

**NO. SC93511**

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**IN THE  
SUPREME COURT OF MISSOURI**

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**RONALD BREHM,  
Plaintiff-Appellant,**

**vs.**

**BACON TOWNSHIP, CITY OF SCHELL CITY,  
VERNON COUNTY, MISSOURI, and  
MISSOURI DEPARTMENT OF CONSERVATION,  
Defendants-Respondents.**

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**APPEAL FROM VERNON COUNTY CIRCUIT COURT  
TWENTY-EIGHTH JUDICIAL CIRCUIT  
THE HONORABLE JAMES R. BICKEL, JUDGE**

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**BRIEF OF RESPONDENT  
MISSOURI DEPARTMENT OF CONSERVATION**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF FACTS .....	3
ARGUMENT .....	5
A. Standard of Review.....	5
B. Section 228.190.2 conclusively deems Road 2710 a public road without any proof other than the fact that Vernon County has been receiving CART (county aid road trust) funds for the road for approximately 22 years since January 1, 1990. ....	6
C. Brehm lacks standing to challenge the constitutionality of § 228.190.2 because he does not own Road 2710, has not been denied access to his adjoining property, and has not suffered any adverse impact to his own rights. ....	8
D. Section 228.190.2 is constitutional under Article I, § 13, of the Missouri Constitution because it does not take away or impair any vested or substantial right in that neither Brehm nor anyone else has a vested right in a road for which a county has received CART funds for approximately 22 years since January 1, 1990 .....	9
E. Section 228.190.2 is constitutional under Amendments V and XIV of the U.S. Constitution and Article I, §§ 10 and 26, of the Missouri Constitution because Brehm does not own Road 2710	

and the declaration of the road to be public by virtue of  
Vernon County having received CART funds with respect to  
the road for approximately 22 years since January 1, 1990,

does not constitute a taking for which Brehm is entitled compensation . . 11

CONCLUSION . . . . . 15

CERTIFICATE OF COMPLIANCE. . . . . 16

**TABLE OF AUTHORITIES**

Cases

*Americans United v. Rogers*,  
 538 S.W.2d 711 (Mo. banc 1976), *cert. denied*, 429 U.S. 1029 ..... 5

*Barker v. St. Louis Cnty.*,  
 104 S.W.2d 371 (Mo. 1937) ..... 13

*Boone Cnty. v. Redden*,  
 262 S.W.3d 291 (Mo. App. W.D. 2008) ..... 12, 13

*Calder v. Bull*,  
 3 U.S. 386 (1798) ..... 10

*Chapman v. Lavy*,  
 20 S.W.3d 610, 613 (Mo. App. E.D. 2000) ..... 6

*City of Gainesville v. Morrison Fertilizer*,  
 158 S.W.3d 872 (Mo. App. S.D. 2005) ..... 13

*Doe v. Roman Catholic Diocese of Jefferson City*,  
 862 S.W.2d 338, 340 (Mo. banc 1993) ..... 10

*Fisher v. Reorganized Sch. Dist. No. R-V of Grundy Cnty.*,  
 567 S.W.2d 647 (Mo. banc 1978). ..... 10, 11

*Hess v. Chase Manhattan Bank*,  
 220 S.W.3d 758, 769 (Mo. banc 2007) ..... 10

*ITT Commercial Fin. Corp. v. Mid-America Supply Corp.*,  
 854 S.W.2d 371, 376 (Mo. banc 1993) ..... 5

*Kleeman v. Kingsley*,  
 167 S.W.3d 198 (Mo. App. S.D. 2005) .....6

*McCullough v. Doss*,  
 318 S.W.3d 676 (Mo. banc 2010) .....7

*Miller v. Police Ret. Sys. of St. Louis*,  
 296 S.W.2d 78, 79–80 (Mo. 1956) ..... 5

*Moore v. State*,  
 288 S.W.3d 810, 812 (Mo. App. S.D. 2009) ..... 9

*People ex rel. Eitel v. Lindheimer*,  
 21 N.E.2d 318, 321 (Ill. 1939) ..... 11

*Rentschler v. Nixon*,  
 311 S.W.3d 783, 786 (Mo. banc 2010) ..... 5, 6

*R.J.J. ex rel. Johnson v. Shineman*,  
 658 S.W.2d 910, 914 (Mo. App. W.D. 1983) ..... 9

*Smith v. Doe*,  
 538 U.S. 84 (2003) .....10

*State v. Charity*,  
 637 S.W.2d 319, 321 (Mo. App. S.D. 1982) .....2

*State v. Ellis*,  
 853 S.W.2d 440, 446 (Mo. App. E.D. 1993) ..... 2

*State v. Prowell*,  
 834 S.W.2d 852, 854 (Mo. App. E.D. 1992) ..... 2

*State v. Stottlemyre*,  
    35 S.W.3d 854, 861 (Mo. App. W.D. 2001) . . . . . 9

*Winston v. Reorganized Sch. Dist. R-2*,  
    636 S.W.2d 324, 327 (Mo. banc 1982) . . . . . 5

Constitutional Provisions

U.S. CONST. art. I, § 9 . . . . .1, 10

U.S. CONST. amend. V. . . . . 1, 11, 12, 13

U.S. CONST. amend. XIV. . . . . 1, 11, 12, 13

Mo. CONST. art. I, § 10 . . . . .1, 11, 12

Mo. CONST. art. I, § 13 . . . . .1, 9, 10

Mo. CONST. art. I, § 26 . . . . . 1, 11, 12, 13

Mo. CONST. art. V, § 3. . . . .1

Missouri Revised Statutes

Section 228.110, RSMo Supp. 2012 . . . . . 3, 6, 7, 8

Section 228.190.1, RSMo Supp. 2012 . . . . . 4, 8, 11

Section 228.190.2, RSMo Supp. 2012 . . . . . 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

Sections 527.010 *et. seq.*, RSMo 2000. . . . . 3

Other Authorities

Rule 74.04(c)(6) . . . . . 5

BLACK’S LAW DICTIONARY 1402 (5<sup>th</sup> ed. 1979) . . . . . 11

## JURISDICTIONAL STATEMENT

This appeal is from the order of the Circuit Court of Vernon County, which entered summary judgment declaring Road 2710 in Vernon County to be a public road pursuant to the provisions of § 228.190.2, RSMo Supp. 2012, which provides:

“From and after January 1, 1990, any road in any county that has been identified as a county road for which the county receives allocations of county aid road trust funds from or through the department of transportation for a period of at least five years shall be conclusively deemed to be a public county road without further proof of the status of the road as a public road. No such public road shall be abandoned or vacated except through the actions of the county commission declaring such road vacated after public hearing, or through the process set out in section 228.110.”

Appellant claims that § 228.190.2 violates Article I, § 9, of the United States Constitution and Article I, § 13, of the Missouri Constitution, which prohibit ex post facto laws, and the Fifth and Fourteenth Amendments to the U. S. Constitution and Article I, §§ 10 and 26, of the Missouri Constitution by purporting to authorize the taking of Appellant’s private property without due process and without just compensation.

Article V, § 3, of the Missouri Constitution provides that the Supreme Court of Missouri has “exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state.” However, merely asserting that a statute is unconstitutional does not deprive the court of appeals of jurisdiction. The constitutional issue must be real and

substantial, not merely colorable. *State v. Ellis*, 853 S.W.2d 440, 446 (Mo. App. E.D. 1993); *State v. Prowell*, 834 S.W.2d 852, 854 (Mo. App. E.D. 1992); *State v. Charity*, 637 S.W.2d 319, 321 (Mo. App. S.D. 1982). Appellant asserts in his Jurisdictional Statement that the Supreme Court of Missouri has exclusive jurisdiction with respect to this appeal. Because the constitutional issue raised in this appeal is, at best, colorable, jurisdiction may lie in the Western District of the Missouri Court of Appeals.

## STATEMENT OF FACTS

Road 2710 extends from Schell City, Missouri, to Schell-Osage Conservation Area, where it dead ends. (L.F. 38, 49). In 1977, Appellant Ronald Brehm (“Brehm”) purchased property adjoining Road 2710. (L.F. 53). In approximately 1990, the Missouri Public Service Company (now Aquila) erected a gate across the road, and Respondent Schell City, Missouri (“Schell City”) removed the gate in 2008. (L.F. 11, 12). Between the time the gate was erected and removed, Brehm, the public, and employees of Aquila, the Missouri Department of Conservation, and Union Pacific railroad used the road. (L.F. 11, 49). Vernon County has been receiving allocations of CART (county aid road trust) funds for Road 2710 since at least 1992. (L.F. 44-47).

In July 2008, Brehm filed a petition pursuant to the Declaratory Judgment Act, §§ 527.010 *et. seq.*, RSMo 2000, in the Circuit Court of Vernon County, Missouri, seeking the court to declare Road 2710 to be private land and not a public street or road and to enjoin Respondents Schell City and Bacon Township from removing any gate or access control device that Brehm, or Aquila, or the Conservation Commission of Missouri may erect. (L.F. 12). In the alternative, Brehm requested the court to declare what portion of the land in question is a public street or road. (L.F. 12). In their answers, Schell City and Bacon Township asserted an affirmative defense that Road 2710 “has been identified as a county or district road for which the district has received allocations of county aid road trust funds (“Cart road”) from and through the Department of Transportation for a period of at least five years, and has not been vacated by an order of the County Commission pursuant to § 228.110, RSMo, *et. seq.*, and therefore, pursuant to

§ 228.190, RSMo, section 2, is conclusively deemed to be a public road.” (L.F. 14, 17). Schell City and Bacon Township also asserted an affirmative defense that the road is a public road pursuant to the provisions of § 228.190.1, RSMo Supp. 2012 (L.F. 14, 17). After the filing of the petition, the Missouri Department of Conservation was granted leave to intervene as a defendant, and Vernon County, Missouri, was joined as a defendant. (L.F. 3, 4).

Respondents filed a joint motion for summary judgment, requesting that the trial court declare Road 2710 to be a public county road and enjoin Brehm from obstructing the road. (L.F. 26–50). Brehm opposed the motion for summary judgment, claiming that § 228.190.2 is an unconstitutional, retroactive taking of his property without just compensation. (L.F. 57–61).

On May 15, 2013, the trial court entered judgment granting Respondents’ motion for summary judgment, finding that § 228.190.2 was controlling and that the receipt of CART funds for a period of at least five years following January 1, 1990, “establishes the status of the road as a public road conclusively.” (L.F. 75). The trial court noted that it had considered Brehm’s argument that the statute is unconstitutional. (L. F. 75). The trial court adjudged that Road 2710 is a public road and ordered that Brehm and his agents and assigns were permanently enjoined “from obstructing said road or in any way interfering with the public’s right to travel on said road.” (L.F. 75, 76).

## ARGUMENT

### A. Standard of Review

The standard of review of appeals from summary judgment is essentially *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The Court will review the record in the light most favorable to the party against whom judgment was entered. *Id.* “Facts set forth by affidavit or otherwise in support of a party’s motion are taken as true unless contradicted by the non-moving party’s response to the summary judgment motion.” *Id.* The Court should grant summary judgment when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Rule 74.04(c)(6).

Brehm’s appeal involves a challenge to the validity of a statute of this state, specifically § 228.190.2, RSMo Supp. 2012, which is also subject to *de novo* review. *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). “A person may question the constitutionality of a statute only when it is applied to his disadvantage.” *Miller v. Police Ret. Sys. of St. Louis*, 296 S.W.2d 78, 79–80 (Mo. 1956). “A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision,” *Rentschler*, 311 S.W.3d at 786, and “should be enforced by our courts as an expression of the people’s will unless it plainly and palpably affronts the fundamental law embodied in the Constitution,” *Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324, 327 (Mo. banc 1982) (citing *Americans United v. Rogers*, 538 S.W.2d 711

(Mo. banc 1976)), *cert. denied*, 429 U.S. 1029 (1976). Brehm has the burden of proving that the statute “clearly and undoubtedly” violates the constitution. *Rentschler*, 311 S.W.3d at 786.

**B. Section 228.190.2 conclusively deems Road 2710 a public road without any proof other than the fact that Vernon County has been receiving CART (county aid road trust) funds for the road for approximately 22 years since January 1, 1990.**

It is settled law that public roads may be established in three ways: 1) under the provisions of Chapter 228, RSMo; 2) by prescription; or 3) by implied or common law dedication. *Kleeman v. Kingsley*, 167 S.W.3d 198 (Mo. App. S.D. 2005); *Chapman v. Lavy*, 20 S.W.3d 610, 613 (Mo. App. E.D. 2000). Section 228.190.2, which, as Brehm states in his brief, was enacted by the Missouri legislature in 2006, is one such statute. Section 228.190.2 provides:

“From and after January 1, 1990, any road in any county that has been identified as a county road for which the county receives allocations of county aid road trust funds from or through the department of transportation for a period of at least five years shall be conclusively deemed to be a public county road without further proof of the status of the road as a public road. No such public road shall be abandoned or vacated except through the actions of the county commission declaring such road vacated after public hearing, or through the process set out in section 228.110.”

Thus, under § 228.190.2, a road is conclusively deemed a public county road without further proof of the road's status if the county has received CART funds from MoDOT (Missouri Department of Transportation) for at least five years from and after January 1, 1990. In that instance, the public road can be abandoned or vacated only by the county commission after public hearing or through the vacation process set out in § 228.110, RSMo Supp. 2012.<sup>1</sup>

The affidavit of Pamela F. Richter, a senior planning technician for MoDOT (L.F. 44-47), established that Road 2710 is a public county road for which Vernon County, Missouri, has been receiving allocations of CART funds from MoDOT for a period of at least 5 years since January 1, 1990—specifically for approximately 22 years. As such, under § 228.190.2, Road 2710 is conclusively deemed a public county road without further proof of the status of the road as a public road. Consequently, there was no genuine dispute as to the material fact of the status of Road 2710, and the trial correctly entered summary judgment declaring Road 2710 to be a public county road.

In *McCullough v. Doss*, 318 S.W.3d 676 (Mo. banc 2010), this Court made it clear that a prerequisite to the application of § 228.190.2 is that the alleged abandonment of a

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<sup>1</sup>The vacation process involves, in part, at least 12 residents of a township petitioning the county commission to vacate a road and notice of the filing of the petition being posted and copy of the petition being personally served on all persons in the township whose lands are crossed or touched by the road proposed to be vacated. Residents of the township have the opportunity to make written opposition.

road must have occurred *after* 1990. In other words, even if a county received CART funds for a road for a period of at least five years after 1990, the road could still be abandoned under the provisions of § 228.190.1, RSMo 2012,<sup>2</sup> provided that the abandonment occurred *before* 1990. Here, even if Road 2710 was abandoned in 1995 as claimed by Brehm, the abandonment occurred after 1990. Consequently, pursuant to the provisions of § 228.190.2, Road 2710 is conclusively deemed a public road and cannot be declared abandoned pursuant to the nonuser provision of § 228.190.1 but, instead, can only be abandoned or vacated through the actions of the county commission declaring such road vacated after public hearing or through the process set out in § 228.110.

**C. Brehm lacks standing to challenge the constitutionality of § 228.190.2 because he does not own Road 2710, has not been denied access to his adjoining property, and has not suffered any adverse impact to his own rights.**

Brehm’s appeal should be dismissed because he lacks standing to challenge the validity of § 228.190.2. “A party has standing to challenge the constitutionality of a

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<sup>2</sup>Section 228.190.1 provides: “All roads in this state that have been established by any order of the county commission, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there have been expended public money or labor for such period, shall be deemed legally established roads; and nonuse by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same.”

statute (or rule or directive as the case may be) only insofar as it has an adverse impact on his own rights.” *R.J.J. ex. rel. Johnson v. Shineman*, 658 S.W.2d 910, 914 (Mo. App. W.D. 1983). “A person does not have standing to challenge the constitutionality of a statute simply because [the statute] may be subject to the charge of invalidity. Standing is a prerequisite to such a challenge. In order to acquire standing, a litigant must be adversely affected by the statute he challenges.” *Moore v. State*, 288 S.W.3d 810, 812 (Mo. App. S.D. 2009) (quoting *State v. Stottlemire*, 35 S.W.3d 854, 861 (Mo. App. W.D. 2001)).

Brehm filed a petition for declaratory judgment seeking a court order to, in effect, determine the status of Road 2710—whether it was a public or private road. In his affidavit, Brehm stated that he had purchased property *adjoining* Road 2710 in 1977. (L.F. 53). He does not claim to own the land on which the road, which extends from Schell City to Schell-Osage Conservation Area where it ends, is situated. Nor does he claim to have been denied access to either the road or to his property lying adjacent to the road. Since Brehm’s own rights were not adversely affected by the application of § 228.190.2, he does not have standing to challenge the validity of § 228.190.2, and his appeal should be dismissed.

**D. Section 228.190.2 is constitutional under Article I, § 13, of the Missouri Constitution because it does not take away or impair any vested or substantial right in that neither Brehm nor anyone else has a vested right in a road for which a county has received CART funds for approximately 22 years since January 1, 1990.**

Brehm claims that § 228.190.2 violates Article I, § 9, of the U. S. Constitution, and Article I, § 13, of the Missouri Constitution. Article I, § 9, of the U. S. Constitution provides, in relevant part: “No Bill of Attainder or ex post facto law shall be passed.” Article I, § 13, of the Missouri Constitution provides: “That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.”

Brehm’s assertion that § 228.190.2 is invalid as an ex post facto law is misplaced. Ex post facto laws apply only with respect to criminal laws and have no application in civil matters. *Calder v. Bull*, 3 U.S. 386 (1798); *Smith v. Doe*, 538 U.S. 84 (2003). The statute at issue relates to a civil matter, specifically roads, and, thus, cannot be invalid as an ex post facto law.

Article I, § 13, of the Missouri Constitution further prohibits the enactment of any law “retrospective in its operation.” This Court has defined a “retrospective law” as: “[a] law is retrospective in operation if it takes away or impairs vested or substantial rights acquired under existing laws or imposes new obligations, duties, or disabilities with respect to past transactions.” *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 769 (Mo. banc 2007) (citing *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc 1993)). In *Fisher v. Reorganized School District No. R-V of Grundy County*, 567 S.W.2d 647 (Mo. banc 1978), this Court stated that

“a vested right . . . must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to

the present or future enjoyment of the demand, or a legal exemption from a demand made by another.”

*Id.* at 649 (quoting *People ex rel. Eitel v. Lindheimer*, 21 N.E.2d 318, 321 (Ill. 1939)).

“Vested right” is defined as a “right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy.” BLACK’S LAW DICTIONARY 1402 (5<sup>th</sup> ed. 1979).

Brehm has failed to show how he, or anyone else, for that matter, can have any more of a vested right in a road for which a county has been receiving CART funds for at least five years since 1990 than he can for a road that has been established under the provisions of § 228.190.1—i.e., roads established by order of the county commission and used as a public highway for a period of ten years or more or a road that has been used as such by the public for ten years continuously and on which there has been expended public money or labor for that period of time.

In addition, Brehm himself stated that he purchased land *adjacent* to Road 2710 (L.F. 53) and requested the trial court “for its declaration as to what portion of the land in question is a public street or road.” (L.F. 12). Clearly, Brehm did not have a complete and consummated right in Road 2710 that was no longer open to controversy.

**E. Section 228.190.2 is constitutional under Amendments V and XIV of the U.S. Constitution and Article I, §§ 10 and 26, of the Missouri Constitution because Brehm does not own Road 2710 and the declaration of the road to be public by virtue of Vernon County having received CART funds with respect to the**

**road for approximately 22 years since January 1, 1990, does not constitute a taking for which Brehm is entitled compensation.**

Brehm claims that § 228.190.2 violates the Amendments V and XIV to the U.S. Constitution<sup>3</sup> and Article I, §§ 10 and 26, of the Missouri Constitution<sup>4</sup> by purporting to allow the taking of Brehm’s property without due process and without compensation.

In *Boone County, Missouri v. Redden*, 262 S.W.3d 291 (Mo. App. W.D. 2008), Boone County filed a lawsuit against numerous landowners who had property adjoining a road, seeking to have the road declared a public road and enjoining two of the landowners

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<sup>3</sup>Amendment V of the U. S Constitution provides, in relevant part: “No person shall be. . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Amendment XIV, § 1, of the U.S. Constitution provides, in relevant part:

“ . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>4</sup>Article I, § 10, of the Missouri Constitution provides: “No person shall be deprived of life, liberty, or property, without due process of law.”

Article I, § 26, of the Missouri Constitution provides, in relevant part:

“That private property shall not be taken or damaged for public use without just compensation.”

from interfering with the public maintenance and use of the road. The county filed a motion for summary judgment, which was granted by the trial court. One of the landowners appealed, arguing that the trial court lacked jurisdiction to declare the road a public road without first assessing compensation to the property owners from the county and that the trial court's entering judgment before establishing compensation violated the takings clause of the Fifth and Fourteenth Amendments to the U.S. Constitution and the eminent domain provisions of Article I, § 26, of the Missouri Constitution. While the appellate court dismissed the appeal because the appellant had defaulted in the case and failed to file a motion to set aside the default judgment entered against her, the court noted that the trial court "did nothing to divest her of any property rights, and the Court clearly had jurisdiction under the Declaratory Judgment Act to issue a declaration regarding the property rights of the parties." *Redden*, 262 S.W.3d at 292. In the case at hand, the trial court did not divest Brehm of his property rights by granting Respondent's joint motion for summary judgment, declaring Road 2710 to be a public road, and enjoining Brehm from obstructing the road.

Furthermore, in *City of Gainesville v. Morrison Fertilizer*, 158 S.W.3d 872 (Mo. App. S.D. 2005), the appellate court interpreted *Barker v. St. Louis County*, 104 S.W.2d 371 (Mo. 1937), as holding that a public entity's acquisition of private property for a public use by adverse possession extinguishes the former owner's constitutional rights to receive just compensation. *Gainesville*, 158 S.W.3d at 876 (quoting *Barker*, 104 S.W.2d at 379). Section 228.190.2, enacted in 2006, is simply another *different* way to declare a road public. If a public entity is not required to pay

compensation for private property acquired for public use by adverse possession, then clearly no compensation is due Brehm for a public road lying adjacent to property he purchased in 1977.

## CONCLUSION

In view of the foregoing, the trial court's judgment granting Respondents' motion for summary judgment and declaring Road 2710 to be a public county road and enjoining Brehm, his agents, and assigns from obstructing the road or in any way interfering with the public's right to travel on the road should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies:

1. That the attached Brief of Respondent Missouri Department of Conservation complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,916 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software;
2. That the undersigned signed the original Brief of Respondent Missouri Department of Conservation; and
3. That on the 6th day of November, 2013, the undersigned electronically filed the foregoing Brief of Respondent Missouri Department of Conservation with the Clerk of the Supreme Court using the Courts eFiling system, which provided service to all attorneys of record, to-wit:

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