative regulation . . . . The statement of basis and purpose . . . serves to provide a reference point against which the validity of the rule can be measured. It removes the review process from the realm of speculation and provides a context within which meaningful judicial review can occur.[34]

The *Citizens for Free Enterprise* opinion also suggests that when a court is considering an agency rulemaking action, judicial review should be limited to two sources: (1) the record before the agency at the time of adopting the rule, and (2) the statement of basis and purpose explain-

28. *See, e.g.*, Webster v. Board of County Comm'rs, 539 P.2d 511, 513 (Colo. Ct. App. 1975).

29. *See, e.g.*, Colorado-Ute Elec. Ass'n v. Public Util. Comm'n, 760 P.2d 627, 641 (Colo. 1988); Home Builders Ass'n v. Public Util. Comm'n, 720 P.2d 552, 562 (Colo. 1986); Colorado Dept. of Social Serv. v. Davis, 796 P.2d 494, 496 (Colo. Ct. App. 1990).

30. COLO. REV. STAT. §§ 24-4-103(8.1)(b)(I)-(IX) (1988).

31. COLO. REV. STAT. §§ 24-4-103(4)(a), (c), (8.1)(b)(V)-(VI) (1988).

32. "The written statement of the basis . . . and purpose of a rule . . . shall include an evaluation of the . . . rationale justifying the rule." COLO. REV. STAT. § 24-4-103(4)(c) (1988).

33. 649 P.2d 1054 (Colo. 1982).

34. *Id.* at 1062.

ing the reasons for the rule. The *Citizens for Free Enterprise* court observed that requiring "an administrative regulation be defensible in terms of the agency's statement of basis and purpose, and with reference to the administrative record . . . serves to . . . assure the effectiveness of subsequent judicial review."[35]

The *Citizens for Free Enterprise* case seems to preclude the judicial use of agency deliberations. The court assumes that the agency's record (without deliberations) and the statement of basis and purpose should be the sole evidence of agency reasoning. Jurisdictions other than Colorado have likewise concluded that an agency's statement of reasons obviates the need to consider the deliberations. One California appellate court stated that "the requirement [that] the agency state [its] findings makes it unnecessary to delve behind the findings for evidence of the agency's actual deliberations; the full findings and administrative record provide a sufficient basis for meaningful judicial review."[36] Similarly, the federal rule states that "where an agency has issued a formal opinion or a written statement of its reasons for acting, transcripts of agency deliberations at Sunshine Act meetings should not routinely be used to impeach that written opinion."[37]

Despite this persuasive rationale from jurisdictions outside Colorado and the *Citizens for Free Enterprise* precedent within Colorado, both the *Park County* district court and the court of appeals chose to ignore the Commission's statement of basis and purpose. Neither the trial court nor the court of appeals mention the existence of the statement of basis and purpose. Both of these courts assumed instead that deliberations, especially statements during deliberations by individual commission members, were a better indication of the entire Commission's reasoning. This judicial use of deliberations, while ignoring the statement of basis and purpose, is exactly what the *Citizens for Free Enterprise* decision wished to avoid—a review process tainted with guesses and speculation.[38]

### B. *Judicial Review Based Only on Deliberations.*

If the APA does not include deliberations as part of the agency record, then how could the *Park County* trial court base its decision on the Commission's deliberations and not the Commission's statement of basis and purpose? The answer seems to lie in a key section of the APA, not cited by the trial court, which provides that "[t]he agency rulemak-

35. *Id.* at 1063. *See also* Anderson v. State Dept. of Personnel, 756 P.2d 969, 978 (Colo. 1988) (judicial review of an administrative agency determination should be limited to the record before the agency).

36. County of San Diego v. Superior Court, 222 Cal. Rptr. 484, 492 (Cal. Ct. App. 1986).

37. Kansas State Network, Inc. v. Federal Communications Comm'n, 720 F.2d 185, 191 (D.C. Cir. 1983); *see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 50 (1983) ("an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

38. *Citizens*, 649 P.2d at 1063 (use of "the agency's statement of basis and purpose" [prevents] the courts [from being] "cast in the role of second-guessing the agency.").

ing record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof."[39] This APA language gives the court of appeals some statutory authority for its conclusion that courts are "vest[ed] with discretion, in appropriate circumstances, to consider the deliberations of the decisionmaking body in reviewing its actions."[40] Therefore, it may be somewhat irrelevant whether deliberations are always part of the record or whether the *Park County* district court incorrectly assumed that the Commission's deliberations were part of the record.[41] The APA flatly states that reviewing courts are not limited to the record. Since the APA allows judicial review of extra-record materials, the question becomes whether agency deliberations may be the exclusive basis for a court's decision, or whether they may, or should, be considered only in conjunction with the record.

The *Park County* trial court seems to have based its decision almost entirely on the Commission's deliberations, without much reference to the record before the Commission when it made its decision. Such exclusive reliance on agency deliberations by reviewing courts seems contrary to the language of the APA and to Colorado case law. While it is true that the APA states that the record "need not constitute the exclusive basis . . . for judicial review,"[42] this language does not state that deliberations without the record may constitute the sole basis for judicial review. The APA permits, at most, the use of deliberations *as a complement to the record.* Use of the record has also been a necessary condition to judicial review in virtually every Colorado case where an appellate court has supported a reversal of agency action.[43] The general rule has been clearly articulated by the Colorado Supreme Court: "In determining whether to disturb the determinations of [agencies], the reviewing court must search the record . . . ."[44]

### C. *Judicial Review Based on Deliberations and the Record*

In recognition of the critical role played by the agency record when there is judicial review, the *Park County* court of appeals' opinion provides trial courts with "discretion, in appropriate circumstances" to consider agency deliberations "in conjunction with" the record.[45] This holding seems to grant reviewing courts an open-ended license to use deliberations whenever the court believes it to be "appropriate," as long as the record is also considered. There are four difficulties with providing courts such limitless discretion to use agency deliberations.

---

39. COLO. REV. STAT. § 24-4-103(8.1)(c) (1988).

40. *Park County*, 809 P.2d at 1109.

41. The transcript of the deliberations was mistakenly submitted as part of the record filed with the trial court. *See supra* note 19.

42. *Park County*, 809 P.2d at 1109.

43. *See, e.g.*, Colorado-Ute Elec. Ass'n v. Public Util. Comm'n, 760 P.2d 627 (Colo. 1988); Colorado Dept. of Social Serv. v. Davis, 796 P.2d 494 (Colo. Ct. App. 1990). *See supra* text accompanying notes 27-28.

44. Atchison, Topeka & Santa Fe Ry. v. Public Util. Comm'n, 763 P.2d 1037, 1041 (Colo. 1988).

45. *Park County*, 809 P.2d at 1109.

1. Use of Deliberations Changes the Standard of Review for Agency Actions

When a court considers the validity of an agency action, the general rule is that the standard of review is deferential minimum scrutiny.[46] The standard of review is *not* strict scrutiny where a reviewing court makes a searching inquiry into the motivation and rationale behind the agency rule. Yet, to permit the *Park County* district court to closely examine deliberations, ignore the reasons set forth in the statement of basis and purpose and overturn an agency action based on the review of deliberations is not limited deferential review, but a form of strict scrutiny.[47] The change in the standard of review to strict scrutiny approved by the *Park County* case is contrary to well-established Colorado precedent regarding judicial review of agency action. Colorado courts have consistently held that reviewing courts should seek to sustain, not overturn, agency rulemaking decisions.

This principle of judicial deference is reflected in six commonly cited "rules of review" that have guided courts considering challenges to agency action. Each of the six rules seems contrary to the liberal judicial use of agency deliberations to overturn agency decisions permitted by the *Park County* case. First, a rule adopted pursuant to an administrative rulemaking proceeding is presumed to be valid.[48] The Commission's decision was not presumed to be valid in *Park County*. Second, in determining whether to disturb the determinations of an agency, a reviewing court must search the record for evidence favorable to the agency.[49] In *Park County*, the reviewing court searched extra-record material for evidence unfavorable to the Commission. Third, a reviewing court should accord substantial deference to an agency exercising special expertise in choosing among conflicting inferences.[50] Although the Commission was exercising its special expertise in choosing among conflicting standards, the reviewing court did not accord substantial defer-

46. Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

47. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 568-74 (2d ed. 1988); GERALD GUNTHER, CONSTITUTIONAL LAW 448-49 (12th ed. 1991). *See also* Deukmejian v. Nuclear Regulatory Comm'n, 751 F.2d 1284, 1325-26 (D.C. Cir. 1984), where the court stated:

> Were courts cavalierly to supplement the record [with agency deliberations], they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators . . . . The accepted deference of court to agency would be turned on its head: the so-called administrative state would be replaced with one run by judges . . . .

48. City of Aurora v. Public Util. Comm'n, 785 P.2d 1280, 1287 (Colo. 1990); AMAX, Inc. v. Water Quality Control Comm'n, 790 P.2d 879, 883 (Colo. Ct. App. 1989); People *ex rel.* Woodard v. Brown, 770 P.2d 1373, 1376 (Colo. Ct. App. 1989); Agnello v. Adolph Coors Co., 689 P.2d 1162, 1165 (Colo. Ct. App. 1984); Mitchell v. Charnes, 656 P.2d 719, 720 (Colo. Ct. App. 1982).

49. Atchison, Topeka, & Santa Fe Ry. v. Public Util. Comm'n, 763 P.2d 1037, 1041 (Colo. 1988); *see also* U-Tote-M, Inc. v. City of Greenwood Village, 563 P.2d 373, 376 (Colo. Ct. App. 1977).

50. G & G Trucking v. Public Util. Comm'n, 745 P.2d 211, 216 (Colo. 1987).

ence to the Commission's action. Fourth, when an agency rule is based on a policy judgment, a reviewing court should not substitute its judgment for that of the agency.[51] Although the Commission made a policy judgment when it chose its standard, the reviewing court substituted its judgment for that of the Commission. Fifth, judicial review of quasi-legislative rulemaking actions of agencies is limited, and a court may not substitute its opinion for that of the agency's.[52] Although the Commission was undertaking a quasi-legislative rulemaking action, the reviewing court substituted its opinion for the Commission's determination. Sixth, whenever there is competent evidence in the record to support the agency's decision, a reviewing court may not substitute its judgment for the agency's conclusion.[53] Although there was evidence in the record to support the Commission's ruling, including the data supplied by Denver, the reviewing court substituted its judgment for that of the Commission.

2. Use of Deliberations Disregards the Mental Process Rule

By permitting the unlimited use of agency deliberations on review, both the *Park County* trial court and the court of appeals disregarded the "mental process rule." This rule, adopted by Colorado and the federal courts, prohibits judicial inquiry into the deliberative processes of administrative agency officials.[54] The United States Supreme Court articulated the separation of powers rationale for the rule in *United States v. Morgan*:[55]

> [I]t [is] not the function of the court to probe the mental processes of the [agency official]. Just as a judge cannot be subjected to such scrutiny, so the integrity of the administrative process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts . . . the appropriate independence of each should be respected by the other.[56]

The mental process rule is primarily applicable to administrative pro-

51. Anderson v. State Dept. of Personnel, 756 P.2d 969, 974 (Colo. 1988); *See also* Regular Route Common Carrier Conf. v. Public Util. Comm'n, 761 P.2d 737, 743 (Colo. 1988) ("proposed rule involves a policy judgment relating to the effective implementation of a statutory purpose . . . .").

52. *See* Colorado Land Use Comm'n v. Board of County Comm'rs, 604 P.2d 32, 35 (Colo. 1979); Tihonovich v. Williams, 582 P.2d 1051, 1053-54 (Colo. 1978); AMAX, Inc. v. Water Quality Control Comm'n, 790 P.2d 879, 883 (Colo. Ct. App. 1989); Bruce v. School Dist. No. 60, 687 P.2d 509, 510 (Colo. Ct. App. 1984).

53. Sangre De Cristo Elec. Ass'n v. Public Util. Comm'n, 524 P.2d 309, 310 (Colo. 1974); Saint Luke's Hosp. v. Colorado Civil Rights Comm'n, 702 P.2d 758, 761 (Colo. Ct. App. 1985).

54. Public Util. Comm'n v. District Court, 431 P.2d 773, 777 (Colo. 1967); Board of Educ. v. District Court, 483 P.2d 361, 362 (Colo. 1971); National Nutritional Foods Ass'n v. Matthew, 557 F.2d 325, 333 (2d Cir. 1977); Montrose Chem. Corp. v. Train, 491 F.2d 63, 64 (D.C. Cir. 1974); Braniff Airways v. Civil Aeronautics Bd., 379 F.2d 453, 460 (D.C. Cir. 1967). *See also* 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 17.5, at 295-97 (2d ed. 1980).

55. 313 U.S. 409 (1941).

56. *Id.* at 422 (citations omitted).

ceedings that are quasi-judicial in character.[57] Nonetheless, the rule should also be applied to quasi-legislative rulemaking actions because judicial review of such actions is more limited than the review of quasi-judicial administrative matters.[58]

There are two exceptions to the mental process rule, but neither exception applies to the facts in the *Park County* case. First, the rule does not apply when there are allegations of illegal or unlawful action, misconduct, bias or bad faith on the part of agency members.[59] Second, judicial examination of the decisionmaking deliberations of administrative agency officials is allowed where there is an inadequate basis stated for the agency's decision.[60] Absent these two exceptions, the mental process rule should act to discourage judicial review of agency deliberations.

### 3. Agency Deliberations Are Not Analogous to Legislative History

The *Park County* court of appeals reasoned that agency deliberations should be made available to reviewing courts because such deliberations "are analogous to legislative history . . . concerning a statute."[61] This analogy is flawed for two reasons. First, the use of legislative history to provide an authoritative interpretation of statutory text is increasingly considered by judges as constituting an unacceptable form of judicial "psychoanalysis" of the legislature.[62] Similarly, reliance on agency deliberations rather than the agency's statement of basis and purpose encourages risky judicial second-guessing, while simultaneously depriving the agency of its officially adopted statement of reasons.

Second, to the extent that legislative history is used by courts, it is only as a means of ascertaining the intention of unclear or ambiguous statutory language.[63] In Colorado, the rule is that "while the statements of individual legislators may be helpful in determining the proper *con-*

57. Hadley v. Moffat County Sch. Dist. RE-1, 681 P.2d 938, 944-45 (Colo. 1984).

58. Bruce v. School Dist. No. 60, 687 P.2d 509, 510 (Colo. Ct. App. 1984); Polk v. School Bd., 373 So. 2d 960 (Fla. Dist. Ct. App. 1979).

The *Park County* court of appeals' decision states that the mental process rule "is inapplicable if the administrative action does not result from a quasi-judicial proceeding." 809 P.2d at 1109. The case cited for this proposition, *Hadley*, instead holds that the rule is inapplicable when there are specific allegations that the agency members acted improperly (i.e., with bias or bad faith), and the agency's action does not resemble a quasi-judicial proceeding. *Hadley*, 681 P.2d at 944-45. The *Park County* court of appeals' reliance on *Hadley* seems misplaced in light of *Hadley's* requirement concerning allegations of agency misconduct as a necessary condition to the rule's inapplicability.

59. Public Util. Comm'n v. District Court, 431 P.2d 773, 777 (Colo. 1967).

60. County of San Diego v. Superior Court, 222 Cal. Rptr. 484, 492 (Cal. Ct. App. 1986).

61. *Park County*, 809 P.2d at 1109.

62. *See* Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2490 (1991) (Scalia, J., dissenting) (quoting United States v. Public Util. Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring)). *See also* Chisom v. Roemer, 111 S. Ct. 2354, 2376 (1991) (Scalia, J., dissenting) ("When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinker's toolbox, we do great harm.").

63. United States v. Stuart 489 U.S. 353, 373 (1989) (Scalia, J., concurring).

*struction of statutory language*, such statements . . . will seldom be sufficient to prove an impermissible legislative motivation."[64] Conversely, when the meaning of a statute is clear it is improper to resort to legislative history to divine legislative intent.[65]

If the analogy regarding agency deliberations and the judicial use of legislative history is viable, agency deliberations are relevant only if the agency rule is so ambiguous that its construction needs further clarification. When a rule is completely unambiguous, as was the Commission's rule in *Park County*, it should be considered improper to use deliberations to "discover" agency motive or intent.

4. Agency Deliberations Are Not Evidence of Agency Intent

A judicial rule permitting reviewing courts to use agency deliberations to overturn agency action is, in effect, judicial approval of the notion that deliberations are an accurate and reliable indicator of agency intent. Such a rule presumes that statements during deliberations by individual agency members may reveal to judges whether the ultimate agency decision was arbitrary, capricious or not supported by evidence in the record. This presumption is wrong for several reasons. First, oral deliberations of a multi-headed agency regarding a complex evidentiary record by nature focus only on certain aspects of the record, usually the most controversial. Limitations of time and energy prevent a detailed discussion of the entire record. As a result of this reality of the deliberative process, a transcript of agency deliberations presents a very incomplete view of the record. Second, a transcript of deliberations is nothing more than a series of statements by individual agency members. It is foolish to impute to the entire decisionmaking body the comments expressed during deliberations by one or a few members of that organization. This is a principle that is well established in the case law.[66] Even the vigorous opposition of an agency member to an agency rule "does not demonstrate, or even suggest, that the [agency] acted in an arbitrary or capricious manner."[67] Similarly, statements by individual legislators during their deliberations on a proposed statute are seldom sufficient to prove impermissible legislative motivation.[68] Third, even if the statements of individual agency members during deliberations reflect general agency sentiment, it is impossible to know the motivation behind any

64. Archer Daniels Midland Co. v. State, 690 P.2d 177, 184 (Colo. 1984) (emphasis added).

65. Commercial Energies, Inc. v. Cheney, 737 F. Supp. 78, 79 (D. Colo. 1990).

66. Garcia v. United States, 469 U.S. 70, 76 (1984) ("We have eschewed reliance [for finding the Legislature's intent] on the passing comments of one Member . . . ."); Weinberger v. Rossi, 456 U.S. 25, 35 (1982). *See also* News and Film Service, Inc. v. Public Util. Comm'n, 787 P.2d 169, 174 (Colo. 1990) (a comment by one member of a multi-headed agency should not be interpreted as determinative of agency intent).

67. *News and Film Service*, 787 P.2d at 174. In light of the *News and Film Service* rationale, it would be improper to assume that the Commission's rule in *Park County* was arbitrary and capricious because one commissioner stated during deliberations that the lack of normal data would produce a standard that was "real arbitrary." Record, *supra* note 10, at 693, 811.

68. *Archer Daniels Midland*, 690 P.2d at 184.

statement made or question posed during deliberations. It is improper to infer that such statements and questions reflect an individual agency member's viewpoint. An agency member may make a statement or ask a question during deliberations to prompt further discussion, assist an undecided colleague, solidify another member's opinion or play "devil's advocate."[69] Whatever the motivation, it is impossible for reviewing courts to know the reason behind any given statement or question appearing in the transcript of an agency's deliberations. To assume otherwise is to encourage courts to engage in judicial "psychoanalysis," a thoroughly discredited practice.[70]

If a court wishes to review the reasoning underlying an agency rule, it should consult the agency's statement of basis and purpose, not the spontaneous statements of individual agency members during deliberations. As the Colorado Supreme Court urged in *Citizens for Free Enterprise*,[71] rather than initiating a de novo inquiry into whether the agency rule is grounded in fact, "the court is directed to the administratively compiled record [and the statement of basis and purpose]."[72]

## IV. CONCLUSION

The rule articulated in *Park County*—that agency deliberations may be used by reviewing courts to overturn agency actions—is poorly reasoned precedent. The rule is wrong as a matter of law and policy. *Park County* will result in a disastrous chilling of free, open and candid discussion during agency deliberations.[73] If the statements of agency members during deliberations may be used against them by a reviewing court, individual agency members may likely arrive at their own conclusions before the deliberative process begins, thereby rendering deliberations meaningless. In such a case, deliberations will not be a dynamic exchange of views aimed at reaching a consensus. Rather, deliberations will be a series of canned, prepared statements inserted to appease reviewing courts.

To avoid such a result, reviewing courts should use agency deliberations in only three limited circumstances: when the agency rule is unclear, when there are allegations of agency misconduct, or when there is an inadequate basis stated for the agency's decision. If a rule is ambigu-

69. This point is appreciated by attorneys who have experienced oral argument before an appellate court. It is impossible to gauge the way a judicial panel will vote solely on the questions posed at oral argument.

70. *See supra* text accompanying note 61.

71. *See supra* text accompanying notes 32-34.

72. Citizens for Free Enter. v. Department of Revenue, 649 P.2d 1054, 1062 (Colo. 1982).

73. Inclusion in the record of documents recounting deliberations of agency members is especially worrisome because of its potential for dampening candid and collegial exchange between members of multi-head agencies. While *public* disclosure stifles debate to some extent, *judicial* disclosure would suppress candor still further since off-hand remarks could turn out to have a *legal* significance they would not have if barred from the record on review.

Deukmejian v. Nuclear Regulatory Comm'n, 751 F.2d 1287, 1326 (D.C. Cir. 1984) (emphasis in original).

ous, resort to agency deliberations is analogous to judicial resort to legislative history to construe an unclear statute.[74] When there are allegations of agency misconduct or an inadequate explanation for the agency action, the use of deliberations is accepted when courts review quasi-judicial agency action.[75] This use should be extended to agencies engaged in rulemaking.

74. *See supra* text accompanying notes 62-64.
75. *See supra* text accompanying notes 58-59.