

STATE OF INDIANA)	MARION COUNTY SUPERIOR COURT
) SS:	ENVIRONMENTAL DIVISION, ROOM NO. 12
COUNTY OF MARION)	CAUSE NO. 49F12-1004-MI-016855

INDIANA-KENTUCKY ELECTRIC CORPORATION,)
)
)
Petitioner (Intervenor-Respondent Below),)
Plaintiff as to Count II,)
)
INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,)
)
)
Party Pursuant to Ind. Code 4-21.5-5-6(d),)
Respondent Below,)
Party as to Count II,)
)
v.)
)
SAVE THE VALLEY, INC.; HOOSIER ENVIRONMENTAL COUNCIL, INC.; and CITIZENS ACTION COALITION OF INDIANA, INC.,)
)
)
Respondents (Petitioners Below),)
Defendants as to Count II.)
)
)
)

CITIZENS GROUPS’ BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS IKEC’S PETITION FOR JUDICIAL REVIEW AND COMPLAINT/MOTION TO SET ASIDE ORDER

Respondents-Defendants Save The Valley, Inc., Hoosier Environmental Council, Inc., and Citizens Action Coalition of Indiana, Inc. (collectively “Citizens Groups”), by counsel, respectfully submit their Brief in Support of Their Motion to Dismiss Petitioner Indiana Kentucky Electric Corporation’s (“IKEC’s”) “Verified Petition for Judicial Review” (hereinafter “2010 Petition”) and “Complaint to Set Aside as Void This Court’s Judgment or Order of

September 6, 2005” (hereinafter “2010 Complaint”). IKEC’s Petition and Complaint were jointly filed on April 15, 2010. Citizens Groups move this Court to dismiss IKEC’s 2010 Petition and Complaint pursuant to Indiana Trial Rules 12(B)(1) (lack of subject matter jurisdiction) and 12(B)(6) (failure to state a claim upon which relief can be granted).

I. INTRODUCTION

IKEC has petitioned this Court to review a final order with prior non-final orders of the Office of Environmental Adjudication (“OEA”) in Cause No. 02-S-J-2989 (hereinafter, the “OEA Proceeding”), a proceeding in which IKEC has prevailed on the merits. IKEC’s Petition and Complaint do not trigger the Court’s subject matter jurisdiction because there is no live controversy in this case and IKEC has no demonstrable injury for this Court to remedy. Indiana courts are restrained to resolving “real controversies in which the complaining party has a demonstrable injury.” *The Knox County Council v. Sievers*, 895 N.E.2d 1263, 1267 (Ind. Ct. App. 2008) (citations omitted). Because IKEC has prevailed on the merits of the OEA Proceeding, it fails to meet AOPA’s “prejudice” requirement for judicial review of agency action and, in addition, all of the issues and matters challenged by IKEC are moot. “An issue becomes moot when it is no longer live and the parties lack a legally cognizable interest in the outcome or when no effective relief can be rendered to the parties. When the principal questions in issue have ceased to be matters of real controversy between the parties, the errors assigned become moot questions and the court will not retain jurisdiction to decide them.” *Ind. Pesticide Review Bd. v. Black Diamond Pest & Termite Control, Inc.*, 916 N.E.2d 168, 179 (Ind. Ct. App. 2009) (citations omitted).

IKEC misuses the statutory procedure set out in AOPA for the judicial review of OEA’s

recent final order in an attempt to secure review of prior non-final orders in the proceeding. OEA's final order is adverse to Citizens Groups, not IKEC. It is Citizens Groups and not IKEC who have been adversely affected and prejudiced by that final order and would be eligible under AOPA, had they so elected and followed the required statutory procedures, to seek its judicial review. Moreover, IKEC does not even claim or petition this Court to correct error in the OEA's final order – because the final order granted precisely the partial summary judgment IKEC had sought. Instead, IKEC seeks belated judicial review of prior non-final orders that have made no difference to the outcome of the proceeding.

It is important to emphasize what IKEC is asking this Court to do. On the surface, IKEC requests this Court (1) to vacate three OEA Orders finding that Citizens Groups satisfied the AOPA requirements for obtaining administrative review and that OEA had the power and authority to grant an adequate remedy in the administrative proceeding initiated in 2002, with direction to dismiss Citizen Groups' petitions for review, and (2) to void this Court's 2005 entry of remand and remand the matter back to OEA with a new entry that dismisses IKEC's 2003 interlocutory appeal but that does not say remand "for further proceedings consistent with the decision of the Court of Appeals" in *Save the Valley*." IKEC's 2010 Petition, p. 47; 2010 Complaint, p. 50. Thus, IKEC is asking the Court to re-open an OEA proceeding that ended with IKEC having prevailed on the merits and to order OEA to dismiss that proceeding.

These prayers for relief are grounded in three more-fundamental invitations to the Court. First, IKEC invites this Court to overturn two Indiana Court of Appeals' rulings in *Save the Valley, Inc. v. Indiana-Kentucky Elec. Co.*, 820 N.E.2d 677 (Ind. Ct. App. 2005), *aff'd on rehearing, trans. denied without opinion* (hereinafter "*Save the Valley*"): (1) that associational

standing can satisfy the “aggrieved or adversely affected” standard of AOPA and thus OEA had authority to grant an adequate remedy in the administrative proceeding; and (2) that the Court of Appeals’ rulings on those issues were necessary to, and intertwined with, its decision that the Marion Superior Court (*i.e.*, this Court) was without subject matter jurisdiction over IKEC’s interlocutory appeal. Second, IKEC invites this Court to ignore the well-established case law recognizing the binding law-of-the-case effect of jurisdictional decisions and to do what IKEC could not get the Indiana Court of Appeals or Supreme Court to do – namely, to rule in IKEC’s favor on the issue of associational standing. And third, IKEC invites this Court after the passage of five years to reconsider and substantively modify its 2005 entry of remand, in order to keep alive IKEC’s claim that Citizens Groups did not meet the AOPA standards for administrative review, based solely on IKEC’s claim that the Court of Appeals’ ruling in *Save the Valley* on the issue of associational standing is void and should be ignored. This Court must decline IKEC’s invitations. IKEC’s 2010 Petition and Complaint clearly are nothing more than an attempt to avoid the binding effect of the *Save the Valley* Court’s ruling on associational standing. The ruling in *Save the Valley* that Citizens Groups can rely on the doctrine of associational standing to meet the AOPA standard for obtaining administrative review constitutes the law of the case and has binding effect on this Court.

IKEC’s Petition for judicial review and Complaint/Rule 60(B) motion neither trigger the Court’s subject matter jurisdiction nor state a claim for which relief can be granted because: (1) the Petition and Complaint do not present live controversies and all of the issues and matters challenged by IKEC are moot; (2) IKEC is not prejudiced by the OEA Orders; (3) any alleged error in the OEA Orders and the Court’s 2005 remand entry is harmless; (4) the ruling by the

Court of Appeals in *Save the Valley* that Citizens Groups can rely on the doctrine of associational standing to meet the AOPA requirements for obtaining administrative review constitutes binding law of the case on this Court and in any further proceedings before the OEA; and (5) the Court's 2005 entry of remand is not void or in error and no relief can be granted to IKEC.

II. PROCEDURAL HISTORY

On December 26, 2002, Citizens Groups filed in the OEA a verified petition for administrative review of the Indiana Department of Environmental Management's ("IDEM's") renewal of IKEC's permit for the Clifty Creek waste site (the "OEA Proceeding" refers to The Matter of Objections to Approval of Solid Waste Facility Renewal [to] Clifty Creek Station, Restricted Waste Site Type III, FP# 39-4 Jefferson County, Indiana OEA Cause No. 02-S-J-2989) On March 3, 2003, intervenor IKEC filed a second motion to dismiss alleging that Citizens Groups' petition for review did not meet AOPA standards to invoke the power and authority of the OEA to conduct the proceeding because "[a]n organization's allegation of its members' injury, as opposed to its own, is insufficient to confer standing under controlling decisions of the Indiana Courts." Second IKEC Motion to Dismiss, p. 1. Citizens Groups filed an amended verified petition on March 31, 2003. OEA's Environmental Law Judge ("ELJ") issued a non-final order on June 23, 2003, denying IKEC's motions to dismiss and concluding that Citizens Groups were entitled to rely on the doctrine of associational standing and thus their allegations in their amended petition met the statutory standards under AOPA to obtain administrative review. IKEC sought immediate judicial review (hereinafter "2003 Interlocutory Appeal") of OEA's June 23 Order in the Marion Superior Court. Citizens Groups opposed IKEC's petition for judicial review and complaint for declaratory judgment and filed a motion to

dismiss on July 25, 2003. On October 27, 2003, the Marion Superior Court denied Citizens Groups' motion to dismiss and granted IKEC a declaratory judgment that OEA lacked the authority to conduct and grant an adequate remedy in the administrative proceeding because Indiana did not recognize associational standing for purposes of satisfying the AOPA standard for obtaining administrative review. Citizens Groups appealed the Superior Court's judgment, and on January 11, 2005, the Court of Appeals reversed the Marion Superior Court. The Court of Appeals ruled that Indiana did recognize associational standing for purposes of satisfying the AOPA standard and thus Citizens Groups were properly before the OEA and IKEC was required to exhaust administrative remedies, ousting the Superior Court of jurisdiction over the 2003 Interlocutory Appeal. *Save the Valley*, 820 N.E.2d at 681-82. On rehearing, the Court of Appeals affirmed the decision on March 31, 2005 (824 N.E.2d 776) and, on August 11, 2005, the Indiana Supreme Court denied transfer without opinion (841 N.E.2d 179). On September 6, 2005, the Marion Superior Court remanded the case back to the OEA for further proceedings consistent with the decision of the Court of Appeals in *Save the Valley*.

III. STANDARD ON MOTION TO DISMISS

Subject matter jurisdiction is the power to hear and determine cases of the general class to which any particular proceeding belongs. *K.S. v. State*, 849 N.E.2d 538, 540 (Ind. 2006). A motion to dismiss under Trial Rule 12(B)(1) for lack of subject matter jurisdiction "presents a threshold question concerning the court's power to act." *Greer v. Buss*, 918 N.E.2d 607, 613 (Ind. Ct. App. 2009), citing *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994). The trial court decides whether the requisite jurisdictional facts exist based on its consideration of the complaint, the motion to dismiss, and any affidavits or other evidence

submitted. *Id.* If the facts before the trial court are not in dispute, then the question of subject matter jurisdiction is purely one of law. *Bellows v. Board of Commissioners of the County of Elkhart*, --- N.E.2d ----, 2010 WL 1740410, *12 (Ind. Ct. App., April 30, 2010).

A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint or petition: that is, whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief. *Bellows*, 2010 WL 1740410, *11. Thus, while the Court does not test the sufficiency of the facts alleged with regards to their adequacy to provide recovery, it does test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred. *Id.* The Court need not accept as true conclusory, nonfactual assertions or legal conclusions. *Richards & O'Neil, LLP v. Conk*, 774 N.E.2d 540, 547 (Ind. Ct. App. 2002).

Objections to failures to meet statutory and procedural requirements are properly raised by means of a motion under Rule 12(B)(1) for lack of jurisdiction or 12(B)(6) for failure to state a claim, depending on whether the claimed defect is apparent on the face of the complaint or petition. *Packard v. Shoopman*, 852 N.E.2d 927, 931 (Ind. 2006).

IV. ARGUMENT

A. THE COURT MUST DISMISS IKEC'S PETITION AND COMPLAINT BECAUSE THE ISSUES IN THE OEA ORDERS AND THE COURT'S REMAND ENTRY ARE MOOT, IKEC IS NOT PREJUDICED BY THE OEA ORDERS, AND ANY ALLEGED ERRORS IN THE ORDERS OR REMAND ENTRY ARE HARMLESS.

IKEC asks this Court to decree that three prior non-final orders (hereinafter, "OEA Orders") issued during Cause No. 02-S-J-2989 are arbitrary, capricious, and not in accordance with law, and to remand the matters to OEA with direction to dismiss Citizens Groups' petitions

for review for not meeting the AOPA standards to obtain administrative review under Ind. Code § 4-21.5-3-7(a)(1)(B). That AOPA provision states: “To qualify for review of any other order described in section 4, 5, or 6 of this chapter, a person must petition for review in a writing that does the following: (1) States facts demonstrating that: . . . (B) the petitioner is aggrieved or adversely affected by the order.”

In reality, IKEC’s 2010 Petition is not directed at the OEA Orders per se. It is a collateral attack on the Court of Appeals’ ruling in *Save the Valley* that Citizens Groups can rely on associational standing to meet the § 4-21.5-3-7(a)(1)(B) standard. IKEC’s Complaint/Rule 60(B) motion also is based solely on this collateral attack to the *Save the Valley* ruling on associational standing.

This Court should dismiss IKEC’s Petition and Complaint for three reasons. First, the issue of Citizens Groups’ ability to rely on associational standing to initiate the OEA Proceeding is moot and no longer a live controversy, now that the OEA Proceeding has concluded with IKEC having prevailed on the merits. There is no injury for this Court to redress. Second, IKEC does not meet the AOPA requirement that a party seeking relief under judicial review show that it has been “prejudiced” by the challenged agency action. Third, the Court has no remedy to provide to IKEC because any alleged procedural errors committed by the OEA in the challenged orders or by the Court in its 2005 entry of remand are harmless error under Trial Rule 61. These orders and remand entry should not be revisited.

1. The Issues IKEC Challenges are Now Moot.

IKEC’s 2010 Petition and Complaint are both based solely on IKEC’s collateral attack to the *Save the Valley* ruling on associational standing. IKEC has failed to show that the matters in

the OEA Orders and the Court's 2005 remand entry of which it complains are live controversies in the context of the OEA Proceeding. The doctrine of mootness in Indiana is explained as follows:

An issue becomes moot when it is no longer live and the parties lack a legally cognizable interest in the outcome or when no effective relief can be rendered to the parties. When the principal questions in issue have ceased to be matters of real controversy between the parties, the errors assigned become moot questions and the court will not retain jurisdiction to decide them.

Ind. Pesticide Review Bd. v. Black Diamond Pest & Termite Control, Inc., 916 N.E.2d 168, 179 (Ind. Ct. App. 2009) (citations omitted); accord *Ind. High Sch. Ath. Ass'n v. Durham*, 748 N.E.2d 404, 410 (Ind. Ct. App. 2001). Because IKEC prevailed on the merits in the OEA Proceeding, the issue of whether Citizens Groups' petitions meet the AOPA standards for obtaining administrative review is no longer a live controversy and is moot. See, e.g., *Appiah v. Hall*, 962 A.2d 1046, (Md. App. Ct. 2008) ("The court was correct that its ruling rendered the limitations issue moot. In other words, appellees, having prevailed on the merits, had no further reason to pursue their claim that appellant's suit was time barred.").

Judicial policy strongly counsels against reviewing IKEC's claims. IKEC argues that the OEA committed procedural legal error. See *K.S. v. State*, 849 N.E.2d 538 (Ind. 2006) and *Packard v. Shoopman*, 852 N.E.2d 927 (Ind. 2006) (holding that at least some failures to meet procedural requirements are legal error rather than jurisdictional failings). As a matter of judicial policy, our courts cannot allow parties prevailing on the merits of a case to reach back and appeal non-final rulings and orders for legal error simply because those rulings and orders may have unfavorable precedential effect in other proceedings in which the party is engaged. Yet this is precisely what IKEC is asking this Court to do. But these non-final rulings have been

superseded by the OEA's final order in IKEC's favor and are now moot.

Furthermore, no effective relief can be rendered to IKEC. IKEC requests that the Court vacate the OEA Orders and remand the matter to OEA with direction to ignore the rulings in *Save the Valley* and dismiss Citizens Groups' petitions for review. To satisfy IKEC's request, this Court would not only have to ignore the binding Court of Appeals' rulings, it would also have to direct OEA to do the same. Moreover, this Court would have to ignore the fact that OEA has already dismissed Citizens Groups' claims, and pretend that dismissal on remand would redress some injury to IKEC. Yet even if the OEA dismissed Citizens Groups' petitions on remand, erasing eight years of litigation, this still would not nullify the binding effect of *Save the Valley* and its ruling on associational standing.

2. IKEC is Not Prejudiced by the OEA Orders and Cannot Challenge the Orders After Prevailing on the Merits.

IKEC claims it has standing to obtain judicial review of the OEA Orders because it is “[a] person to whom the agency action is specifically directed.” Ind. Code § 4-21.5-5-3(a)(1). This provision, however, is insufficient to trigger relief on judicial review pursuant to AOPA. A court may grant relief on judicial review under Ind. Code § 4-21.5-5-15 “only if it determines that a person seeking judicial relief has been *prejudiced* by an agency action.” Ind. Code § 4-21.5-5-14(d) (emphasis added). Having prevailed on the merits, IKEC is no longer prejudiced by the OEA Orders. To show prejudice, IKEC must demonstrate that but for the challenged agency action the outcome of the OEA Proceeding on the merits would have been different. *See, e.g., Farris v. State*, 907 N.E.2d 985, 987 (Ind. 2009) (to show prejudice, the petitioner must show that but for the counsel's errors, the outcome of the trial would have been different); *Roberts v. Cmty. Hosps. of Ind., Inc.*, 897 N.E.2d 458, 466 (Ind. 2008) (by failing to identify admissible and

material evidence that would have changed the outcome on the merits, the motion to correct error did not show how the party was prejudiced); *Henley v. State*, 881 N.E.2d 639, 644 (Ind. 2008) (prejudice is a reasonable probability, *i.e.*, a probability sufficient to undermine confidence in the outcome, that, but for counsel's errors, the result of the proceeding would have been different). IKEC has not and cannot make this necessary showing that it still is prejudiced by the OEA Orders, since the relief it requests would not change the outcome of that Proceeding. The only prejudice that IKEC contends it suffered is the loss of money used to pay its attorneys for litigation. But the costs of litigation cannot be the basis of the "prejudice" required to obtain relief on judicial review, since every party litigating an administrative proceeding would meet that standard, rendering the "prejudice" requirement meaningless.

Because IKEC cannot show prejudice stemming from the OEA Proceeding, it contends that the OEA Orders jeopardize IKEC's permits and business and that the OEA ELJ incorporated by reference at least one of the OEA Orders in the ongoing OEA Cause No. 08-S-J-4106. IKEC's 2010 Petition, p. 47. If those allegations are true, IKEC can challenge the issues in the OEA Orders in the context of that OEA proceeding. To obtain judicial review of Cause No. 02-S-J-2989, however, IKEC must show it has been prejudiced in Cause No. 02-S-J-2989, which has ended with a final order on the merits in IKEC's favor. IKEC cannot meet its burden to show prejudice by challenging one proceeding yet claiming that the prejudice will occur in another proceeding, and it cannot meet its burden to show prejudice by claiming that it would have preferred to win its case on different grounds.

3. **Any Procedural Errors OEA May Have Committed in its Orders or the Court May Have Committed in its Entry of Remand are Harmless Because They Do Not Affect IKEC's Substantial Rights.**

IKEC is in effect requesting the Court to set aside the final judgment of the OEA in Cause No. 02-S-J-2989, since that would be the result of granting IKEC's request for relief. But any alleged errors in the OEA Orders or the Court's 2005 remand entry do not affect IKEC's substantial rights and made no difference to the final outcome of the case, and are thus harmless. Harmless errors are not an adequate ground for granting relief.

The harmless error doctrine applies to orders of courts as well as administrative decisions. *Indiana State Highway Com. v. Indiana Civil Rights Com.*, 424 N.E.2d 1024, 1034 (Ind. Ct. App. 1981). Trial Rule 61 states as follows:

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting relief under a motion to correct errors or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order or for reversal on appeal, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the *substantial rights* of the parties.

(Emphasis added). IKEC bears the burden of showing that the OEA Orders and the Court's remand entry affect its "substantial rights." See Trial Rule 61; *State of Indiana v. Haldeman*, 919 N.E.2d 539, 544 (Ind. 2010); see also *Sullivan v. City of Evansville*, 728 N.E.2d 182, 194 (Ind. Ct. App. 2000) (citing the rule that harmless error doctrine applies to judicial review of administrative proceedings and appellant bears burden of showing reversible error). IKEC has not met this burden.

Given that IKEC has prevailed on the merits of the OEA Proceeding, any alleged

procedural error or defect in the Proceeding does not affect IKEC's substantial rights. Consider *Boffo v. Boone County Board of Zoning Appeals*, 421 N.E.2d 1119 (Ind. Ct. App. 1981). The Boffos contended that the trial court erred in concluding that because they had failed to allege that they were aggrieved parties as required by the relevant statute they lacked standing to raise certain issues. *Id.* at 1131. The Court of Appeals, invoking Trial Rule 61, ruled that the trial court's conclusion that the Boffos lacked standing to raise the disputed issues was harmless error, because in spite of the trial court's conclusion "the court in effect afforded Boffos standing by addressing those very issues on the merits." *Id.* at 1132. The Court stated: "[A]ssuming arguendo that the trial court erred in its conclusion, the error did not harm or prejudice the substantial rights of Boffos to have the issues . . . heard and determined on the merits. We must hold as harmless any error the court may have committed in concluding that the Boffos lacked standing[.]" *Id.* As in *Boffo*, any error as to the OEA's or this Court's incorporation of the *Save the Valley* ruling that Citizens Groups can rely on associational standing is harmless because such alleged errors made no difference to the final outcome of the case.

B. THE COURT MUST DISMISS IKEC'S PETITION AND COMPLAINT BECAUSE THE COURT OF APPEALS' RULINGS IN *SAVE THE VALLEY* ARE BINDING ON THIS COURT AND THE OEA. THIS COURT MUST DECLINE IKEC'S INVITATION TO VACATE THE COURT OF APPEALS' RULINGS IN *SAVE THE VALLEY*.

In order for this Court to grant IKEC's request for relief in its 2010 Petition, the Court would effectively have to overturn the rulings of the Court of Appeals in *Save the Valley*. As we argue below, the rulings by the *Save the Valley* Court on associational standing and OEA's authority to provide an adequate remedy in the OEA Proceeding were necessary to, and intertwined with, the Court of Appeals' decision that IKEC had to exhaust administrative

remedies and that the Marion Superior Court lacked subject matter jurisdiction over IKEC's 2003 Interlocutory Appeal. The Court of Appeals expressly tied these issues together in both its main decision and on rehearing. And IKEC vigorously presented these issues as inextricably linked in its briefs to the OEA, to the Marion Superior Court on judicial review, and to the Court of Appeals in *Save the Valley*. Thus, these rulings in *Save the Valley* are binding law of case and have preclusive effect on this Court. See *Hanson v. The Valma M. Hanson Revocable Trust*, 855 N.E.2d 655, 662 (Ind. Ct. App. 2006) (all statements of the court that are necessary in the determination of the issues presented are binding law of the case). These rulings were properly viewed as such by this Court, as reflected in its September 6, 2005 entry of remand, and by the OEA on remand from the Court. IKEC's request that this Court vacate the rulings in *Save the Valley* fails to state a claim upon which relief can be granted.

Over the next several subsections, Citizens Groups explain the law-of-the-case doctrine and argue that the rulings in *Save the Valley*, particularly those regarding associational standing, continue to be binding law of the case on this Court and the OEA.

1. **The Law-of-the-Case Doctrine States That All Issues Decided Directly or by Necessary Implication in a Prior Appellate Decision are Binding in All Subsequent Stages of the Same Case.**

The "law-of-the-case" doctrine refers to a family of rules embodying the general concept that a tribunal involved in later phases of a lawsuit should not reopen questions decided by that tribunal or a higher one in earlier phases. For example, under the law-of-the-case doctrine, an appellate court's determination of a legal issue is binding both on the trial court on remand and on the appellate court on a subsequent appeal, given the same case with substantially the same facts. *Boonville Convalescent Ctr., Inc. v. Cloverleaf Healthcare Servs. Inc.*, 834 N.E.2d 1116,

1125 (Ind. Ct. App. 2005); *Humphreys v. Day*, 735 N.E.2d 837, 841 (Ind. Ct. App. 2000); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). All issues conclusively decided directly, indirectly, or by implication in a prior appellate decision are binding in all subsequent stages of the same case. *Boonville*, 834 N.E.2d at 1125; *Lynn v. Windridge Co-Owners Ass’n, Inc.*, 830 N.E.2d 950, 956 (Ind. Ct. App. 2005); *Fairfield Development, Inc. v. Georgetown Woods Sr. Apartments Ltd. Partnership*, 768 N.E.2d 463, 476 (Ind. Ct. App. 2002); *Humphreys*, 735 N.E.2d at 841.

A tribunal generally has the discretion to reconsider its own prior decisions of issues addressed prior to entry of a final order or judgment. However, once the prior decision of an issue has been the subject of an appeal and the issue conclusively decided expressly or by necessary implication in a final appellate decision, the law-of-the-case doctrine prevents a tribunal from reconsidering the issue decided. *Merrillville Conservancy Dist. ex rel. Bd. of Directors v. Atlas Excavating, Inc.*, 764 N.E.2d 718, 725 (Ind. Ct. App. 2002); *Serletic v. Noel*, 700 N.E.2d 1159, 1161 (Ind. Ct. App. 1998); *Crocker*, 49 F.3d at 739. Only an “extraordinary circumstance,” such as where the initial decision was clearly erroneous and would work manifest injustice, could persuade a court to revisit an issue already decided. *Boonville*, 834 N.E.2d at 1125.

The law-of-the-case doctrine is based on the sound policy that once an issue is litigated and decided, that should be the end of the matter. *Indiana Farm Gas Production Co. v. Southern Indiana Gas & Elec. Co.*, 662 N.E.2d 977, 981 (Ind. Ct. App. 1996); *see also Rothberg v. Hershberger*, 832 N.E.2d 593, 598 (Ind. Ct. App. 2005) (“The purpose of the doctrine is to minimize unnecessary re-litigation of legal issues once an appellate court has resolved them.”).

If all questions that have been determined by a court of appeals are to be regarded as still open for discussion and revision in the same case, there would be no end of their litigation until the financial ability of the parties had been exhausted (although the financial impacts of unnecessary re-litigation of issues tend to fall disproportionately). Indiana has applied the law of the case doctrine in its strictest sense and has resisted creating exceptions to the strict application of the doctrine. *Indiana Farm Gas*, 662 N.E.2d at 981.

The Court of Appeals' ruling in *Save the Valley* that Citizens Groups can rely on the doctrine of associational standing to meet the AOPA standard for obtaining administrative review was necessary and essential for the appellate court's reversal of the Marion Superior Court, and constitutes binding law of the case on this Court. IKEC's 2010 Petition and Complaint attempt to avoid the preclusive effect of *Save the Valley* on the associational standing issue, and ask this Court to ignore a binding appellate decision where no extraordinary circumstances exist and no manifest injustice will result. IKEC's contentions are meritless.

2. The Law-of-the-Case Doctrine Applies to Previous Decisions on Issues of Jurisdiction as well as to Previous Judgments Entered on the Merits.

An appellate decision on the issue of jurisdiction is the law of the case with respect to the questions actually decided just as it is with a judgment on the merits. *See, e.g., In re Matter of Lemond*, 413 N.E.2d 228 (Ind. 1980); *Indiana Farm Gas Production Co., Inc. v. Southern Indiana Gas and Elec. Co.*, 662 N.E.2d 977 (Ind. Ct. App. 1996). The law-of-the-case doctrine belongs to a family of preclusion doctrines that includes collateral estoppel (issue preclusion), which "bars the subsequent relitigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in a subsequent action." *Wedel v. American Elec. Power Service Corp.*, 681 N.E.2d 1122, 1131 (Ind. Ct. App.

1997). Several decisions from Indiana and other jurisdictions illustrate that both the law-of-the-case doctrine and issue preclusion apply to jurisdictional rulings.

Two Seventh Circuit opinions are particularly illustrative of the point. In *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 708 (7th Cir. 1999), the court stated: “[Plaintiff] argues [that a dismissal] for want of jurisdiction cannot have any res judicata effect because a ruling by a court that lacks jurisdiction over the case is a nullity. That is an oversimplification. A ruling by a court that it lacks jurisdiction is res judicata on the issue of that court’s jurisdiction[.]” The opinion in *Okoro v. Bohman* also is illuminating:

It may seem paradoxical to suggest that a court can render a preclusive judgment when dismissing a suit on the ground that the suit does not engage the jurisdiction of the court. But the paradox is superficial. A court has jurisdiction to determine its own jurisdiction. . . . A ruling that it lacks jurisdiction is therefore entitled to preclusive effect. The only difference . . . is that a judgment on the merits precludes relitigation of any ground within the compass of the suit, while a jurisdictional dismissal precludes only the relitigation of the ground of that dismissal, . . . and thus has collateral estoppel (issue preclusion) effect rather than the broader res judicata effect that nowadays goes by the name of claim preclusion.

164 F.3d 1059, 1063 (7th Cir. 1999) (internal citations omitted). In addition, Wright & Miller, 18A *Fed. Prac. & Proc. Juris.2d* § 4436 (2005), echo the point made in *Okoro*:

Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question. If it seems necessary to rebut the sophistic argument that preclusion cannot arise from the judgment of a court that admits to a lack of jurisdiction, comfort may be found in the notion that a court has jurisdiction to determine its own jurisdiction.

See also Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 816 fn. 5 (1988) (applying law-of-the-case principles to transfer decisions, stating: “There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee’s

jurisdiction. Perpetual litigation of any issue – jurisdictional or non-jurisdictional – delays, and therefore threatens to deny, justice.”); *Hill v. Potter*, 352 F.3d 1142, 1146-47 (7th Cir. 2003) (explaining that district court’s ruling that it lacked subject matter jurisdiction over claim due to plaintiff’s failure to exhaust administrative remedies was preclusive with respect to plaintiff’s attempt to relitigate the question of whether he had exhausted administrative remedies); *Ferreira v. Borja*, 93 F.3d 671, 674 (9th Cir. 1996), *cert. denied*, 519 U.S. 1122 (1997) (“Surely a court that has decided that it has jurisdiction is not duty-bound to entertain thereafter a series of repetitive motions to dismiss for lack of jurisdiction.”); *LaShawn A. v. Barry*, 87 F.3d 1389, 1394 (D.C. Cir. 1996) (“Today, this court and other courts of appeals routinely apply law-of-the-case preclusion to questions of jurisdiction, and do so even when the first decision regarding jurisdiction is less than explicit.”) (citations omitted); *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 142-43 (D.D.C. 2002) (“The law of the case doctrine applies equally to jurisdictional issues.”).

Two Indiana cases illustrate the binding effect of jurisdictional rulings. *In re Matter of Lemond*, 413 N.E.2d 228 (Ind. 1980), the father in a child custody dispute filed a petition to modify a governing consent decree entered by a Hawaiian trial court. The Pike Circuit Court denied the petition but granted custody to the father. On appeal, the Indiana Court of Appeals had ruled that the circuit court erred in assuming jurisdiction – *i.e.*, the circuit court could not exercise jurisdiction to modify the physical custody provisions of a Hawaii divorce decree because Hawaii was the child’s “home state.” *Id.* at 232. After remand, imposition of a stay order by the circuit court, and further challenges in the appeals court, the Indiana Supreme Court denied the father’s petition to transfer. The Court concluded that the prior ruling of the appeals

court on the jurisdictional issue was the law of the case:

[T]he Clerk of the Supreme Court and Court of Appeals sent notices to all counsel of record, informing them that the petition to transfer had been denied and the stay dissolved. In addition, the Clerk of these Courts certified the opinion of the Court of Appeals and transmitted the opinion to the Clerk of the Pike Circuit Court. . . . *The effect of the denial of transfer and dissolution of the stay was to make the Court of Appeals opinion the law of the case. . . . Thus, all the issues directly decided by the Court of Appeals opinion were binding in further proceedings in this case. Hawaii had been found to be the home state for purposes of determining any further custody disputes, and that decision was not subject to further attack in Indiana.*

Id. at 232 (internal citations omitted) (emphasis added).

Similarly, in *Indiana Farm Gas Production Co., Inc. v. Southern Indiana Gas and Elec. Co.*, 662 N.E.2d 977 (Ind. Ct. App. 1996), IFG had filed a petition with the Indiana Utility Regulatory Commission (“Commission”) for an order requiring SIGECO to transport gas. SIGECO filed a motion to dismiss the petition for want of jurisdiction. The Commission denied the motion to dismiss, and SIGECO appealed. The Court of Appeals, concluding that IFG had not met its burden to prove the jurisdictional prerequisites, reversed the Commission’s order and remanded the case for an order granting summary judgment in favor of SIGECO on the grounds that the Commission lacked jurisdiction to decide the dispositive issues of property law (“*Farm Gas I*”). On rehearing, the appeals court determined that the parties had not actually presented sworn affidavits to the Commission and remanded the matter back to the Commission for a hearing upon the issues presented by IFG’s petition, including a determination of jurisdiction (“*Farm Gas II*”). On remand, the Commission held an evidentiary hearing and then dismissed the case, concluding, on the authority of *Farm Gas I*, that it lacked jurisdiction over the threshold issues of property law in the case. IFG then appealed the Commission’s dismissal. The Court of Appeals concluded that it “need not address the merits of IFG’s arguments concerning the

jurisdiction of the Commission” because it was “bound by our holding in *Farm Gas I* that the Commission lacked jurisdiction through the ‘law of the case’ doctrine.” 662 N.E.2d at 981.

In both *Lemond* and *Indiana Farm Gas*, the appellate court’s prior holding that the lower court lacked jurisdiction was held under the law-of-the-case doctrine to preclude further litigation of jurisdictional issues.

Furthermore, the application of the law-of-the-case doctrine to jurisdictional rulings does not depend on how the jurisdictional issue was presented to the tribunal lacking jurisdiction – for example, whether the issue was decided on a motion to dismiss or on a motion for summary judgment. This is plainly illustrated by *Indiana Farm Gas*, 662 N.E.2d at 977. In that case, much like the current case, SIGECO filed a motion to dismiss which was denied by the tribunal below. On appeal, the Court of Appeals treated SIGECO’s motion to dismiss as a motion for summary judgment under Trial Rule 56 because the Commission considered pre-filed testimony outside the pleadings. The court held that summary judgment should be entered in favor of SIGECO that the Utility Regulatory Commission lacked jurisdiction (*Farm Gas I*). 662 N.E.2d 981-82. On rehearing, the Court of Appeals subsequently ruled that the prefiled testimony should not have been considered because it was not submitted under oath and remanded the case to the Commission for a hearing on the issues in dispute, including jurisdiction (*Farm Gas II*). *Id.* at 982. In a subsequent appeal following the remand, the Court of Appeals ruled that its determination in *Farm Gas I* that the Commission lacked jurisdiction over the dispositive property law issues was law of the case notwithstanding its remand for a hearing in *Farm Gas II*. In so doing, the Court explained: “Although *Farm Gas I* was vacated in part by *Farm Gas II*, we find that the grounds for vacating portions of the opinion were procedural in nature and had no

effect on the jurisdictional analysis of the original opinion.” *Id.* The Court of Appeals accorded law-of-the-case status to the jurisdictional analysis in *Farm Gas I*, and the fact that the jurisdictional issue had been raised in a motion to dismiss that had been improperly converted to a motion for summary judgment was immaterial to the preclusive effect of the ruling on later proceedings.

IKEC previously litigated the issue of associational standing before the OEA and this Court. The culmination of that litigation was a jurisdictional decision by the Court of Appeals in *Save the Valley*. Rulings on issues necessary to and intertwined with that jurisdictional decision preclude re-litigation of those issues before this Court. *See, e.g., Hanson v. The Valma M. Hanson Revocable Trust*, 855 N.E.2d 655, 662 (Ind. Ct. App. 2006) (all statements of the court that are necessary in the determination of the issues presented are binding law of the case). Over the next four subsections, Citizens Groups show that the key underlying issue in IKEC’s 2010 claims – *i.e.*, whether Citizens Groups can rely on associational standing to meet AOPA standards for obtaining administrative review – was necessary to and intertwined with the jurisdictional decision by the Court of Appeals in *Save the Valley*. IKEC is thus barred by the law-of-the-case doctrine and collateral estoppel from re-litigating that issue or related issues.

3. **Throughout the 2003–2005 Litigation, IKEC Argued to the Courts that It Did Not Have to Exhaust Administrative Remedies Because the OEA Proceeding was *Ultra Vires*, in Turn Because Groups Could Not Rely on Associational Standing to Meet the AOPA Standards for Obtaining Administrative Review, and IKEC is Judicially Estopped From Now Arguing the Contrary.**

In 2003, Citizens Groups moved the Marion Superior Court to dismiss IKEC’s (and IDEM’s) Interlocutory Appeal on the grounds that IKEC had failed to meet the requirements of Ind. Code §§ 4-21.5-5-2(c) and 4-21.5-5-4(a) for judicial review of a non-final agency action –

i.e., IKEC failed to exhaust its administrative remedies – and therefore, based on Indiana case law, the Marion Superior Court did not have subject matter jurisdiction over the appeal. *See* IKEC’s 2010 Petition, pp. 8-9, ¶¶15-16.

Indiana Code § 4-21.5-5-2(c) states:

- (c) A person is entitled to judicial review of a nonfinal agency action only if the person establishes both of the following:
 - (1) Immediate and irreparable harm.
 - (2) No adequate remedy exists at law. (The failure of a person to comply with the procedural requirements of this article may not be the basis for a finding of an inadequate remedy at law.)

Indiana Code § 4-21.5-5-4(a) states:

- (a) A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review.

IKEC resisted Citizens Groups’ failure-to-exhaust claim by arguing the following: (1) Citizens Groups could not meet the AOPA standard for obtaining administrative review using the doctrine of associational standing; (2) this meant that the OEA Proceeding was *ultra vires* – OEA lacked the power and authority to grant an adequate remedy in the OEA Proceeding; (3) without an adequate remedy at law no exhaustion is required, according to § 4-21.5-5-2(c) and settled Indiana case law. *See also* IKEC’s Brief in Response to Motion to Dismiss (Marion Sup. Ct., filed Aug. 6, 2003), pp. 2-3 (Exhibit A). The following quotations, which are representative of IKEC’s position and arguments, are excerpted from IKEC’s 2003 briefs to the Marion Superior Court.

IKEC moved to dismiss the [Citizens Groups’] Amended Petition on the ground that it does not conform to the mandatory requirement of Ind. Code 4-21.5-3-7(a)(1) that a petition “must” state facts demonstrating that “the petitioner is aggrieved or adversely affected by the order.” SIGs’ Amended Petition does not meet that threshold requirement, because it alleges, not that a petitioner is

aggrieved or adversely affected by the permit order, but that other persons are so aggrieved. Because SIGs' amended Petition does not meet this threshold requirement of the statute, OEA has no jurisdiction over the case. That is, OEA has no right, power, or authority to even hear the case, much less issue any administrative remedy. The bulk of SIGs' motion to dismiss centers on IKEC's alleged failure to exhaust administrative remedies. However, since OEA is without right, power, or authority to issue any administrative remedy, this argument lacks any basis or force.

IKEC's Brief in Response to Motion to Dismiss (Marion Sup. Ct., filed Aug. 6, 2003), pp. 2-3

(Exhibit A).

SIGs urge that administrative remedies are adequate to address IKEC's claims here. Again, as throughout this entire controversy, SIGs fail to cite any authority showing that OEA has jurisdiction to award any administrative remedy at all. If SIGs are without standing to initiate the OEA proceeding, as the statute and all the cases indicate, then OEA has no jurisdiction over the case and can award no administrative relief[.] . . . Because OEA has no authority to act in the proceeding below, that proceeding is *ultra vires*, and OEA is without ability to award the administrative remedies upon which SIGs harp so repetitively.

Id. at pp. 12-13 (Exhibit A).

Since OEA is without jurisdiction, it cannot award any administrative remedy, so the doctrine of exhaustion does not apply, and this Court has jurisdiction over IKEC's claim for declaratory judgment.

IKEC's Supplemental Brief Opposing SIG's Motion to Dismiss (Marion Sup. Ct., filed Aug. 11, 2003), p. 8 (Exhibit B).

IKEC then presented precisely the same positions in briefing for *Save the Valley*. In the Court of Appeals, IKEC represented the dispute as turning precisely on the issues of associational standing and OEA's authority to grant adequate relief in the OEA Proceeding (this authority was then phrased as "jurisdiction over the case"):

This case turns entirely on a straightforward issue of statutory construction: does Groups' petition for administrative review state facts demonstrating that petitioners are "aggrieved or adversely affected by the order," as required by Ind. Code 4-21.5-3-7(a)(1)(B)? If not, then OEA lacked jurisdiction over the case and was powerless to do anything but dismiss.

IKEC's Brief of Appellee (Indiana Court of Appeals, filed June 11, 2004), p. 7.

The above quotations and arguments excerpted from IKEC 2003 briefs to the Marion Superior Court and the Court of Appeals stand in stark contrast to IKEC's current arguments to this Court. Compare the above quotations with the following argument found on page 22 of IKEC's 2010 Petition:

[N]either Groups' standing (or lack of it) before OEA nor OEA's "jurisdiction over the case" (or lack of it) had any possible bearing on whether IKEC or IDEM qualified for judicial review of a non-final agency order under IND. CODE § 4-21.5-5-2(c).

In 2003, IKEC argued that Groups' lack of associational standing meant that IKEC had no adequate remedy and thus qualified for judicial review. Now IKEC argues that Groups' associational standing is unrelated to whether it had no adequate remedy and thus qualified for judicial review. IKEC is judicially estopped from asserting inconsistent positions at different stages of this case. *See S & B Constr., LLC v. Old Fort LLC*, 826 N.E.2d 32, 36 (Ind. Ct. App. 2005) ("Judicial estoppel protects the essential integrity of the judicial process by preventing a party and its counsel from 'playing fast and loose' with the courts. . . . A party may not assert a position in a legal proceeding inconsistent with one previously asserted.") (citations omitted).

4. **The Issue of Whether Citizens Groups May Rely on the Doctrine of Associational Standing to Meet the "Aggrieved or Adversely Affected" Standard of AOPA was Expressly Litigated and Conclusively Decided at Every Juncture Leading Up to and Including the Court of Appeals Decision in *Save the Valley*.**

The issue of associational standing was expressly litigated and conclusively decided at every juncture in the proceedings leading up to the Court of Appeals decision in *Save the Valley*. First, the June 2003 OEA Order denying IKEC's motions to dismiss Citizens Groups' petition

for review, which was the subject of the 2003 Interlocutory Appeal, concluded that Citizens Groups had alleged facts in their amended petition for review that were sufficient to confer associational standing, and so Citizens Groups could represent their members interests in the OEA Proceeding. OEA Findings of Fact, Conclusions of Law, and Order Denying Motions to Dismiss (issued June 23, 2003), p. 12, ¶¶ 71, 73 (Exhibit C).

Second, the Marion Superior Court squarely decided the associational standing issue – and the related issues of OEA’s authority, IKEC’s exhaustion of remedies, and the Court’s subject matter jurisdiction – in favor of IKEC:

9. Because they have not carried their burden of establishing that OEA has jurisdiction over the case, Groups have not established that IKEC failed to exhaust administrative remedies and have not raised a bar to this Court's subject matter jurisdiction over IKEC’s complaint for declaratory judgment.

* * *

18. The Court thus determines: that IKEC exhausted its only administrative remedy by seeking dismissal of the OEA proceeding for lack of jurisdiction; that IKEC is suffering immediate and irreparable harm by being unwillingly subjected to an extra-jurisdictional administrative proceeding at great cost which it will be unable to recoup in the ordinary course of litigation; that the Court has a constitutional duty to determine OEA’s jurisdiction when properly raised and that such duty is not derived from, or subject to abridgement by, statute; and that further resort to administrative remedies would be futile, because OEA, being without jurisdiction over the case, can award no remedy except dismissal, which it has repeatedly failed to do.

For the foregoing reasons, Groups' motion to dismiss for lack of subject matter jurisdiction is denied.

* * *

The Court ORDERS, ADJUDGES, AND DECLARES that an organization or membership association does not satisfy the jurisdictional standing requirement of Ind. Code § 4-21.5-3-7(a)(1)(B) by stating facts that demonstrate that its members are aggrieved or adversely affected by the order of which review is sought. In order to invoke administrative review under AOPA, a petitioner seeking review under Ind. Code § 4-21.5-3-7(a)(1)(B) must petition for review in a writing that states facts demonstrating that “the petitioner is aggrieved or adversely affected by the order” of which review is sought. *Id.* Allegations by an unaffected

association that members of the association (or any other persons than the petitioner itself) are aggrieved are not sufficient to invoke the tribunal's jurisdiction over the case.

Findings of Fact, Conclusions of Law and Orders (1) Denying Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and (2) Granting Partial Summary Judgment to Petitioner-Plaintiff, Cause Nos. 49F12-0307-MI002024 and 49F12-0307-PL002327 (Marion Sup. Ct., filed Oct. 27, 2003), pp. 12, 15-17 (Exhibit D); *see also Save the Valley*, 820 N.E.2d at 678 ("The trial court concluded that the OEA never had jurisdiction over the case or the authority to award any administrative remedy except the dismissal of the Appellants' petition because the Appellants' petition did not demonstrate that they were aggrieved or adversely affected by the granting of the permit."). Note that even though the Superior Court in its Oct. 27, 2003 Orders (quoted above) used paragraphs 9 and 18 to link the issue of IKEC's exhaustion of administrative remedies to OEA's authority to conduct the proceeding (then called "jurisdiction over the case"), and later in the Order linked the OEA's authority to the issue of associational standing, taken as a whole the Oct. 27, 2003 Order expressly links all of these issues together with the Court's subject matter jurisdiction.

Third, in the Marion Superior Court's certification of its October 27, 2003 Orders to the Court of Appeals, the Superior Court found that the Orders "involve a substantial question of law, *i.e.*, the availability of 'associational standing' under Ind. Code § 4-21.5-3-7[.]" Certification of Interlocutory Orders for Immediate Appeal, Cause Nos. 49F12-0307-MI002024 and 49F12-0307-PL002327 (Marion Sup. Ct., filed Nov. 20, 2003), p. 2.

Finally, the Court of Appeals in *Save the Valley* squarely and expressly ruled on the issues that had been litigated up to that point:

We see no reason why the Appellants should not be permitted to seek

administrative review under the doctrine of associational standing. . . . Finally, based on our conclusion that the Appellants had standing to seek administrative review, we must also conclude that the trial court improperly denied their motion to dismiss IKEC's petition for judicial review and complaint for declaratory judgment. Because the Appellants had standing, the OEA had jurisdiction over the case, requiring the Appellees to comply with the AOPA procedures for seeking judicial review.

Save the Valley, 820 N.E.2d at 682. The Court of Appeals reiterated this ruling on rehearing:

IKEC also asserts that the trial court had subject matter jurisdiction for a number of reasons that were not addressed in our opinion. To the contrary, however, because the Appellants had associational standing to seek administrative review and the OEA had jurisdiction over the case, it necessarily follows that the trial court was without subject matter jurisdiction and that the Appellees must comply with AOPA procedures for seeking judicial review.

Save Valley, 824 N.E.2d 776 (Ind. Ct. App. 2005) (opinion on rehearing).

5. **The Court of Appeals in *Save the Valley* Correctly Linked the Issues of Associational Standing and OEA's Authority to Grant an Adequate Remedy in the OEA Proceeding to the Determination that the Superior Court Lacked Subject Matter Jurisdiction Over IKEC's 2003 Interlocutory Appeal.**

The crux of IKEC's assertions in both the 2010 Petition and 2010 Complaint, as it has been over the numerous motions to dismiss and motions to reconsider in the OEA Proceeding since the *Save the Valley* decision, is that the Court of Appeals' ruling on associational standing is without binding effect because the *Save the Valley* Court concluded that the trial court lacked subject matter jurisdiction over IKEC's 2003 Interlocutory Appeal. IKEC's assertion is built upon the faulty premise that a court's ruling that it lacks jurisdiction renders every part of that decision void, including the conclusions of law necessary to its jurisdictional decision. Perhaps recognizing the absurdity of this argument, IKEC attempts to divide the Court of Appeals' rulings in *Save the Valley* into "valid" rulings on jurisdiction and "void" rulings on "merits" (*see, e.g.,* IKEC's 2010 Petition, p. 9, ¶ 17). However, IKEC's framing of the issue ignores that the

rulings by the Court of Appeals on associational standing and OEA's authority to provide an adequate remedy in the OEA Proceeding (phrased as "jurisdiction over the case") were necessary and essential to, and inextricably intertwined with, the Court's determination that IKEC was required to exhaust administrative remedies and that the Marion Superior Court lacked subject matter jurisdiction over IKEC's 2003 Interlocutory Appeal. IKEC does not dispute that the failure to exhaust administrative remedies ousts the reviewing court of subject matter jurisdiction; in fact, the court's lack of jurisdiction is central to its argument that the Court of Appeals' ruling in *Save the Valley* is void. See IKEC's 2010 Petition, pp. 22-23; see also *Johnson v. Celebration Fireworks*, 829 N.E.2d 979, 984 (Ind. 2005). The *Save the Valley* Court ruled that these issues are linked, through its use of language and its specific structuring of the opinion:

[B]ecause the Appellants had associational standing to seek administrative review and the OEA had jurisdiction over the case, it necessarily follows that the trial court was without subject matter jurisdiction and that the Appellees must comply with AOPA procedures for seeking judicial review.

Save the Valley, 824 N.E.2d at 776 (opinion on rehearing). And as we discuss below, Indiana case law supports such a ruling. IKEC's assertions to the contrary have been repeatedly rejected by OEA's ELJ and should similarly be rejected by this Court.

Contrary to IKEC's claims, the Court of Appeals' ruling that the Marion Superior Court lacked subject matter jurisdiction over IKEC's 2003 Interlocutory Appeal in no way prevents the *Save the Valley* rulings from being binding law of the case. The Court of Appeals had jurisdiction to determine its own jurisdiction as well as the jurisdiction of the Marion Superior Court. See *Okoro*, 164 F.3d at 1063. The *Save the Valley* decision is clearly saying that the Superior Court should have exercised its jurisdiction to determine its jurisdiction by dismissing

IKEC's claims precisely because Citizens Groups could rely on associational standing and OEA had authority to exercise its jurisdiction over the Proceeding. The Superior Court was required to follow the same analysis of the issues as the Court of Appeals when it considered whether to grant or deny Citizens Groups' motion to dismiss. In fact, the Superior Court expressly linked the issue of Citizens Groups' ability to rely on associational standing to the OEA's authority over the Proceeding and the Court's subject matter jurisdiction. *See* Findings of Fact, Conclusions of Law and Orders (Marion Sup. Ct., filed Oct. 27, 2003), pp. 15-17 (Exhibit D). But because the Superior Court exercised its trial court jurisdiction incorrectly, the Court of Appeals exercised its appellate court jurisdiction to correct the lower court's error.

The Court of Appeals' rulings complied with Indiana case law, which is clear that a court has wide leeway to decide issues that are necessary to determining its own subject matter jurisdiction. For example, *Perry v. Stitzer Buick GMC* teaches that the court may resolve factual disputes:

In ruling on a motion to dismiss for lack of subject matter jurisdiction, the court may resolve factual disputes. The court has considerable latitude in devising procedures to ferret out the facts pertinent to jurisdiction, and it is well established that in doing so it may consider not only the complaint and motion but any affidavits or other evidence submitted. Moreover, when considering a motion to dismiss for want of subject matter jurisdiction, a court may weigh the evidence to determine the existence of the requisite jurisdictional facts.

637 N.E.2d 1282, 1286-87 (Ind. 1994) (internal citations omitted).

This leeway afforded to Indiana courts applies to considerations of law as well as of fact. For example, in *Montgomery v. State Board of Tax Commissioners*, 708 N.E.2d 936 (Indiana Tax Ct. 1999), petitioners filed a tax appeal challenging the constitutionality of a property tax levy. The respondents filed a motion to dismiss contending that the Tax Court lacked subject

matter jurisdiction, but the Court disagreed because the petitioners qualified for an exception to the administrative exhaustion requirement (*i.e.*, the administrative remedies available to the petitioners were inadequate). On reconsideration, the respondents contended that the Court prematurely evaluated the merits of the case when determining the exhaustion issue because the Court analyzed whether the property tax levy was a state tax or a local tax. The Court responded that it was required to decide the status of the property tax levy to determine the adequacy of the available administrative remedies, and thus its own subject matter jurisdiction:

Exhaustion of administrative remedies is generally required before a court may exercise jurisdiction over a matter conferred to an administrative agency. One exception to this general rule is where the available administrative remedies are inadequate. As a result, the Court, in its analysis of whether it had subject matter jurisdiction was required to examine the adequacy of the administrative remedies in this case and determine the legal issues raised by this examination. To the extent that these legal issues involved the law governing the HCI property tax levy, a complaint that the Court was determining the merits of the case cannot succeed.

Accordingly, the respondents' complaint that the Court should not have examined whether the HCI property tax was a state tax in its evaluation of the adequacy of the administrative remedies available to the petitioners misses the point.

. . . Courts must often come to factual and legal conclusions regarding their jurisdiction over a case. This case is no different. In order to determine whether the Court had subject matter jurisdiction, one of the legal issues the Court was called upon to resolve was whether the HCI property tax levy was a state tax or a local tax. The Court did so, and it cannot be erroneous to do what the law requires.

Montgomery, 708 N.E.2d at 937-38 (internal citations omitted).

As in *Montgomery*, the Court of Appeals in *Save the Valley* ruled on issues of law that were necessary to and intertwined with the determination of subject matter jurisdiction. IKEC argued in the Marion Superior Court and Court of Appeals that it had no adequate remedy at law in the OEA Proceeding (and that OEA was conducting “an outlaw proceeding”) because Citizens

Groups could not rely on associational standing. *See, e.g.*, IKEC's Brief in Response to Motion to Dismiss (Marion Sup. Ct., filed Aug. 6, 2003), p. 27 (Exhibit A). IKEC's argument was an attempt to obtain judicial review of a non-final agency action under Ind. Code § 4-21.5-5-2(c) and to avoid the exhaustion requirement in Ind. Code § 4-21.5-5-4(a). The *Save the Valley* Court rejected IKEC's arguments, and ruled that the OEA had authority to exercise its jurisdiction in the OEA Proceeding, an adequate remedy at law thus existed, and the Marion Superior Court lacked subject matter jurisdiction, all because Citizens Groups could rely on associational standing. This ruling is binding law of the case and cannot now be challenged.

6. IKEC's Contention That it was Not Necessary and Essential for the *Save the Valley* Court to Rule on Associational Standing and OEA's Ability to Provide Adequate Relief is Not Supported by Case Law.

In its 2010 Petition, IKEC raises four arguments as to why it may avoid the *Save the Valley* Court's ruling that linked the issue of associational standing to the Superior Court's lack of subject matter jurisdiction. *See* 2010 Petition, pp. 24-28, ¶ 35. None of these arguments has merit.

a. *FDL and Huffman Present No Challenge to *Save the Valley*.*

IKEC first argues in paragraph 35(a) that a trial court's subject matter jurisdiction under Chapter 5 of AOPA does not depend on associational standing, citing *FDL v. Steuben County Waste Watchers*, 749 N.E.2d 1243 (Ind. Ct. App. 2001) and *Huffman v. Office of Env'tl Adjudication*, 811 N.E.2d 806 (Ind. 2004). But neither of those cases raised the question presented to the *Save the Valley* Court (and vigorously argued by IKEC) – namely, did the party seeking judicial review of a non-final order without exhausting administrative remedies have no adequate remedy at law because the agency had no authority to provide an adequate remedy?

That question, in turn, hinged on the issue of associational standing, which up to that time had “not been addressed in Indiana.” *Save the Valley*, 820 N.E.2d at 679. As IKEC admits on page 26 of its 2010 Petition, in *FDL* and *Huffman* the petitioners for judicial review, unlike IKEC, had exhausted administrative remedies. These cases thus do not shed any light on the *Save the Valley* Court’s analysis of the trial court’s subject matter jurisdiction.

b. Neither *K.S.* nor *Packard* Change the Necessary Analysis in *Save the Valley*.

IKEC secondly argues that since the time *Save the Valley* was decided, the Indiana Supreme Court in *K.S. v. State*, 849 N.E.2d 538 (Ind. 2006) and *Packard v. Shoopman*, 852 N.E.2d 927 (Ind. 2006) has abolished the concept of “jurisdiction over the case” with retroactive effect, and that this undercuts the argument that it was necessary for the Court of Appeals to rule on associational standing and OEA’s “jurisdiction over the case.” See IKEC’s 2010 Petition, pp. 26, 29-32, ¶¶ 35(b), 36. Contrary to IKEC’s contention, the decisions in *K.S.* and *Packard* do not change or invalidate any of the analysis and rulings in *Save the Valley*.

The key issue in *K.S.* and *Packard* was whether particular procedural failures can affect a court’s subject matter jurisdiction. If such procedural failures could affect subject matter jurisdiction, a party could challenge the failures at any time. If, on the other hand, the procedural failures did not affect subject matter jurisdiction, a party could waive the issue by not objecting to the failure in a timely fashion and in addition could not collaterally attack the failure. Because Indiana case law had not been explicit about what statutory and procedural failures affect subject matter jurisdiction, some parties took advantage of the lack of clarity and tried to label every procedural failure as “jurisdictional” to get around the problem of waiver.

The Indiana Supreme Court in *K.S.* and *Packard* clarified that failing to comply with at

least some procedural requirements is “legal error,” rather than a “jurisdictional” limitation. *K.S.*, 849 N.E.2d at 540; *Packard*, 852 N.E.2d at 930. The Supreme Court also clarified that the term “jurisdiction over the case” is a “misnomer” because this so-called “jurisdiction,” unlike subject matter jurisdiction, can be waived by untimely objection and cannot be collaterally attacked. *Id.* at 929-30. (The issue of procedural failure is properly raised by means of a motion under Rule 12(B)(1) for lack of jurisdiction or 12(B)(6) for failure to state a claim, depending on whether the claimed defect is apparent on the face of the petition, *Id.* at 931.) This holding, then, is critically important for the issues of collateral attack and waiver.

However, abolishing the term “jurisdiction over the case,” as erroneously used by the lower courts in *K.S.* and *Packard*, does not change the analysis that the *Save the Valley* Court found necessary to conduct, because the *Save the Valley* Court employed the term “jurisdiction over the case” to mean what the Indiana Supreme Court clarified that it means: the authority to exercise subject matter jurisdiction to conduct a specific proceeding and to grant a remedy in that proceeding. *Packard* clarified that the term “jurisdiction over the case” refers to various procedural prerequisites to the *exercise* of subject matter jurisdiction. *Packard*, 852 N.E.2d at 930; *see also Rohrman v. Tippecanoe County Assessor*, 901 N.E.2d 95, 96 (Ind. Tax Ct. 2009) (“Rohrman's failure to name the Assessor in his December 1, 2008 petition is not the type of error that implicates this Court's subject matter jurisdiction. Rather, it is the type of procedural error that may prevent this Court from exercising its jurisdiction.”); *In re Petition to Annex Approximately 7,806 Acres of Real Estate into City of Jeffersonville*, 891 N.E.2d 1157, 1160-61 (Ind. Ct. App. 2008) (“Jurisdiction over the case” refers rather to various procedural prerequisites to the exercise of subject matter jurisdiction.”); *cf. Runkle v. Runkle*, 916 N.E.2d 184, 189 (Ind.

Ct. App. 2009) (“[t]he legal capacity of a party to prosecute its claim is a matter which affects the trial court’s jurisdiction over the particular case”). The *Save the Valley* Court knew that OEA’s “subject matter jurisdiction” was not at issue – the Marion Superior Court had said that it was not. See Findings of Fact, Conclusions of Law and Orders (Marion Sup. Ct., filed Oct. 27, 2003), p. 8, ¶ 5. The issue of OEA’s authority to conduct the OEA Proceeding was, in turn, inextricably linked to the questions of whether IKEC had an adequate remedy at law and thus whether it was required to exhaust its administrative remedies, and whether Citizens Groups were properly invoking the OEA’s authority through the doctrine of associational standing. Those questions were presented to both the Superior Court and the *Save the Valley* Court.

Therefore, whether OEA’s authority is called “jurisdiction over the case” or “authority to exercise its jurisdiction” or “authority to conduct and provide a remedy in the proceeding” has no bearing on the binding effect of the rulings in *Save the Valley*. In other words, *K.S.*, *Packard* and their progeny do not change the meaning or preclusive effect of the *Save the Valley* rulings in any way because these cases do not control the fundamental issue in *Save the Valley*: namely, whether the OEA had the power and authority to exercise its jurisdiction to conduct the OEA Proceeding initiated by Citizens Groups’ petitions and to provide an adequate remedy to IKEC in the Proceeding.

A brief closer look at *K.S.* and *Packard* is illustrative. The dispositive issue in *K.S. v. State* was whether *K.S.* could collaterally attack on appeal an order of the juvenile court committing him to the Department of Correction because of a procedural error – an error to which *K.S.* did not object – occurring in the original delinquency proceedings. *K.S.* argued that this procedural error, the court’s failure to approve by written order the filing of the original

delinquency petition, stripped the juvenile court of “jurisdiction” (K.S. called it “jurisdiction over the case”). If the “jurisdiction” at issue was subject matter jurisdiction, the juvenile court’s judgment could be collaterally attacked and the issue could not be waived by failing to object. The Indiana Supreme Court ruled that the procedural error did not affect subject matter jurisdiction, and thus the issue could be, and was, waived by K.S. 849 N.E.2d at 542. In *Packard* the Supreme Court similarly ruled that an assessor’s objection that a taxpayer failed to comply with the statutory requirement that petition to the Tax Court be filed within thirty days after an agency determination is waived if not raised in the first response to the petition because this failure to timely file a petition does not affect subject matter jurisdiction. Thus, *K.S.* and *Packard* make clear that failure to follow statutory procedures is legal error, at least as to the statutes at issue in those cases, and a party must timely object to the procedural defects or the issue will be waived. (The *Packard* court left the door open to the possibility that “other statutes” might impose procedural requirements that go to the court’s subject matter jurisdiction, 852 N.E.2d at 931.)

IKEC also argues that *K.S.* and *Packard* have retrospective effect, and cites *Don Medow Motors, Inc. v. Grauman*, 446 N.E.2d 651, 654-55 (Ind. Ct. App. 1983) in support. IKEC’s 2010 Petition, pp. 29-30. In any event, whether or not *K.S.* and *Packard* are applied retrospectively is irrelevant for IKEC’s Petition because those opinions have no impact on the rulings in *Save the Valley*.

In *Don Medow* the Court of Appeals stated: “Generally, enunciations of the common law through judicial opinions rendered in civil cases have retrospective as well as prospective effect, except where the enunciation would impair contracts made, or vested rights acquired, in reliance

on an earlier decision.” *Id.* at 654. The Court followed the above statement with words of limitation: “Thus, a civil case is determined on the common law as it stands when the judgment is to be rendered and not as it stood when the suit was brought. This is the rule even where the case is pending before an intermediate court.” *Id.* at 654-55. Thus, *Don Medow* illustrates the principle that during the time a case is at trial or on appeal, if the law changes the ruling court will apply the law as it stands at the time of the decision. Those were the facts in *Don Medow*: the appeal was fully briefed on October 27, 1982; subsequently, the Indiana Supreme Court changed the standard of proof for recovery of punitive damages on December 6, 1982; the appellate opinion was issued on March 29, 1983; and the Appeals Court then remanded back to the trial court for a new trial using the new standard. *Don Medow* thus does not necessarily control in situations where the law changes after the case was remanded to a lower tribunal, which describes the OEA Proceeding. Furthermore, the analysis of whether to apply a judicial decision retrospectively depends on several factors not cited or discussed by IKEC. *See Sheila Ray-Hayes v. Heinamann*, 768 N.E.2d 899 (Ind. 2002).

c. None of IKEC’s Cited Cases are On Point Because They Do Not Raise the Issues that Were Raised and Were Dispositive in *Save the Valley*.

Third, in paragraph 35(c) IKEC cites a number of cases and contends that “dismissal for lack of subject matter jurisdiction was upheld or required in each of the cases just cited on grounds of failure to exhaust, and in none of such cases did the court address the ‘standing’ of any party before the agency, whether any party had ‘associational standing,’ or the agency’s ‘jurisdiction over the case.’” IKEC’s 2010 Petition, p. 27. The reason that none of these cases addresses standing or associational standing is that these issues were never raised before the deciding court. A court can find a failure to exhaust administrative remedies without analyzing

every hypothetical argument and exception to the doctrine never raised by any of the parties. Courts need not argue parties' cases for them. In these cited cases, unlike in *Save the Valley*, the parties never raised the issues of standing in an attempt to avoid the exhaustion requirement, and thus standing was not necessary to these courts' rulings that exhaustion is required. *See, e.g., Johnson v. Celebration Fireworks, Inc.*, 829 N.E.2d 979, 983-84 (Ind. 2005) (rejecting plaintiff's argument that administrative exhaustion was not necessary before appealing assessment of fees to trial court because agency action was *ultra vires* and seeking an administrative remedy would be futile; dispositive issue was "a question of fact properly resolved through the administrative process"); *M-Plan, Inc. v. Indiana Comprehensive Health Ins. Ass'n*, 809 N.E.2d 834, 839-40 (Ind. 2004) (ruling that plaintiff HMOs had to first appeal assessment of fees to ICHIA Board, and rejecting plaintiffs' argument that exhaustion was not necessary because of behavior of agency administrators); *Town Bd. of Orland v. Greenfield Mills, Inc.*, 663 N.E.2d 523, 528 (Ind. 1996) (holding that plaintiffs were required to exhaust administrative remedies before raising common law and constitutional claims that IDEM had no authority to hear, because injunction that was sought to prevent construction and operation of sewage treatment project permitted by IDEM was within IDEM's power to grant); *Sun Life Assurance Co. of Canada v. Indiana Comprehensive Health Ins. Assn.*, 827 N.E.2d 1206, 1210 (Ind. Ct. App. 2005) (rejecting plaintiff's argument that it was not required to exhaust administrative remedies before challenging Insurance Association's decision in trial court because it was not a member of Association, stating "whether an insurer is a member [of the Association] is a decision that should be left to the expertise of the Board of Directors or Commissioner"); *Indiana Family & Soc. Servs. Admin. v. Legacy Healthcare*, 756 N.E.2d 567, 571 (Ind. Ct. App. 2001) (holding that

trial court had no subject matter jurisdiction to hear plaintiff's petition for a stay of the FSSA's termination of Medicaid funding because no final order was entered by the agency, mere economic injury is insufficient to establish irreparable harm, and the trial court's order disrupted the administrative process).

Furthermore, IKEC's statement that dismissal on grounds of failure to exhaust was not related to the agency's "jurisdiction over the case" in any of these cited cases is not accurate. In *M-Plan*, 809 N.E.2d 834, the Indiana Supreme Court explained that the appeals court had reasoned that because ICHIA's motion to dismiss for lack of subject matter jurisdiction was based on failure to exhaust procedures prescribed by ICHIA's Plan of Operation, the central question was whether ICHIA is an agency subject to AOPA. *Id.* at 837-38. The Court agreed with the plaintiffs that ICHIA is not a state agency, but stated, "we do not agree that this issue controls disposition of this case." The Court went on to explain in depth why even if ICHIA is viewed as a private association, exhaustion of internal remedies is still required. *Id.* at 838-39. Thus, the Court analyzed the legal authority of the Association to conduct and grant a remedy in an administrative proceeding – that is, using now outdated terminology, the Association's "jurisdiction over the case" – in order to decide whether the trial court had subject matter jurisdiction over plaintiffs' appeal.

d. The Court of Appeals in *Save the Valley* had Subject Matter Jurisdiction to Decide Issues of Law.

IKEC also appears to argue that the Court of Appeals in *Save the Valley* lacked subject matter jurisdiction to decide whether OEA "in fact" possessed the authority to hold the OEA Proceeding and grant an adequate remedy. IKEC 2010 Petition, p. 27, ¶ 35(c). The *Save the Valley* litigation tested the adequacy of Citizen Groups' petition for review: specifically,

whether, Citizens Groups could rely on the doctrine of associational standing to meet AOPA standards. The Court of Appeals had subject matter jurisdiction to decide that purely *legal issue* on the pleadings irrespective of whether or not Citizens Groups' individual members were subsequently determined to have individual standing *as a matter of fact*. Thus, it is irrelevant to the Court of Appeals' subject matter jurisdiction in 2005 that OEA ruled in 2010 that Citizens Groups individual members had not been injured as a matter of fact because contaminated groundwater would not reach their domestic water supplies.

7. Controlling Indiana Law on the Issue Expressly Decided in *Save the Valley* has Not Changed Since That Opinion.

Under the law-of-the-case doctrine, a tribunal may reconsider a prior decision that would otherwise be the law of the case only if an intervening change in the controlling law, or some other special circumstance, requires reexamining the matter to prevent injustice. *See Turner v. State*, 751 N.E.2d 726, 730-31 (Ind. Ct. App. 2001) (stating that “while we should be loath to revisit prior decisions of this court, we do so under extraordinary circumstances such as where the initial decision was ‘clearly erroneous and would work manifest injustice’”) (citations omitted); *Indiana Farm Gas*, 662 N.E.2d at 981-82 (finding the law-of-the-case doctrine applicable to jurisdictional ruling because the court found no “‘extraordinary circumstances,’ such as a change in the law or a constitutional right in jeopardy, which would cause adherence to the previous ruling to work a manifest injustice”).

The only cases decided after *Save the Valley* that figure in IKEC's 2010 Petition are *K.S. v. State*, *Packard v. Shoopman*, and *Indiana Association of Beverage Retailers, Inc. v. Indiana Alcohol and Tobacco Comm'n*, 836 N.E.2d 255 (Ind. 2005) (hereinafter, “*Ass'n of Beverage Retailers*”). We have shown above that *K.S.* and *Packard* do not compromise the binding effect

of the rulings in *Save the Valley*. As we now show, *Ass'n of Beverage Retailers* similarly has no impact on the binding effect of the rulings in *Save the Valley*.

In *Ass'n of Beverage Retailers*, the Association sought judicial review of an order by the Indiana Alcohol and Tobacco Commission (“ATC”) granting a permit. The ATC moved to dismiss the Association’s petition for lack of standing to seek judicial review of the order. The Association claimed standing under Ind. Code § 4-21.5-5-3(a)(2) as “a party to the agency proceeding.” 836 N.E.2d at 257. The Indiana Supreme Court held that the Association was not a party to the agency proceedings that led to the agency action, and thus did not have standing to seek judicial review, because the Association did not even attempt to show that it would be “aggrieved or adversely affected” by the agency action or request to be designated a party to the administrative proceedings:

[I]f IABR desired to achieve the status of an intervenor to preserve its right to either administrative or judicial review, then it was required to show that it would be “aggrieved or adversely affected” by the agency action and be designated a “party” to the administrative proceedings. *IABR did not attempt to meet these requirements.*

Id. at 259 (emphasis added). *See also Indiana Association of Beverage Retailers*, 809 N.E.2d 374, 378 (Ind. Ct. App. 2004) (“IABR is seeking judicial review as a ‘party’ to the administrative proceedings, *and not as a person otherwise aggrieved or adversely affected by the agency action.*”) (emphasis added). Thus, *Ass'n of Beverage Retailers* simply does not support the proposition that an association may not be “aggrieved or adversely affected” on the basis of asserted injuries to its members; the petitioning association attempted no such showing and the Supreme Court made no such ruling.

Equally clearly, *Ass'n of Beverage Retailers* did not address the issue of associational

standing or the circumstances under which it would apply. *Ass'n of Beverage Retailers* is as silent on the issue of associational standing as was *Huffman v. Office of Env'tl Adjudication*, 820 N.E.2d 677 (Ind. 2004). Thus, *Ass'n of Beverage Retailers* does not overrule *Save the Valley* with respect to associational standing under AOPA any more than *Huffman* could be read to conflict with it. See *Save the Valley*, 820 N.E.2d at 679 (“The statute and *Huffman* are silent regarding an association’s standing to sue on behalf of its members.”).

Therefore, there has been no change in controlling law or any other circumstance since *Save the Valley* was decided that would warrant a departure from the application of the law-of-the-case doctrine to the Court of Appeals’ rulings. Even if there had been some change in the controlling law here, IKEC can claim no injustice from this Court’s adherence to *Save the Valley*, since IKEC was successful in the OEA Proceeding. Accordingly, the Court of Appeals rulings in *Save the Valley* remain the binding law of the case in this litigation with respect to the matters challenged by IKEC: OEA’s power to provide adequate remedy to IKEC in the OEA Proceeding and the applicability of associational standing to Citizens Groups’ petitions.

8. Pages 33-46 of IKEC’s 2010 Petition Contain Nothing More Than the Argument that the Court of Appeals Decided the Issue of “Associational Standing” Wrongly in *Save the Valley*.

IKEC’s argument on pages 33-46 of its 2010 Petition would have been appropriately addressed to the Indiana Supreme Court but for the Supreme Court’s denial of transfer in the case. IKEC is now arguing that frustrated appeal to this Court in the hopes that the Court will nullify the Court of Appeals’ ruling that associational standing applies to administrative petitions for review in Indiana. Because the Court of Appeals’ ruling in *Save the Valley* on the issue of associational standing is binding law of the case, this Court must dismiss IKEC’s Petition.

C. IKEC’S TRIAL RULE 60(B) MOTION FOR RELIEF FROM JUDGMENT OR ORDER (2010 COMPLAINT) IS UNJUSTIFIED AND UNTIMELY.

On January 11 and March 31, 2005, the Court of Appeals ruled against IKEC in *Save the Valley*. The Marion Superior Court issued its entry of remand on September 6, 2005. Now, almost five years later, after winning the OEA Proceeding on the merits, IKEC has moved this Court to reconsider and substantively modify its entry of remand, with no new facts, circumstances, or changes in applicable law to justify either. IKEC’s motion to reconsider is both unjustified and untimely.

IKEC presents its Complaint expressly pursuant to subparagraphs (6) and (8) of Trial Rule 60(B). IKEC’s 2010 Complaint, p. 49. These subparagraphs state:

On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment, including a judgment by default, for the following reasons: * * *

(6) the judgment is void;

* * *

(8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in subparagraphs (1), (2), (3), and (4).

First of all, IKEC can request reconsideration under either subparagraph (6) *or* (8) but not both. *Public Service Commission of Indiana v. Joseph Schaller and Associated Freight Lines, Inc.*, 299 N.E.2d 625, 629 (Ind. Ct. App. 1973) (“Apparently, they believe that Section 8 is coextensive with other sections. Such is not the case. The provisions of the two sections [7 and 8] are mutually exclusive.”).

Relief cannot be granted under either subparagraph. Rule 60(B) requires that “the motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8)” and “[a] movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.” IKEC had every reasonable opportunity to move this Court to set aside its September 6, 2005 remand

entry prior to April 2010 but did not. IKEC has presented no reason why it withheld its Rule 60(B) motion until the final order of the OEA on the merits of the Proceeding. Citizens Groups are prejudiced by IKEC's untimely filing of its Complaint because they should be able to find finality after losing on the merits in the OEA Proceeding.

In addition, IKEC failed to move the Court to correct errors under Trial Rule 59. "The proper function of T.R. 60(B) is to afford relief from circumstances which could not have been discovered during the sixty-day period in which a T.R. 59 motion to correct errors could have been filed with the trial court." *Snider v. Gaddis*, 413 N.E.2d 322, 324 (Ind. Ct. App. 1980); accord *Vazquez v. Dulios*, 505 N.E.2d 152, 153-54 (Ind. Ct. App. 1987) (applying rationale of *Snider*). The matters raised by IKEC in its 2010 Complaint were known immediately upon this Court's 2005 remand to OEA, and no new facts, case law, or circumstances have appeared since that time to affect those matters. The proper time for IKEC to move for correction or reconsideration of this Court's 2005 remand entry was prior to winning on the merits in the OEA Proceeding. IKEC has offered no excuse for why it waited five years. IKEC's motion is untimely.

Furthermore, IKEC has offered no "meritorious claim or defense" to support a motion under Trial Rule 60(B)(8). The movant must show enough admissible evidence to make a prima facie showing indicating that the judgment would change and that the movant would suffer an injustice if the judgment were allowed to stand. *Heartland Resources, Inc. v. Bedel*, 903 N.E.2d 1004, 1007 (Ind. Ct. App. 2009). The only claim or defense that IKEC has offered is that *Save the Valley* is not binding law of the case because the Court of Appeals did not have jurisdiction to determine the Marion Superior Court's jurisdiction and the intertwined issues necessary to that

determination. As we have shown above, this contention is not meritorious. The “evidence” IKEC sets forth in its 2010 Petition changes neither the OEA’s final judgment nor this Court’s 2005 entry of remand.

On a motion based on subparagraph (8) of Trial Rule 60(B), relief may be granted “only in exceptional circumstances.” *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 558 (Ind. Ct. App. 1999); *see also Chelovich v. Ruff and Silvian Agency*, 551 N.E.2d 890, 892 (Ind. Ct. App. 1990) (“[S]ome extraordinary circumstance must be affirmatively demonstrated to come within the purview of T.R. 60(B)(8). The burden is on the movant to establish the existence of grounds for T.R. 60(B) relief and he must additionally establish a meritorious defense to the judgment.”) (citations omitted); *Masterson v. State*, 511 N.E.2d 499, 500 (Ind. Ct. App. 1987) (“A subsequent decision by the court of review in an unrelated case does not permit a trial court to change its judgment pursuant to T.R. 60(B)(2),(7), and (8). Trial Rules 60(B)(7) and (8) are concerned only with exceptional circumstances.”) (citations omitted). No exceptional circumstance warrants relief under subparagraph (8) in this case and IKEC has not met its burden to demonstrate such circumstance.

For similar reasons, this Court cannot grant relief to IKEC under subparagraph (6) of Rule 60(B). IKEC’s contention that this Court’s entry of remand is void is based solely on its argument that *Save the Valley* is not binding law of the case because the Court of Appeals did not have jurisdiction to determine the Marion Superior Court’s jurisdiction and the intertwined issues necessary to that determination. As we have shown above, this contention is meritless. Furthermore, this Court’s 2005 entry of remand is not void because there is and can be no claim by IKEC that the Court of Appeals’ decision did not reverse the Marion Superior Court’s order

on Citizens Groups' motion to dismiss, that the Court of Appeals did not properly remand the case to the trial court, or that the Clerk did not certify the Court of Appeals' decision after the Supreme Court denied transfer. The remand entry was not in error, let alone void or entered without subject matter jurisdiction. In essence, IKEC's 2010 Complaint is designed to prod this Court into reconsidering issues already expressly and conclusively decided by the Court of Appeals and which the Indiana Supreme Court declined to hear. A motion for reconsideration or relief from judgment is not a valid substitute for an appeal. *See Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995) ("It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him. Were such a procedure to be countenanced, some lawsuits really might never end, rather than just seeming endless."); *Zurich Capital Markets Inc. v. Coglianese*, 383 F. Supp. 2d 1041, 1045 (N.D. Ill. 2005) (stating that "it is clear that motions to reconsider are not appropriate vehicles to advance arguments already rejected by the Court or new legal theories not argued before the ruling") (citations omitted); *see also Bolden v. State*, 736 N.E.2d 1260, 1261 (Ind. Ct. App. 2000) (stating that a motion to reconsider pursuant to Trial Rule 60(B) is not a substitute for a belated or expired appeal).

IKEC's claim in its 2010 Complaint that it failed to receive a timely copy of this Court's 2005 entry of remand is hollow and must be dismissed. Even assuming IKEC did not receive a copy of the remand entry at the time it was issued, IKEC was on notice of the resulting OEA Proceeding and participated actively in it. IKEC has thus waived its objection. *See Brinson v. Sheriff's Merit Bd. of Jefferson County*, 395 N.E.2d 267, 273 (Ind. Ct. App. 1979) (concluding that in administrative hearings and trial courts, "where there is an appearance, without objection,

or indeed, where there is any act indicating consent, want of notice will be deemed waived”). Even assuming it was error that IKEC did not receive notice of the remand entry, its lawyers have a duty to inquire and the error was patently harmless. Moreover, even if had it been harmful error, IKEC’s remedy would have been to appeal the remand entry to the Court of Appeals on grounds that the instructions in the remand entry were not consistent with the *Save the Valley* opinion. But, IKEC does not even make that allegation – and, of course, IKEC did not perfect such an appeal. Instead, IKEC now collaterally attacks the Court of Appeals’ decision five years after it became law of the case.

In its 2010 Complaint, IKEC asks for the following relief:

IKEC prays that this Court set aside as void, or clarify and grant IKEC relief from, this Court’s order of September 6, 2005, in the *Save the Valley* I cases, and enter in its stead an order expressly granting Citizens Groups’ Joint Motions to Dismiss (Exhibits F & G) the cases for lack of subject matter jurisdiction, without adjudication of any other issue, as required by the Court of Appeals in *Save the Valley* I.

p. 50. In other words, IKEC requests that this Court void its 2005 entry of remand and remand the matter back to OEA with a new order that dismisses IKEC’s 2003 Interlocutory Appeal but that does not say remanded “for further proceedings consistent with the decision of the Court of Appeals” in *Save the Valley*. What will happen if OEA decides on remand to respect the binding effect of the rulings in *Save the Valley*? Rule again that IKEC wins on the merits? And would Citizens Groups be forced once again to respond before this Court on another round of judicial review? In the interests of judicial economy and integrity alone the Court must reject IKEC’s attempts to keep OEA Cause No. 02-S-J-2989 from the finality that is warranted by law.

Trial Rule 60(B) motions address only the procedural, equitable grounds justifying relief from the legal finality of a final judgment, not the legal merits of the judgment. *Mid-west*

Federal Savings Bank v. Epperson, 579 N.E.2d 124, 129 (Ind. Ct. App. 1991). The *Epperson* Court stated, “In exercising its discretion, the trial court balances the alleged injustice suffered by the party moving for relief against the interests of the winning party and society generally in the finality of litigation.” *Id.* Note that the *Epperson* Court did not even contemplate the circumstances here, in which the party moving for Rule 60(B) relief is the winning party (*i.e.*, IKEC) and the party with the greatest interest in the finality of litigation is the losing party (*i.e.*, Citizens Groups). Here, IKEC has suffered no injustice (on the contrary, it prevailed on the merits). Society’s and Citizens Groups’ interests in the finality of the OEA Proceeding and the Court of Appeals’ rulings in *Save the Valley* are great.

Accordingly, IKEC’s 2010 Complaint/Trial Rule 60(B) motion is subject to dismissal both for lack of subject matter jurisdiction and as a claim for which relief cannot be granted. The Marion Superior Court’s entry of remand is not void, there is no error in its remand instructions to OEA, and even if there is error, the error is both harmless and waived.

V. CONCLUSION

IKEC’s Petition for judicial review and Complaint/Rule 60(B) motion are wholly unjustified and without merit, and must be dismissed pursuant to Trial Rule 12(B)(1) and 12(B)(6). The Petition and Complaint neither trigger the Court’s subject matter jurisdiction nor state a claim for which relief can be granted because: (1) they do not present live controversies and all of the matters presented by IKEC are moot; (2) IKEC is not prejudiced by the OEA Orders; (3) any alleged error in the OEA Orders or the Court’s 2005 entry of remand is harmless; (4) the ruling by the Court of Appeals in *Save the Valley* that Citizens Groups can rely on the doctrine of associational standing to meet the AOPA requirements for obtaining administrative

review constitutes binding law of the case on this Court and in any further proceedings before the OEA; and (5) the Court's 2005 entry of remand is not void or in error and no relief can be granted to IKEC.

For each of the foregoing reasons, Citizens Groups respectfully request that this Court dismiss IKEC's 2010 Petition and 2010 Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and award Citizens Groups (1) attorney's fees and the costs of responding to IKEC's 2010 Petition and 2010 Complaint, and (2) all other relief that this Court deems proper and just under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by hand delivery or U.S. Mail, postage prepaid, this 10th day of May, 2010, on the following counsel of record:

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