

**VIRGINIA:
IN THE CIRCUIT COURT OF THE COUNTY OF WISE**

	)	
VIRGINIA URANIUM, INC., <i>et al.</i>	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CL 15-623
	)	
THE COMMONWEALTH OF VIRGINIA,	)	
<i>et al.</i> ,	)	
	)	
Defendants.	)	

BRIEF AMICUS CURIAE FOR RIVER BASIN ASSOCIATIONS

The Roanoke River Basin Association (“RRBA”) and the Dan River Basin Association (“DRBA”) (collectively the “River Basin Associations”), by and through undersigned counsel, file this brief amicus curiae in support of the Commonwealth’s demurrer and plea in bar.

INTRODUCTION

This action challenges a decades-old state law prohibiting uranium mining throughout the Commonwealth. Over the past nine years, Plaintiffs have repeatedly attempted to repeal the mining ban, first through direct lobbying at the General Assembly, then through a challenge in federal court, and now here. In all prior attempts, Plaintiffs have failed. The River Basin Associations are local organizations whose members would face immediate and adverse impacts if Plaintiffs prevail in this action, harming their ability to carry out strategies for the development, use, and preservation of natural assets in the region and compromising their ability to attract businesses and tourism to the area. If Plaintiffs obtain the injunctive relief they seek, their future mining operations in Pittsylvania County also will permanently and negatively impact the waterways and communities that the River Basin Associations exist to protect.

FACTUAL BACKGROUND

In 1982, the Virginia General Assembly enacted a moratorium on uranium mining in the Commonwealth. (Compl. at ¶ 3). In 1983, the General Assembly extended the ban until the legislature established a specific uranium mining regulatory program “by statute.” Va. Code § 45.1-283; (Compl. at ¶ 3). At roughly the same time, the market for uranium ‘yellowcake’ was in freefall, and efforts to develop a potential state mining program for uranium fell off the General Assembly’s radar. (John C. Watkins, *Uranium Can Be Mined Safely in Virginia*, Richmond Times-Dispatch, Jan. 21, 2013 (“Watkins Op-Ed,” attached hereto as Exh. A)) (“[A] downturn in the uranium market in the mid-1980s shelved the idea, and a moratorium originally conceived as a temporary measure has remained in place *by default* for the past 30 years.”) (emphasis added).

A quarter-century after Virginia adopted its uranium mining law, the various plaintiffs in this action assumed corporate form. In 2007, the Coles and Bowen families, who each own significant real estate in Pittsylvania County, formed the respective limited liability corporations Coles Hill, LLC (“Coles Hill”) and Bowen Minerals, LLC (“Bowen Minerals”). (Compl. at ¶¶ 9-10). That same year, Walter Coles, Sr. and Henry Bowen also formed Plaintiff Virginia Uranium, Inc. (“VUI”) (Compl. at ¶ 8), although Plaintiff Virginia Energy Resources, Inc. – a Canadian company – now wholly owns VUI. (Compl. at ¶ 11). The mining ban was twenty-five years old by the time any of these plaintiffs came into legal existence.

In 2007, Plaintiffs began lobbying the Virginia General Assembly to repeal the mining ban. (See Compl. at ¶ 46). At that time, Plaintiffs recognized Virginia’s rightful authority to regulate uranium mining. In a March 2011 opinion-editorial published in the *Danville Register & Bee* and elsewhere, Mr. Walter Coles, Sr., CEO of both Plaintiff Virginia Uranium, Inc. and Plaintiff Virginia Energy Resources, pledged that Virginia Uranium was “prepared to work with

the members of the General Assembly in 2012” on the issue, adding that VUI has “unequivocally supported the efforts” of a state-commissioned study ever since “the Virginia Coal and Energy Commission tasked the National Academy of Sciences to conduct such a study in 2009.” See Walter Coles, Sr., “No End-Run Around The Study,” *Danville Register & Bee* (Mar. 28, 2011) (A copy of Mr. Coles’ opinion piece is no longer available on the *Register & Bee*’s website and is included with this brief as Exh. B) (hereinafter Coles Op-Ed).¹ Virginia Uranium stated it was “fully committed to heeding [the NAS’s] findings - regardless of the outcome. . . . [I]f the NAS finds that uranium mining would entail unacceptable risks, we will not pursue lifting the moratorium in 2012. Period.” *Id.* In 2013, Senator Watkins introduced a bill to end the ban.² Before either chamber of the General Assembly considered his bill, however, Senator Watkins withdrew it. All told, since 1983, the Virginia General Assembly has not made any amendments or changes to the uranium mining ban.

Despite prior pledges to abide by the legislative process, in 2015, Plaintiffs filed a lawsuit in federal court arguing that the federal Atomic Energy Act preempted any state regulation of uranium mining. *Virginia Uranium, Inc. v. McAuliffe*, No. 4:15-CV-00031, 2015 WL 7776606, at *2 (W.D. Va. Dec. 2, 2015). After full briefing and oral argument on the Commonwealth’s motion to dismiss and Plaintiffs’ cross-motion for summary judgment, the court dismissed the entire complaint. *Virginia Uranium*, 2015 WL 7776606, at *13 (“Because the AEA does not preempt [the mining ban], I will grant Defendants’ Rule 12(b)(6) Motion to Dismiss.”). Plaintiffs have since filed a notice of appeal with the U.S. Circuit Court of Appeals for the Fourth Circuit.

¹ See also Opinion Letter by Walter Coles, *South Hill Enterprise* (Mar. 29, 2011), available at http://www.southhillenterprise.com/opinion/article_3df9d621-27e4-50de-8f69-07ffeea412e2.html (last visited March 17, 2016) (containing language virtually identical to what was published in the *Register & Bee*).

² Jackson H. Miller, a member of the Virginia House of Delegates, introduced House Bill 2330, which was identical to Senator Watkins’ bill, available at <http://lis.virginia.gov/cgi-bin/legp604.exe?131+sum+HB2330> (last visited March 17, 2016). That legislation was left in the House Commerce and Labor Committee without ever coming up for a vote.

Notice of Docketing on Appeal, *Virginia Uranium, Inc., et al. v. McAuliffe, et al.*, No. 16-1005 (4th Cir. Jan. 5, 2016).

PROCEDURAL HISTORY

This lawsuit is yet another attempt to circumvent the legislative and democratic process by asking a court to unravel valid Virginia laws. Plaintiffs' entire case boils down to one argument: the mining ban is an unconstitutional, uncompensated infringement on private property rights – a “taking.” Plaintiffs seek alternative forms of relief: (1) an order that all state agencies ignore the mining ban and process Plaintiffs' permit applications or (2) adequate compensation for Plaintiffs' lost property value. (Compl. at ¶ 97). Plaintiffs are not entitled to either relief for the simple reason that the mining ban is not a taking. Moreover, even if it were, the statute of limitations clearly bars Plaintiffs' action for recovery.

ARGUMENT

I. The mining ban is a valid exercise of the Commonwealth's traditional police power, not a taking under eminent domain.

The complaint alleges four causes of action: (1) the mining ban is an unconstitutional taking for private use (Compl. at ¶¶ 68-74), (2) the mining ban is an unnecessary infringement of private property rights (Compl. at ¶¶ 75-81), (3) the mining ban takes more property than is necessary (Compl. at ¶¶ 82-88), and (4) inverse condemnation (Compl. at ¶¶ 89-96). Each of these causes of action incorrectly presumes a “taking” has occurred in violation of Article I, Section 11 of the Virginia Constitution, and each of these causes of action fails as a matter of law.

In Virginia, not all legislation that impacts property rights rises to the level of “taking.” *Cochran v. Fairfax Cty. Bd. of Zoning Appeals*, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004) (“All citizens hold property subject to the proper exercise of police power for the common

good.”); *Weber City Sanitation Comm’n v. Craft*, 196 Va. 1140, 1148, 87 S.E.2d 153, 158 (1955) (“A citizen holds his property subject to the proper exercise of the police power Such laws do not appropriate private property for public use but simply regulate its use and enjoyment by the owners.”).

In fact, Virginia law only recognizes two types of taking: “categorical” or “regulatory.” *Bd. of Sup’rs of Culpeper Cty. v. Greengael, L.L.C.*, 271 Va. 266, 287, 626 S.E.2d 357, 369 (2006), *as revised* (May 26, 2006). A “categorical taking” is “a deprivation of all economic use of property.” *Greengael*, 271 Va. at 287 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001)). A “regulatory taking,” on the other hand, “‘places limitations on land that fall short of eliminating all economically beneficial use [but render an] economic effect on the landowner [and] interfere with reasonable investment backed expectations,’ among other harms.” *Greengael*, 271 Va. at 287, 626 S.E.2d at 369. The Complaint vacillates back and forth, alleging some elements of one type of taking, then alleging unrelated elements of the other form, but the Complaint never actually identifies which type of taking Plaintiffs allege. (*Compare* Compl. at ¶¶ 62 and 64). In reality, the mining ban is neither a categorical nor a regulatory taking.

At its heart, the Complaint questions the law’s legitimacy, claiming that it serves no “public purpose” and is therefore “not a necessary measure.” (Compl. at ¶ 5; *see also* Compl. at ¶¶ 43-61). In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), the U.S. Supreme Court expressly rejected that inquiry in a takings case. The Court first observed that the plaintiffs in that case sought the same type of relief Plaintiffs now seek here. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 544, 125 S. Ct. 2074, 2085, 161 L. Ed. 2d 876 (2005) (“Chevron plainly does not seek compensation for a taking of its property for a legitimate

public use, but rather an injunction against the enforcement of a regulation that it alleges to be fundamentally arbitrary and irrational.”). The Court then ruled that a takings case could not provide such relief because an inverse condemnation lawsuit should not question whether a statute “substantially advances” a public purpose. *Lingle*, 544 U.S. at 548, 125 S. Ct. at 2087 (“We hold that the “substantially advances [a public purpose]” formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence.”).

On the contrary, the Court noted that takings law “presupposes that the government has acted in pursuit of a valid public purpose.” *Lingle*, 544 U.S. at 543, 125 S. Ct. at 2084. The Court rejected a “substantially advances” test in takings cases because such a test “would require courts to scrutinize the efficacy of a vast array of state and federal regulations – a task for which courts are not well suited.” *Lingle*, 544 U.S. at 544, 125 S. Ct. at 2085.

Plaintiffs attempt to use takings law for an improper purpose – to challenge the fundamental validity of state law by claiming that mining ban “cannot be justified.” (Compl. at ¶ 5). Under the proper takings analysis, however, the mining ban is presumptively valid, and the only remaining question is whether the ban rises to the level of a “take” for which the Commonwealth must compensate Plaintiffs. It does not.

A. The mining ban is not a categorical taking.

Based on Plaintiffs’ own allegations, the mining ban is not a categorical taking, defined as “a deprivation of all economic use of [the] property’ without the acquisition of any right in the property by the government.” *Byler v. Virginia Elec. & Power Co.*, 284 Va. 501, 506-07, 731 S.E.2d 916, 919 (2012) (citing *Greengael*, 271 Va. at 287, 626 S.E.2d at 369). This deprivation must be absolute and entire. *Bd. of Sup'rs of Prince William Cty. v. Omni Homes, Inc.*, 253 Va. 59, 67, 481 S.E.2d 460, 464 (1997), *overruled in part on other grounds as stated in Greengael*,

271 Va. at 287 n. 12, 626 S.E.2d at 369 n. 12 (“The loss of the ability to develop or use the land as originally intended is not a categorical taking if another economic use for the land is available, even if the value of the use is less than the value attached to the owner’s desired use.”). Here, Plaintiffs have not alleged, nor can they, that their land has absolutely no economic use. In fact, they repeatedly allege that the mining ban impacts only a portion of the total property interest. (See Compl. at ¶ 63) (The impacted uranium mineral estate “is a separate stick in the bundle that makes up the *entire* property interest in the land that contains it.”) (emphasis added). Plaintiffs retain interests in their land entirely separate and apart from the mineral estate. (Compl. at ¶¶ 9-10).³ Since, according to Plaintiffs’ own Complaint, the mining ban does not affect any of those rights, the mining ban is not a categorical taking.

B. The mining ban is not a regulatory taking.

On Plaintiffs’ own facts, the mining ban is also not a regulatory taking, which “‘places limitations on land that falls short of eliminating all economically beneficial use [but render an] economic effect on the landowner [and] interfere [] with reasonable investment-backed expectations,’ among other harms. *Greengael*, 271 Va. at 287, 626 S.E.2d at 369 (citing *Palazzolo*, 533 U.S. at 617; *Penn Central Transp. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978)). In this analysis, courts apply a three factor test: “[t]he economic impact of the regulation on the claimant, . . . the extent to which the regulation has interfered with distinct investment-backed expectations, . . . and the character of the governmental action.” *Greengael*, 271 Va. at 287, 626 S.E.2d at 369 (citing *Penn Central* 438 U.S. at 124). Based on

³ VUI has suffered no taking, despite Plaintiffs’ claim that VUI has a property interest “*only* in the mineral estate that is comprised of the uranium beneath the surface.” (Compl. at ¶ 63). The mining ban predated VUI’s lease interest in the mineral estate, and VUI knew of the mining ban when it entered into that lease. The market value of that leasehold reflected the regulatory landscape at the time of the lease. In other words, VUI leased what it paid for – a mineral interest encumbered by a regulatory prohibition. Since VUI leased the property subject to the mining ban, the mining ban has not devalued that leasehold in any way.

the allegations contained in the Complaint, Plaintiffs fail to stake out a claim for a “regulatory taking” under *any* of these factors.

1) *Plaintiffs have not suffered an economic impact that would justify a takings claim.*

As discussed above, Plaintiffs do not – and cannot – allege that the mining ban has destroyed all value in the land. Even allegations that the mining ban affected only part of the land’s value fail to justify a takings claim. Article I, Section 11 of the Virginia Constitution “does not . . . authorize a remedy for every diminution in the value of property that is caused by a public improvement.” *Byler*, 284 Va. at 509, 731 S.E.2d at 921 (internal citations omitted).

In this case, the mining ban has not caused a significant economic impact. Plaintiffs implausibly claim the uranium deposit is “worth approximately \$6 billion at today’s prices” (Compl. at ¶ 3), and they further contend a state-commissioned report found the project might generate “nearly \$5 billion of net revenue for Virginia businesses.” (Compl. at ¶ 28). That same state-commissioned report, however, also reported that in a worse-case scenario, uranium mining would harm Virginia’s economy as “the net loss would top \$10.3 billion to Virginia.”⁴ The report further found:

Given the low grade quality of the uranium deposits at the Coles Hill site and the uniqueness of the physical environment of Pittsylvania County – particularly its high levels of precipitation and population density compared to the American southwest – it is unlikely VUI will be a low cost producer of uranium. The Scoping Study [produced by VUI] indicates that should the average price VUI receives for its uranium fall below \$45 per pound, then the net present value of the entire operation would approach zero.⁵

⁴ Chmura Economics & Analytics, Prepared for Virginia Coal and Energy Commission, “The Socioeconomic Impact of Uranium Mining and Milling in the Chatham Labor Shed, Virginia,” at 149 (Nov. 29, 2011) (the “Chmura Study”), available at <http://lis.virginia.gov/111/oth/Uranium.120611.pdf> (last visited March 17, 2016).

⁵ Chmura Study at 66.

As of the filing of this brief, the spot price for uranium was \$28.75.⁶ In other words, at today's prices, VUI's project would not even be economic to mine.

Today's prices, however, are irrelevant because courts look to the change in land value at the time of the alleged taking. *Lynch v. Com. Transp. Comm'r*, 247 Va. 388, 391, 442 S.E.2d 388, 389 (1994) ("The measure of compensation for the property taken is the fair market value of the property *at the time of the taking*." (emphasis added)); *see also White v. State Highway Comm'r*, 201 Va. 885, 887, 114 S.E.2d 614, 616 (1960) ("The general and well-established rule which is followed in this State is that compensation for the taking of property for public use must be determined *as of the time of the taking*." (emphasis added)). In fact, "[r]emote or speculative advantages and disadvantages . . . are not to be considered." *Lynch*, 247 Va. at 391, 442 S.E.2d at 390. Here, Plaintiffs only speculate about the value of uranium today and offer no allegations as to the value during the relevant time period.

When the General Assembly enacted the mining ban in 1982 and extended it in 1983, the market price of uranium was in freefall. The National Academy of Sciences report cited in Plaintiffs' Complaint at paragraphs 47-50 noted that the price of uranium plummeted from a high of \$160 per pound (adjusted for inflation) before the Three Mile Island incident to approximately \$40 at the time of the state law enactment.⁷ At that time, the low price rendered the Coles Hill uranium deposit un-mineable, just as it is today. (Watkins Op-Ed). In other words, when the General Assembly enacted the ban, there was no economic impact on the uranium deposit because was *already* uneconomic to develop.

⁶ See <https://www.uxc.com/review/uxcPrices.aspx> (spot price for uranium U₃O₈ as of March 14, 2016).

⁷ See National Research Council of the National Academies, "Uranium Mining in Virginia: Scientific, Technical, Environmental, Human Health and Safety, and Regulatory Aspects of Uranium Mining and Processing in Virginia," at 93, Figure 3.22 ("NAS Study") (History of monthly inflation-adjusted spot uranium prices and oil prices from 1974 to 2011), *available at* <http://www.nap.edu/catalog/13266/uranium-mining-in-virginia-scientific-technical-environmental-human-health-and-safety-and-regulatory-aspects-of-uranium-mining-and-processing-in-virginia> (*last visited* March 17, 2016).

A law with no quantifiable economic impact clearly does not rise to a taking, especially considering that courts have previously found that diminution in land value of nearly one-third did not result in a take. *Omni Homes*, 253 Va. at 71, 481 S.E.2d at 466 (economic impact “was at most a decrease of \$100,000 in value, or somewhat less than one-third of the fair market value,” which “was not one of significant diminution in value.”). Facts weighing against a take are even stronger here where the challenged law did little to no damage to the property’s economic value either at the time of the alleged take or at today’s depressed prices. Under any analysis, there is no significant economic impact here to a uranium mining proposal that would not have been economically viable back in 1983 and would not be economically viable today.

2) *The mining ban does not interfere with any reasonable investment-backed expectation.*

The mining ban does not interfere with any reasonable investment-backed expectations that Plaintiffs might have. Plaintiffs allegedly incurred millions of dollars in costs related to uranium mining activities and now claim that “[a]ll of these up-front costs are wholly deprived of value unless Virginia’s ban on uranium mining is lifted.” (Compl. at ¶ 65). Plaintiffs fail to acknowledge, however, that they knowingly undertook these costs only after the ban had been in effect for decades. The mining ban dates back to 1983, whereas each plaintiff was formed in 2007. While a pre-existing law or regulation does not prevent a takings claim *per se*, here Plaintiffs cannot claim a taking because they knowingly assumed the risk that the mining ban might very well continue to remain in place. *Greengael*, 271 Va. at 287, 626 S.E.2d at 369; *see also Omni Homes*, 253 Va. at 69, 481 S.E.2d at 465 (“One who buys with knowledge of a restraint must assume the risk of economic loss.”).

Nevertheless, Plaintiffs claim they incurred these alleged costs on the “reasonable” belief that federal law preempted – and thus should invalidate – the mining ban. (Compl. at ¶ 64). Since

filing this lawsuit, however, a federal court has rejected this “reasonable” belief, finding that federal law does *not* preempt the state mining ban. *Virginia Uranium*, 2015 WL 7776606, at *13. Plaintiffs now ask this Court to invalidate a thirty-three year old statute because Plaintiffs misunderstood the applicable laws and spent millions of dollars in their misplaced belief they could alter the regulatory landscape via lobbying or litigation. Takings law offers them no such remedy. *Omni Homes*, 253 Va. at 69 (Plaintiffs’ “hope or optimism that it could secure the required access cannot transform a risk of development into an investment-backed expectation”). Simply put, Plaintiffs’ gambled and lost, and they now improperly ask this Court for recompense. *Omni Homes*, 253 Va. at 69 (“A party may not undertake a calculated business risk and then seek reimbursement from the Government when the party’s gamble does not result in its favor.”) (citing *Atlas Enters. Ltd. Partnership v. United States*, 32 Fed. Cl. 704, 708 (1995)). The reasonable investment-backed expectation factor weighs strongly against Plaintiffs’ takings claim.

3) *The mining ban’s “character” does not justify a takings claim.*

Without question, the mining ban’s “character” does not justify any finding a taking. “Character,” in this inquiry, hinges primarily on whether the challenged regulation involves physical occupation of the property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 102 S. Ct. 3164, 3171, 73 L. Ed. 2d 868 (1982) (“[W]hen the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, “the *character* of the government action” not only is an important factor in resolving whether the action works a taking but also is determinative.”) (emphasis added); *Penn Cent.*, 438 U.S. at 124 (“A taking “may more readily be found when the interference with property can be *characterized* as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common

good.”) (emphasis added) (citing *U.S. v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946)); see also *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123 (4th Cir. 1995) (because the challenged regulation merely “prohibits a use of the property, not a physical invasion, . . . the regulation at issue is drastically less offensive than a physical taking.”). Here, Plaintiffs cannot and do not allege that the mining law authorizes the Commonwealth – or anyone else for that matter – to occupy or invade Plaintiffs’ property in any way. Accordingly, Plaintiffs cannot plausibly argue that the mining ban’s “character” supports a takings claim.

II. Even if the mining ban were a “taking,” the statute of limitations bars this action.

Even assuming the mining ban were a “taking,” however, the applicable statute of limitations unquestionably bars Plaintiffs’ claims. Each cause of action alleges a taking in violation of Article I, Section 11. (Compl. at ¶¶ 70-74, 77-80, 84-88, 91-95). Although Plaintiffs only specifically plead inverse condemnation in one of their four counts, inverse condemnation would actually be the remedy for every Article I, Section 11 takings claim. *Livingston v. Virginia Dep’t of Transp.*, 284 Va. 140, 150, 726 S.E.2d 264, 270 (2012) (“Article I, Section 11 of the Constitution of Virginia confers upon a property owner a right to just compensation if the government takes or damages his property for public use. A property owner may enforce this constitutional right through an inverse condemnation suit.”) (citing *Kitchen v. City of Newport News*, 275 Va. 378, 386, 657 S.E.2d 132, 136 (2008)); *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 601, 594 S.E.2d 606, 608 (2004) (“Since 1919, this Court has consistently held that when the government failed to condemn private land taken for public purposes, the landowner’s recourse was to file an action for inverse condemnation based on the implied contract between the government and the landowner.”); *Richmond, Fredericksburg & Potomac R. Co. v. Metro.*

Washington Airports Auth., 251 Va. 201, 212, 468 S.E.2d 90, 96-97 (1996) (Article I, Section 11 of the Constitution of Virginia “permits the landowner to enforce its constitutional right to compensation in a common law action based upon implied contract . . . both where the property is taken for public use and where it is *damaged* for public use”) (emphasis added). (citing *Burns v. Bd. of Sup’rs of Fairfax Cnty*, 218 Va. 625, 627, 238 S.E.2d 823, 825 (1977); *Jenkins v. Cnty of Shenandoah*, 246 Va. 467, 470, 436 S.E.2d 607, 609 (1993)).

The Supreme Court of Virginia has explicitly ruled that a three year statute of limitations applies to inverse condemnation actions because they sound in contract law. *Richmeade*, 267 Va. at 602, 594 S.E.2d at 608 (“[A]n inverse condemnation action is based on an implied contract that the government will justly compensate landowners for the land it has taken”); *see also Burns*, 218 Va. at 627, 238 S.E.2d at 825 (remedy for inverse condemnation is “to sue upon an implied contract” that compensation would be paid as “if the property had been condemned under the eminent domain statute”).

The three year time period begins to run when actual damage occurs or becomes inevitable. *S. Ry. Co. v. Watts*, 134 Va. 503, 114 S.E. 736, 738 (1922) (“[T]he cause of action accrued, and the statute therefore began to run, at the time the damage commenced . . .”). In this case, Plaintiffs repeat over and over that they suffered damage because the “ban has stripped away Plaintiffs’ property rights in their uranium deposit, rendering it utterly valueless.” (Compl. at ¶ 62); *see also* Compl. at ¶ 63 (“Virginia’s ban has taken away Plaintiffs’ property interest in that mineral estate, depriving it of all beneficial economic use.”); Compl. at ¶ 67 (Virginia’s ban, however, amounts to *an absolute bar* to mining uranium, depriving Plaintiffs of even the *opportunity* of developing the valuable deposit of uranium beneath their land.”). Their alleged injury, if it occurred at all, occurred more than three decades ago when the General Assembly

passed the mining ban in the 1982 and 1983 timeframe. Plaintiffs cannot possibly argue that a later legislative action reset the statute of limitations clock for the simple reason that the General Assembly has not passed any update or other amendment to the mining ban since 1983. (Watkins Op-Ed).⁸ The legislative history on the law is straightforward; it has not been touched by the General Assembly in any way in more than thirty years.⁹

Moreover, even if the mining ban is a “taking,” Plaintiffs cannot request injunctive relief. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016, 104 S. Ct. 2862, 2880, 81 L. Ed. 2d 815 (1984) (“Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.”) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697, n. 18, 69 S.Ct. 1457, 1465, n. 18, 93 L.Ed. 1628 (1949)).). Dismissing Plaintiffs’ complaint for compensation on statute of limitations grounds would not resurrect Plaintiffs’ equitable claims. *Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 266 Va. 455, 467, 587 S.E.2d 701, 708 (2003) (“It is a well-established principle uniformly acted upon by courts of equity, that in respect to the statute of limitations equity follows the law; and if a legal demand be asserted in equity which at law is barred by statute, it is equally barred in equity.”) (citing *Belcher v. Kirkwood*, 238 Va. 430, 433, 383 S.E.2d 729, 731 (1989)). Plaintiffs identify

⁸ Plaintiffs also cannot argue that they are “injured each day Defendants refuse to process, or even accept, the applications for the permits Plaintiffs need” (Compl. at ¶ 63). First, a denial of a permit application is not an injury to a property right. Second, the Complaint fails to include even one alleged instance where any plaintiff actually submitted an application that any defendant actually refused to process. In fact, Plaintiffs’ own documents reveal the opposite. (August 19, 2013 Preliminary Economic Assessment of Virginia Uranium Holdings, Inc., at 116-17) (“Legislation will likely be introduced to VA General Assembly in 2013 to lift the uranium moratorium and enable preparation of uranium-specific mining rules No mine permit application will be submitted until after these rules have been implemented.”), available at <http://virginiaenergyresources.com/i/pdf/VUI-Coles-Hill-PEA-Updated-Technical-Report-Aug19.pdf> (last visited March 17, 2016).

⁹ See <http://law.lis.virginia.gov/vacode/title45.1/chapter21/section45.1-283/> (last visited March 17, 2016) (noting that no Act of Assembly has affected the statute since 1983).

no injury within the applicable statute of limitations period. As such, even if they could articulate a plausible takings allegation, such a claim is time barred.

CONCLUSION

For the foregoing reasons, the River Basin Associations respectfully request that this Court grant the Commonwealth's demurrer and plea in bar and dismiss this action with prejudice.

March 18, 2016

Respectfully submitted,



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