

and for Declaratory Judgment” (hereinafter “Amended Petition/Complaint”).

IKEC’s Amended Petition/Complaint, filed on May 17, 2010, adds a declaratory judgment action to IKEC’s initial Petition/Complaint. Citizens Groups now move this Court to dismiss IKEC’s Amended Petition/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). Citizens Groups also have, in a concurrent filing, moved the Court to strike Exhibits N, O, and P and associated allegations in paragraphs 4-11 of IKEC’s declaratory judgment action.

Citizens Groups incorporate by reference the entirety of the following submissions they have filed with the Court in this Cause: (1) Citizens Groups’ Motion to Dismiss IKEC’s Petition for Judicial Review and Complaint/Motion to Set Aside Order, filed on May 10, 2010; (2) Citizens Groups’ Brief in Support of their Motion to Dismiss IKEC’s Petition for Judicial Review and Complaint/Motion to Set Aside Order, filed May 10, 2010; (3) Citizens Groups’ Exhibits in Support of their Motion to Dismiss IKEC’s Petition for Judicial Review and Complaint/Motion to Set Aside Order, filed May 10, 2010; (4) Citizens Groups’ Motion to Strike Exhibits N, O, and P and Associated Allegations in IKEC’s Petition for Judicial Review and Amended Complaint, with brief in support, filed concurrently with this motion and brief.

I. INTRODUCTION

This is a judicial review proceeding under the Indiana Administrative Orders and Procedures Act (“AOPA”) to review agency action in OEA Cause No. 02-S-J-2989 (also referred to here as the “OEA Proceeding”). Citizens Groups have already responded to IKEC’s initial 2010 Petition/Complaint. Because IKEC’s Amended Petition/Complaint appears to differ from its initial pleading only in the addition of a declaratory judgment action, in this motion to dismiss

Citizens Groups focus on responding to issues raised by that declaratory judgment action.

IKEC's declaratory judgment action, like its petition for review and Rule 60(B) motion, is nothing more than a collateral attack on the law of the case established 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*") that Indiana law recognizes the doctrine of associational standing and that the doctrine is available to Citizens Groups for the purpose of their challenge to IDEM's permit in the OEA. This declaratory action is yet another procedural tool used by IKEC (although used improperly) to ask this Court for the same remedy that IKEC has already requested in its initial Petition/Complaint: namely, to ignore the binding law-of-the-case and collateral estoppel effect of the rulings in *Save the Valley* and to do what IKEC could not get the Indiana Court of Appeals or Supreme Court to do – rule in IKEC's favor on the issue of associational standing.

IKEC's declaratory judgment action (and the 2010 Amended Petition/Complaint in its entirety) must be dismissed for three reasons. First, IKEC is improperly attempting to use a declaratory judgment action to obtain review of agency action; such review is the exclusive domain of AOPA. To the extent that IKEC's declaratory action is an express or implied challenge to agency action in OEA Cause No. 02-S-J-2989 (as evidenced by IKEC's filing of its declaratory action in association with, rather than as an alternative to, this judicial review proceeding), the declaratory action fails for the same reasons that the petition for review fails: there is no live controversy in this case and IKEC is not prejudiced by OEA's actions. The issue of Citizens Groups' ability to rely on associational standing to meet AOPA standards – the sole basis of IKEC's declaratory judgment action and indeed of its entire Amended

Petition/Complaint – is moot. IKEC also has failed to show that it is “prejudiced” by challenged agency actions in the OEA proceeding under review, as required by Ind. Code § 4-21.5-5-14(d). Furthermore, to the extent that IKEC’s declaratory judgment action is an express or implied challenge to agency action in the separate OEA Cause No. 08-S-J-4106 (as evidenced by IKEC’s arguments and its proffered Exhibits N, O, and P), the declaratory action does not trigger this Court’s subject matter jurisdiction because IKEC is attempting to obtain review of non-final agency action using the wrong cause of action, in the wrong forum, and without following AOPA procedures for interlocutory review. *See* Ind. Code § 4-21.5-5-2(c). AOPA Chapter 5 “establishes the exclusive means for judicial review of an agency action.” Ind. Code § 4-21.5-5-1 (emphasis added).

Second, IKEC’s declaratory judgment action and Amended Petition/Complaint must be dismissed for failure to state a claim for which relief can be granted because *Save the Valley* is the law on associational standing in administrative proceedings in Indiana, and thus IKEC cannot prove any set of facts or circumstances under which it would be entitled to relief in this matter. The declaration on associational standing requested by IKEC (*see* Amended Petition/Complaint, pp. 53-54) is directly contrary to Indiana law as articulated in *Save the Valley*. The rulings in *Save the Valley* are binding on this Court and on the OEA under the doctrines of the law of the case and collateral estoppel.

Third, IKEC’s declaratory judgment action must be dismissed for failure to state a claim for which relief can be granted because the Indiana Declaratory Judgment Act does not provide for declaratory judgments in the circumstances of this case. Indiana law is clear that relief under the Declaratory Judgment Act should not be granted where the issuance of a declaratory

judgment would not serve a useful purpose or where another remedy is more effective or efficient. IKEC has already had an adequate remedy at law for the issue that is the basis of its declaratory judgment action: namely, IKEC had a full and fair review of the issue of associational standing in this Court and in the Court of Appeals in the *Save the Valley* litigation. IKEC got its fully adequate remedy because, as the case was presented to this Court and the Court of Appeals, the issue on which IKEC sought interlocutory review was inextricably linked to the issue of this Court's subject matter jurisdiction. Therefore, any claim by IKEC at this time that it has not or cannot get a fair hearing on the issue of associational standing is hollow.

With this declaratory judgment action, IKEC's filings in this case have come full circle. The circle began with IKEC's interlocutory action for declaratory judgment filed with this Court in 2003, which requested that the Court declare that Citizens Groups could not rely on the doctrine of associational standing to meet the AOPA standard for obtaining administrative review in OEA Cause No. 02-S-J-2989. At that time, this Court determined its own jurisdiction by ruling that because Citizens Groups could not rely on the associational standing doctrine, OEA did not have the authority to provide an adequate remedy in the proceeding, and thus that this Court had jurisdiction over IKEC's interlocutory action.

On appeal, the Court of Appeals in *Save the Valley* concluded that Citizens Groups could rely on associational standing and in turn that OEA had the necessary authority. The Supreme Court then denied IKEC's request for transfer. Thus, crucially, the issue that IKEC sought to have adjudicated in the first place – the issue of associational standing – was adjudicated fully and fairly all the way up to the Indiana Supreme Court.

Now, after the *Save the Valley* decision, and after IKEC has prevailed on the merits in

OEA Cause No. 02-S-J-2989, IKEC has filed a new declaratory judgment action, again requesting that this Court declare that Citizens Groups could not rely on the doctrine of associational standing to meet the AOPA standard for obtaining administrative review. IKEC concedes that this new action is the same as the declaratory judgment action it brought before this Court in 2003 (*see* Amended Petition/Complaint, p. 51, ¶ 2). IKEC's repeated request for declaratory judgment on the issue of associational standing, after the Court of Appeals has spoken clearly on the issue as requested by IKEC, is groundless, obdurate, and an unreasonable multiplication of filings in this case.

II. PROCEDURAL HISTORY

Citizens Groups have already provided a procedural history of this case in their May 10, 2010 filings incorporated here. To this history is added IKEC's Amended Petition/Complaint containing its new declaratory judgment action, filed on May 17, 2010.

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 Trial Rule 12(b)(6) tests the legal sufficiency of a complaint or petition: that is, whether the allegations in the complaint or petition establish any set of circumstances under which a plaintiff would be entitled to relief. *Bellows*, 2010 WL 1740410 at *11. Thus, while the court does not test the sufficiency of the facts alleged with regard to their adequacy to provide recovery, it does test their sufficiency with regard 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). The defenses of res judicata, collateral estoppel (issue preclusion), and law of the case are properly brought before the court on a Rule 12(b)(6) motion to dismiss. *See Lake Monroe Regional Waste Dist. v. Waicukauski*, 501 N.E.2d 466, 469 (Ind. Ct. App. 1986) (“Res judicata also may be raised in a T.R. 12(b)(6) motion if the defense appears on the face of the complaint.”). Also, a motion to dismiss a complaint for declaratory judgment may be granted pursuant to Rule 12(b)(6). *See Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009) (dismissing complaint for declaratory judgment pursuant to Trial Rule 12(b)(6)).

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 DECLARATORY JUDGMENT ACTION (AND THE 2010 AMENDED PETITION/COMPLAINT IN ITS ENTIRETY) BECAUSE THE ISSUES RAISED BY IKEC ARE MOOT, IKEC IS NOT PREJUDICED, AND IKEC HAS NOT FOLLOWED REQUIRED AOPA PROCEDURES FOR REVIEW OF AGENCY ACTIONS.

IKEC’s declaratory judgment action conflates and confuses three different modes by which this Court may exercise jurisdiction: (1) review of final agency action pursuant to AOPA Chapter 5; (2) review of non-final agency action pursuant to AOPA §§ 4-21.5-5-2(c) and -4; and (3) declaration of rights, status, and other legal relations pursuant to the Indiana Uniform Declaratory Judgment Act, Ind. Code §§ 34-14-1-1 *et seq.* IKEC appears to be attempting to use its declaratory judgment action to invoke all three of these modes: that is, to obtain review of final agency action in OEA Cause No. 02-S-J-2989, to obtain review of non-final agency action in OEA Cause No. 08-S-J-4106, and to obtain a declaration that Indiana does not recognize associational standing for administrative review. A declaratory judgment action, however, is an alternative to, rather than an addendum to or initiation of, a statutory cause of action under AOPA. IKEC’s declaratory action generally cannot be maintained to the extent it seeks to have this Court review agency actions such as OEA orders. *See* Ind. Code § 4-21.5-5-1 (AOPA Chapter 5 “establishes the exclusive means for judicial review of an agency action”) (emphasis added); *see also City of North Vernon v. Funkhouser*, 725 N.E.2d 898, 904 (Ind. Ct. App. 2000) (affirming trial court’s dismissal for lack of jurisdiction of declaratory judgment action challenging order issued by IDEM, because of failure to seek judicial review of IDEM’s order pursuant to AOPA); *Harp v. Indiana Department of Highways*, 585 N.E.2d 652, 661 (Ind. Ct. App. 1992) (“Indiana courts have held that the existence of an exclusive statutory remedy bars

the exercise of jurisdiction over an independent action challenging an administrative action.”); *Linthecome v. Board of Trustees of the Public Employees Retirement Fund*, 585 N.E.2d 651 (Ind. Ct. App. 1991) (“Linthecome’s declaratory judgment action may not be used to obtain judicial review . . . and thereby circumvent the administrative process.”); *Warram v. Stanton*, 415 N.E.2d 114, 116 (Ind. Ct. App. 1981) (“[W]here there is a statutory means of review, it must be followed. A resort to an independent action will not be permitted.”).

1. To the Extent IKEC’s Declaratory Judgment Action is an Express or Implied Challenge to Agency Action in OEA Cause No. 02-S-J-2989, the Declaratory Judgment Action Must be Dismissed Because There is No Live Controversy and IKEC is Not Prejudiced.

The fact that IKEC has filed its declaratory judgment action in association with, rather than as an alternative to, this AOPA proceeding reviewing OEA Cause No. 02-S-J-2989 indicates that IKEC is using its declaratory action, at least in part, to challenge agency action in the OEA Proceeding. To the extent that IKEC’s declaratory action is an express or implied challenge to agency action in Cause No. 02-S-J-2989, the declaratory action cannot be maintained and it fails for the same reasons that the petition for review fails: there is no live controversy in this case and IKEC is not prejudiced by OEA’s actions.

The issue of Citizens Groups’ ability to rely on associational standing to meet AOPA’s “aggrieved or adversely affected” standard – the basis of IKEC’s declaratory judgment action (see 2010 Amended Petition/Complaint, p. 51, ¶ 1) and indeed in its entire Amended Petition/Complaint – is moot, now that the OEA Proceeding has concluded with IKEC having prevailed on the merits. An appeal is moot “when there is no longer a live controversy” and when the court “is unable to render effective relief upon an issue or where absolutely no change in the status quo will result.” *Kaminsky v. Medical Licensing Bd. of Indiana*, 511 N.E.2d 492,

496 (Ind. Ct. App. 1987) (citation omitted). The OEA's intermediate rulings on Citizens Groups' ability to rely on associational standing no longer constitute a live controversy and this Court cannot grant any effective relief to IKEC in this judicial review of the OEA Proceeding. Vacating IKEC's victory on the merits and replacing it with a dismissal of the OEA Proceeding on other grounds, as IKEC requests, would not change the status quo.

In addition, IKEC does not meet the express AOPA requirement that a party seeking relief under judicial review must show that it has been "prejudiced" by the challenged agency action. *See* Ind. Code § 4-21.5-5-14(d) ("The court shall grant relief under section 15 of this chapter only if it determines that a person seeking judicial relief has been prejudiced by an agency action[.]"). As a general rule, a party that prevails in a court or tribunal on the merits is not prejudiced or aggrieved by intermediate rulings in the case. *See, e.g., Givan v. U.S.*, 133 N.E.2d 577, 578 (Ind. Ct. App. 1956) (finding "nothing in the record that indicates that the appellant has or will be aggrieved in any manner by the favorable judgment from which he appeals"); *In re DES Litigation*, 7 F.3d 20, 23 (2d Cir. 1993) (dismissing defendant's appeal of the dismissal of plaintiffs' complaint because defendant prevailed on the merits by successfully moving to have the plaintiffs' complaint dismissed with prejudice and "[o]rdinarily, a prevailing party cannot appeal from a district court judgment in its favor").

A recent opinion of the Illinois Appellate Court is illustrative of this rule as it applies to IKEC's 2010 Amended Petition/Complaint. In *Board of Education of Park Forest Heights School District No. 163, Cook County, Ill. v. State Teacher Certification Bd.*, 842 N.E.2d 1230 (App. Ct. Ill. 2006), the regional superintendant suspended Michael DuBose's teaching certificate, but the superintendant's decision was overturned by the State Teacher Certification

Board (“Cert. Bd.”). In the trial court’s review, DuBose argued, in addition to the merits, that the Cert. Bd. deprived him of a de novo hearing and that the Cert. Bd.’s procedures were invalid. The trial court rejected DuBose’s arguments as did the appellate court, which held that, as the prevailing party before the Cert. Bd., DuBose failed to show he was “prejudiced” by the alleged procedural error. On DuBose’s contention that he was due a de novo hearing, the appellate court explained:

DuBose next contends that the Certification Board erred by denying him a de novo hearing. . . . However, DuBose has failed to assert or prove any prejudice from the Certification Board’s alleged error. In fact, the Certification Board granted the relief requested by DuBose when it overturned the suspension of DuBose’s teaching certificate. *As a general rule, a party cannot complain of error that does not prejudicially affect it, and one who has obtained by judgment all that has been asked for cannot appeal from the judgment.* Accordingly, this court need not consider the merits of DuBose’s contention where he has failed to show any prejudice in this case.

Id. at 1234 (citations omitted) (emphasis added). The appellate court used the same reasoning to dispose of DuBose’s contention that the Cert. Board used invalid procedures:

DuBose next contends that this court should invalidate the Certification Board’s procedures . . . because they are “rules” that were not adopted in accordance with the Illinois Administrative Procedure Act. . . . DuBose cannot complain of error that does not prejudicially affect him and where the Certification Board granted him the relief that he requested. Furthermore, issues that are not essential to a disposition of the cause *or where the result will not be affected regardless of the determination of the issue will not be considered by a reviewing court.* Even if this court construed the certification Board’s procedures as a “rule” within the Act and found that the Certification Board failed to follow statutory procedures, that determination would not impact the present case. Accordingly, we need not consider DuBose’s contention.

Id. at 1236-37 (citations omitted) (emphasis added).

Like DuBose, IKEC, having prevailed on the merits, has obtained everything it asked for, and is not prejudiced by the agency’s intermediate actions on the path to victory. In fact, IKEC

is in a better position than DuBose because, unlike DuBose, IKEC has not had to face an appeal of the agency's decision in its favor. In IKEC's case, IKEC is not prejudiced by OEA orders allowing Citizens Groups to rely on the doctrine of associational standing to meet the AOPA standard. To show prejudice, IKEC must demonstrate that but for the challenged agency action the outcome of the OEA Proceeding now being reviewed by this Court would have come out differently. *See, e.g., Farris v. State*, 907 N.E.2d 985, 987 (Ind. 2009); *Roberts v. Cmty. Hosps. of Ind., Inc.*, 897 N.E.2d 458, 466 (Ind. 2008); *Boffo v. Boone County Board of Zoning Appeals*, 421 N.E.2d 1119, 1132 (Ind. Ct. App. 1981); *Board of Educ. of Park Forest Heights*, 842 N.E.2d at 1236-37. For IKEC, a different outcome on the issue of associational standing would simply have been a different path to victory in the OEA Proceeding. IKEC has not and cannot make the necessary showing of prejudice.

IKEC's contention that it has suffered loss of money by having to litigate the merits is certainly not the showing of "prejudice" required by AOPA § 4-21.5-5-14(d), since most parties litigating an administrative proceeding would meet that test, rendering the "prejudice" requirement meaningless. Similarly, IKEC cannot show the required "prejudice" by arguing that the OEA orders below jeopardize IKEC's permits and business; IKEC has prevailed on the merits of the OEA Proceeding and so its permits and business remain unaffected by the OEA's intermediate orders.

Nor can IKEC point to OEA's rulings in the separate Cause No. 08-S-J-4106 to satisfy the "prejudice" requirement for the OEA Proceeding under review. The OEA orders accepting the doctrine of associational standing in the concluded OEA Proceeding are not the cause of IKEC's losses on the same issue in Cause No. 08-S-J-4106. The OEA is bound in Cause No. 08-

S-J-4106, under the doctrine of collateral estoppel, to continue to follow the law on associational standing as articulated in *Save the Valley*.

2. To the Extent that IKEC's Declaratory Judgment Action is an Express or Implied Challenge to Agency Action in OEA Cause No. 08-S-J-4106, the Declaratory Action Must be Dismissed Because IKEC Attempts to Obtain Review of Non-final Agency Action Without Following AOPA Procedures.

The fact that IKEC included in its declaratory judgment action two non-final OEA orders (labeled Exhibits N and P in IKEC's complaint) issued in OEA Cause No. 08-S-J-4106, and included paragraphs 4-11 which reference and make contentions about those orders and OEA's actions (*see* 2010 Amended Petition/Complaint, pp. 51-53), indicates that IKEC is using its declaratory action, at least in part, to expressly challenge agency action in Cause No. 08-S-J-4106. (*See also* Citizens Groups' Motion to Strike filed concurrently with this motion). OEA Cause No. 08-S-J-4106 is an ongoing proceeding that OEA expressly separated from the OEA Proceeding in Cause No. 02-S-J-2989, the subject of this judicial review. *See* OEA Findings of Fact, Conclusions of Law and Final Order, Cause No. 02-S-J-2989, dated March 17, 2010, pp. 4-5. To the extent that IKEC's declaratory judgment action is an express or implied challenge to agency action in the separate OEA Cause No. 08-S-J-4106, the declaratory action cannot be maintained because IKEC is attempting to obtain review of non-final agency action (a) using the wrong cause of action, (b) in the wrong forum, and (c) without following AOPA procedures for interlocutory review.

First, IKEC is attempting to use a declaratory judgment action to initiate judicial review of non-final agency action in the separate Cause No. 08-S-J-4106. Such a maneuver is an improper use of a declaratory judgment action. IKEC has not to date filed a petition for interlocutory judicial review in Cause No. 08-S-J-4106, and a declaratory judgment action

generally cannot be used as a substitute. *See, e.g., Carter v. Nugent Sand Company*, 925 N.E.2d 356 (Ind. 2010) (“[C]ourts do not generally entertain requests for declaratory relief if the result is to bypass available administrative procedures.”); *Linthecome v. Board of Trustees of the Public Employees Retirement Fund*, 585 N.E.2d 651 (Ind. Ct. App. 1991) (“Linthecome’s declaratory judgment action may not be used to obtain judicial review . . . and thereby circumvent the administrative process.”).

Second, IKEC is attempting to use the current proceeding for judicial review of agency action in Cause No. 02-S-J-2989 to launch an interlocutory review of non-final agency action in the separate Cause No. 08-S-J-4106. An IKEC challenge to non-final agency action in Cause No. 08-S-J-4106 cannot be piggybacked onto the current Cause for judicial review of a final OEA order. A separate petition for interlocutory review would have to be filed in Cause No. 08-S-J-4106 to invoke this Court’s jurisdiction to review IKEC’s allegations of error in its paragraphs 4-11.

Third, any new petition for interlocutory review filed by IKEC to complain about errors in Cause No. 08-S-J-4106 must satisfy AOPA procedures for obtaining judicial review of non-final agency action. *See* Ind. Code § 4-21.5-5-2(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.”). AOPA Chapter 5 “establishes the exclusive means for judicial review of an agency action.” Ind. Code § 4-21.5-5-1 (emphasis added). In paragraph 9 of its declaratory action, IKEC appears to invoke the “adequate remedy” factor in Ind. Code § 4-21.5-5-2(c)(2) by arguing that “IKEC has no administrative remedy and no remedy at law.” 2010 Amended Petition/Complaint, p. 52, ¶ 9. IKEC’s statement lends

credence to the interpretation that IKEC is indeed attempting to use its declaratory action to obtain interlocutory review of non-final OEA orders issued in Cause No. 08-S-J-4106. Even if IKEC could establish that it is entitled to interlocutory judicial review of its Exhibits N, O, and P, however, the current judicial review proceeding is not the valid forum for that challenge and a declaratory judgment action is not the proper cause of action to invoke the Court's jurisdiction. Regardless of IKEC's intentions, its declaratory judgment action must be dismissed to the extent that it expressly or implicitly challenges final or non-final agency actions, thus bypassing AOPA's exclusive means for review of such actions.

B. THE COURT MUST DISMISS IKEC'S DECLARATORY JUDGMENT ACTION (AND THE 2010 AMENDED PETITION/COMPLAINT IN ITS ENTIRETY) BECAUSE THE COURT OF APPEALS' RULINGS IN *SAVE THE VALLEY* ARE THE LAW AND ARE BINDING ON THIS COURT AND THE OEA.

After the express or implied challenges to agency action are dismissed or stricken from IKEC's declaratory judgment action, what remains must be dismissed pursuant to Trial Rule 12(b)(6) because the declaration on associational standing requested by IKEC is directly contrary to Indiana law as articulated in *Save the Valley*. IKEC simply reiterates its meritless collateral attack on the Court of Appeals' ruling in *Save the Valley* that Citizens Groups could rely on associational standing to meet the "aggrieved or adversely affected" standard for administrative review under AOPA. *See* Amended Petition/Complaint, p. 51, ¶¶ 1-2, pp. 53-54, prayer for relief. IKEC also chides the OEA for understanding and respecting the binding and preclusive effect of the *Save the Valley* rulings. *See id.*, p. 53, ¶ 11. Moreover, IKEC states that Citizens Groups have argued that "no time is the right time" to construe the AOPA statute at Ind. Code § 4-21.5-3-7(a)(1)(B) (*Id.*, p. 53, ¶ 12) and that Citizens Groups are barred from contending that the Court of Appeals had jurisdiction "to affirm the 2003 OEA Order or issue any binding law on its

correctness” (*Id.*, p. 53, ¶ 13). IKEC’s contentions demonstrate its fundamental misunderstanding of the *Save the Valley* decision as well as of settled law. Citizens Groups make the following four points.

First, IKEC suggests that Citizens Groups would deny IKEC review of the issue of whether associational standing can be used to meet AOPA’s requirements for obtaining administrative review (*see* Amended Petition/Complaint, p. 53, ¶ 12). Obviously, only courts have the power to deny or grant review, and in fact the courts have provided IKEC the review of the associational standing issue that IKEC continues to seek. IKEC did get a full and fair review of the issue of associational standing in this Court and the Court of Appeals, and even requested that the Indiana Supreme Court review the issue. This Court and the Court of Appeals ruled squarely on the issue, and the Supreme Court denied transfer. Because the result of that litigation is not what IKEC wanted, it now claims that the courts must start over again adjudicating the same issue. The law-of-the-case and collateral estoppel doctrines evolved precisely to keep this type of repeated litigation of the same issue from occurring. *See, e.g.*, 18-132 Moore's Federal Practice - Civil § 132.01 (application of the doctrine of issue preclusion “relieves parties of the cost and vexation of multiple lawsuits, prevents inconsistent decisions, encourages reliance on adjudication by minimizing the possibility of inconsistent decisions, and conserves judicial resources. . . . Moreover, the policy underlying the doctrine is that ‘one fair opportunity to litigate an issue is enough[.]’”) (citations omitted).

Second, it is a well-established principle of law that courts have jurisdiction to determine their own jurisdiction, and an appellate court has jurisdiction to determine the jurisdiction of the lower court. As explained by Judge Posner in *Okoro v. Bohman*:

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.

164 F.3d 1059, 1063 (7th Cir. 1999) (internal citations omitted). 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.

The Court of Appeals in *Save the Valley* had jurisdiction to determine its own jurisdiction as well as the jurisdiction of the Marion Superior Court.

Third, courts have jurisdiction to rule on those issues necessary to a jurisdictional determination, even if those issues overlap with the substance of the petitioner's complaint. Courts are not infrequently called upon to decide an issue that goes both to the court's jurisdiction and to the substance of the petitioner's complaint. For example, in *Schornhorst ex rel. Fleenor v. Anderson*, 77 F. Supp. 2d 944 (S.D. Ind. 1999), on a petition for writ of habeas corpus and related emergency motions, the district court expressly recognized that the issue of the inmate's mental competence went both to the court's subject matter jurisdiction and to whether relief was warranted under the *Ford* doctrine (which prohibits a State from carrying out a sentence of death upon a prisoner who is insane). The district court explained:

This is a case where the merits of the underlying claim are closely intertwined with the court's jurisdiction because of the issue of the petitioner-attorneys' standing. If Fleenor were mentally incompetent, then the petitioner-attorneys would be entitled to act as his "next friends," and relief under *Ford* would be

appropriate. If Fleenor is mentally competent, then the petitioner-attorneys have no standing to seek relief, and relief is not warranted on the merits.

Id. at 951. The district court ruled that the petitioner-attorneys did not have standing to proceed as the inmate’s “next friends” and that *Ford* relief was not justified. Accordingly, the court denied the petition for lack of subject matter jurisdiction and also denied the substantive relief requested by the petitioner-attorneys. *Id.* at 956.

In *Montgomery v. State Board of Tax Commissioners*, 708 N.E.2d 936 (Indiana Tax Ct. 1999), an exhaustion of administrative remedies case, the Tax Court explained its ruling on an issue that went both to jurisdiction and to the substantive relief requested:

[T]he 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 [] property tax levy, a complaint that the Court was determining the merits of the case cannot succeed. . . . 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 [] 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.

Id. at 937-38 (citations omitted).

Similar to *Montgomery* and *Schornhorst ex rel. Fleenor*, the Court of Appeals in *Save the Valley* was called upon to decide issues – *i.e.*, associational standing and OEA’s authority – that went both to subject matter jurisdiction and to the substance of the petitioner’s contentions. The Court of Appeals’ ruling on associational standing in *Save the Valley* was necessary and essential to its jurisdictional determination, as shown by the *Save the Valley* opinions:

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.

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.

824 N.E.2d 776 (Ind. Ct. App. 2005) (opinion on rehearing). This Court made the same connections between issues, although more obliquely, in its determination of its own jurisdiction over IKEC's interlocutory petition (*see* Findings of Fact, Conclusions of Law and Orders, October 27, 2003). As was well-stated by the Tax Court in *Montgomery*, "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. . . [A] complaint that the Court was determining the merits of the case cannot succeed." 708 N.E.2d at 937-38.

Fourth, the law-of-the-case and collateral estoppel doctrines apply to jurisdictional rulings, which include both the determination of whether the court has jurisdiction and any rulings on issues necessary to that jurisdictional determination. *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); *Indiana Farm Gas Production Co., Inc. v. Southern Indiana Gas and Elec. Co.*, 662 N.E.2d 977, 981 (Ind. Ct. App. 1996) (stating that under the law-of-the-case doctrine "[a]ll issues decided directly or implicitly in a prior decision are binding on all subsequent portions of the case");

Okoro, 164 F.3d at 1063 (stating that “a jurisdictional dismissal precludes only the relitigation of the ground of that dismissal”); Wright & Miller, 18A *Fed. Prac. & Proc. Juris.2d* § 4436 (“[A] dismissal for lack of jurisdiction . . . does preclude relitigation of the issues determined in ruling on the jurisdiction question.”). The Court of Appeals’ ruling in *Save the Valley* on associational standing, because it was necessary and essential to the Court’s jurisdictional determination, is binding on this Court and the OEA under the doctrines of law of the case and collateral estoppel.

C. THE COURT MUST DISMISS IKEC’S DECLARATORY JUDGMENT ACTION BECAUSE THE INDIANA DECLARATORY JUDGMENT ACT DOES NOT PROVIDE FOR RELIEF UNDER THE CIRCUMSTANCES OF THIS CASE.

As Citizens Groups argue above, IKEC’s core declaratory judgment action – that is, the action remaining after the express or implied challenges to agency action are dismissed or stricken – must be dismissed because the declaration on associational standing requested by IKEC is directly contrary to Indiana law as articulated in *Save the Valley*. Citizens Groups now show, additionally, that IKEC’s declaratory judgment action must be dismissed because the Indiana Declaratory Judgment Act does not provide for declaratory judgments in the circumstances of this case.

Declaratory judgments in Indiana are governed by the Indiana Uniform Declaratory Judgment Act, Ind. Code §§ 34-14-1-1 *et seq.*, and Trial Rule 57. The rule that relief under the Declaratory Judgment Act may not be had where another established remedy is available (*see, e.g., Hinkle v. Howard*, 73 N.E.2d 674 (Ind. 1947)) is modified by Trial Rule 57, which states: “The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” *See Office of Utility Consumer Counselor v. Public Service Co. of Indiana*, 592 N.E.2d 709, 711-12 (Ind. Ct. App. 1992). Indiana courts have developed a test to

determine when declaratory relief is “appropriate.” The Court of Appeals in *KLLM, Inc. v. Legg*, 826 N.E.2d 136 (Ind. Ct. App. 2005), explained:

The Uniform Declaratory Judgment Act was not intended to eliminate well-known causes of action or to substitute an appellate court for a court of original jurisdiction, particularly where the issues are ripe for litigation through the normal processes. Instead, the Act was intended to furnish a full and adequate remedy where none existed before, and a declaratory judgment action should not be resorted to where such a judgment is unnecessary. Such a judgment is unnecessary where a full and adequate remedy is already provided by another cause of action. However, “the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” Ind. Trial Rule 57. *The test to determine the propriety of declaratory relief is whether the issuance of a declaratory judgment will effectively solve the problem involved, whether it will serve a useful purpose, and whether or not another remedy is more effective or efficient.*

Id. at 145 (remaining citations omitted) (emphasis added). *See also Ember v. Ember*, 720 N.E.2d 436, 439 (Ind. Ct. App. 1999) (stating that “the determinative factor of this test is whether the declaratory action will result in a just and more expeditious and economical determination of the entire controversy,” and holding that the trial court properly rejected husband’s claim for declaratory relief because husband had an adequate and complete opportunity to litigate the issues in another forum); *Madden v. Houck*, 403 N.E.2d 1133, 1135 (Ind. Ct. App. 1980) (stating that “use of a declaratory judgment is usually unnecessary where a full and adequate remedy is already provided in the form of another action,” and holding that declaratory relief was improper because the plaintiff could have filed a quo warranto action to receive the desired remedy).

IKEC has already had a fully adequate and effective remedy at law for the issue that is the basis of its declaratory judgment action: namely, IKEC had a full and fair review of the issue of associational standing in this Court and in the Court of Appeals in the *Save the Valley* litigation. Both Courts ruled squarely on the issue, and the Supreme Court denied transfer.

IKEC got its fully adequate remedy because, as the case was presented to this Court and the Court of Appeals, the issue on which IKEC sought interlocutory review was inextricably linked to the issue of this Court's subject matter jurisdiction. Therefore, any claim by IKEC at this time that it has not or cannot get a fair hearing on the issue of associational standing is hollow. Moreover, any musings about what the Courts would have done in different hypothetical situations does not have anything to do with the factual circumstances of this case. IKEC has had a full and fair hearing of the issue, and IKEC's declaratory judgment action serves no useful purpose and is unnecessary. This Court should accordingly dismiss the action. "[A] declaratory judgment action should not be resorted to where such a judgment is unnecessary. Such a judgment is unnecessary where a full and adequate remedy is already provided by another cause of action." *KLLM*, 826 N.E.2d at 145 (citations omitted).

V. CONCLUSION

IKEC's 2010 Amended Petition/Complaint is wholly unjustified and without merit, and must be dismissed pursuant to Trial Rules 12(b)(1) and 12(b)(6). The Amended Petition/Complaint neither triggers this Court's subject matter jurisdiction nor states a claim for which relief can be granted because: (1) it does not present a live controversy and all of the matters presented by IKEC are moot; (2) IKEC is not prejudiced by the OEA's actions and any alleged error is harmless; (3) IKEC has not followed required AOPA procedures; (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 is binding on this Court and the OEA under the law-of-the-case and collateral estoppel doctrines; (5) IKEC's declaratory judgment action serves no useful purpose and a full and effective remedy

has already been had in the *Save the Valley* litigation; and (6) 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 Amended Petition/Complaint, which includes its Complaint for Declaratory Judgment, 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 costs of responding to IKEC's 2010 Amended Petition/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 2nd day of June, 2010, on the following counsel of record:

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