

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. D07
CAUSE NO. 49D07-1004-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.)

FILED

189 OCT 05 2010

Elizabeth A. White
CLERK

**ORDER GRANTING RESPONDENTS/DEFENDANTS CITIZENS GROUPS'
MOTIONS TO DISMISS**

This matter came before the Court upon the Motions by the Respondents/Defendants Save the Valley, Inc., Hoosier Environmental Council, Inc., and Citizens Action Coalition of Indiana, Inc. to dismiss the verified petition for judicial review, the complaint to set aside the Superior Court's entry of remand of September 6, 2005, and the complaint for declaratory judgment of Petitioner/Plaintiff Indiana-Kentucky Electric Corporation, and to strike Petitioner/Plaintiff's exhibits N, O, and P. The issues were fully briefed and submitted to the Court, and the Court held a hearing on said motions on September 9, 2010. The Court, being

DW/TB

duly advised, now issues the following ruling and Order:

1. For ease of identification, the Court will use the following designations:
 - a. Respondents/Defendants as “Citizens Groups”
 - b. Petitioner/Plaintiff as “IKEC”
 - c. Office of Environmental Adjudication as “OEA”
 - d. Indiana Administrative Orders and Procedures Act as “AOPA.”
2. IKEC brought this action against Citizens Groups on April 15, 2010 in Marion Superior Court after prevailing on the merits in the OEA proceeding below in Cause No. 02-S-J-2989. Record, Item 68 (OEA Final Order dated March 17, 2010).
3. In Cause No. 02-S-J-2989, Citizens Groups petitioned for administrative review of the Indiana Department of Environmental Management’s 2002 renewal of IKEC’s coal ash landfill permit for the Clifty Creek Generating Station. IKEC moved to dismiss the petition on the grounds that Citizens Groups could not obtain administrative review on behalf of their members. OEA denied IKEC’s motions in a June 23, 2003 order, which ruled that Citizens Groups’ petition met the requirements of Ind. Code §§ 13-15-6-2 and 4-21.5-3-7(a). OEA denied IKEC’s subsequent motions to dismiss and to reconsider on the same grounds in orders dated March 24, 2006 and August 28, 2008.
4. IKEC sought interlocutory judicial review of OEA’s 2003 order, arguing that it was entitled to interlocutory review and summary judgment because OEA had no authority to hold a proceeding initiated by a petition that relied on associational standing. Citizens Groups sought dismissal for failure to meet AOPA requirements for appeal. The Superior Court granted review and summary judgment for IKEC, and the Court of Appeals reversed in *Save the Valley v. IKEC*, 820 N.E.2d 677 (Ind. Ct. App. 2005), *aff’d on reh’g*, 824 N.E.2d 776

(Ind. Ct. App. 2005), *trans. denied*, 841 N.E.2d 179 (Ind. 2005) (hereinafter “*Save the Valley*”). The Court of Appeals ruled initially:

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.

820 N.E.2d at 682. On rehearing, the Court of Appeals affirmed and clarified its initial ruling:

[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.

824 N.E.2d at 776.

5. In spite of the fact that OEA has issued a final order granting IKEC summary judgment on the merits, IKEC now requests in its petition for judicial review of the final OEA disposition of the matter that this Court vacate the three intermediate OEA orders and remand with direction to dismiss Citizens Groups’ 2003 petition for review. IKEC further requests that this Court set aside, clarify, or grant relief from the Superior Court’s 2005 order remanding this case to OEA “for further proceedings consistent with the decision of the Court of Appeals” in *Save the Valley*. Lastly, IKEC requests that this Court declare that an organization does not satisfy the requirements for administrative review under AOPA even if that organization states facts that demonstrate that its members are aggrieved or adversely affected by an agency action.
6. The issue in the challenged OEA orders and for which IKEC seeks relief – i.e., Citizens Groups’ ability to obtain administrative review on behalf of their members – has already

been conclusively decided by the Court of Appeals in *Save the Valley* and is binding on this Court under the law-of-the-case and collateral estoppel doctrines. The law-of-the-case doctrine mandates that 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. *Pinnacle Media, L.L.C. v. Metro. Dev. Comm'n of Marion County*, 868 N.E.2d 894, 901 (Ind. Ct. App. 2007). Collateral estoppel operates to bar re-litigation of an issue where that issue was necessarily adjudicated in a former action and the same issue is presented in a subsequent action. *Sullivan v. Am. Cas. Co. of Reading, Pa.*, 605 N.E.2d 134, 137 (Ind. 1992). There is no reason why the *Save the Valley* ruling is not binding under these doctrines. Moreover, there is no indication that IKEC lacked a full and fair opportunity to litigate the issue of associational standing decided in *Save the Valley* and in the challenged OEA orders.

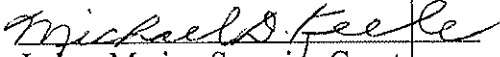
7. In addition, the issues decided in the challenged OEA orders are now moot. When the principal questions at issue have ceased to be matters of real controversy between the parties or when the court is unable to render effective relief upon an issue, the alleged errors become moot questions and the court will not retain jurisdiction to decide them. *Indiana Pesticide Review Bd. v. Black Diamond Pest & Termite Control, Inc.*, 916 N.E.2d 168, 179 (Ind. Ct. App. 2009). IKEC prevailed on the permit challenge in the OEA proceeding below, and it is unnecessary and improper to revisit the issue of Citizens Groups' ability to obtain review under AOPA § 4-21.5-3-7(a).
8. Furthermore, IKEC's action is governed by the well-established rule of law that prevailing parties generally cannot appeal a judgment in their favor and are not prejudiced by intermediate rulings that have no collateral consequences. *Givan v. U.S.*, 133 N.E.2d 577,

578 (Ind. Ct. App. 1956); *In re DES Litig.*, 7 F.3d 20, 23 (2d Cir. 1993); *Bd. of Educ. of Park Forest Heights Sch. District No. 163, Cook County, Ill. v. State Teacher Certification Bd.*, 842 N.E.2d 1230, 1234 (App. Ct. Ill. 2006).

9. Citizens Groups' motion to strike IKEC's exhibits N, O, and P is granted. Also, IKEC's exhibit Q is excluded. This Court does not consider any matters outside the pleadings in ruling on Citizens Groups' motions to dismiss.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Citizens Groups' Motions to Dismiss against IKEC are hereby GRANTED, that IKEC's verified petition for judicial review is denied and dismissed, and that IKEC's complaint to set aside the entry of remand of September 6, 2005 and complaint for declaratory judgment are dismissed.

Dated: October 5, 2010


Judge, Marion Superior Court
Civil Division, Room No. D07

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