

2007

Wasatch County, a body politic of the State of Utah
v. E. RAY OKELBERRY, BRIAN OKELBERRY,
ERIC OKELBERRY, WEST DANIELS LAND
ASSOCIATION, UTAH DIVISION OF
WILDLIFE RESOURCES, : Amicus Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

WASATCH COUNTY, a body politic of
the State of Utah,

Respondent,

vs.

E. RAY OKELBERRY, BRIAN
OKELBERRY, ERIC OKELBERRY,
WEST DANIELS LAND ASSOCIATION,
UTAH DIVISION OF WILDLIFE
RESOURCES,

Petitioners.

**BRIEF OF AMICUS CURIAE IN
SUPPORT OF PETITIONERS**

Case No. 20070011-SC

On Writ of Certiorari from the Ruling of the Utah Court of Appeals in
Wasatch County v. Okelberry, 2006 UT App 473, 153 P.3d 745

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STATEMENT OF INTEREST

Amicus curiae Brigham Young University (BYU) owns private property within the state of Utah. At least ten major private roads cross BYU's campus and are potentially subject to abandonment and dedication to the use of the public under Utah Code Annotated § 72-5-104(1).

BYU has filed an amicus curiae brief in the related case of *Town of Leeds v. Prisbrey*, No. 20061085-SC, which is tentatively scheduled for oral argument in this Court on the same day as this appeal. BYU filed its amicus curiae brief in *Prisbrey* in the Utah Court of Appeals on April 2, 2007. By order dated May 2, 2007, this Court vacated its transfer order and recalled the *Prisbrey* appeal. Since the order only directs future filings to be made in this Court, BYU will not file an updated amicus curiae brief in *Prisbrey* and will instead make its dedication statute arguments to this Court in this brief.

SUMMARY OF ARGUMENT

Unlike the rural private roads at issue in this case, and in many of this Court's and the Utah Court of Appeals' decisions, BYU's private roads connect directly to main municipal arterial routes. The Court of Appeals' balancing test is unworkable when applied to heavily-traveled, through-traffic urban and suburban private roads.

Like the owners of the rural private roads at issue in this case and in *Prisbrey*, BYU desires a predictable and clear rule, easily applicable ex ante, that it can rely on to prevent its private roads from being abandoned and dedicated to the public use. A bright-line rule would protect private property interests yet allow for the maximum amount of beneficial public use. Without a bright-line rule clearly delineating a safe harbor for

BYU and other private landowners to allow public use on private roads, the public may ultimately be excluded from using many private roads.

ARGUMENT

A. The Balancing Test is Unworkable in Through-Traffic Urban and Suburban Areas

1. The Dedication Statute

The dedication statute, Utah Code Annotated § 72-5-104(1), states: “A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years.” The Court of Appeals articulated a balancing test for determining whether a road has been continuously used as a public thoroughfare. *Wasatch County v. Okelberry*, 2006 UT App 473, 153 P.3d 745. The Court of Appeals instructed that “the question of continuous use should be approached as a multi-faceted inquiry,” and that “the trial court should weigh the evidence regarding the duration and frequency that the gate was locked against the frequency and volume of public use to determine if there is clear and convincing evidence that public use of the road was continuous.” *Id.* ¶ 18.

Many of the dedication statute cases decided by this Court and by the Utah Court of Appeals involve rural roads or roads at the edges of suburban sprawl. *See, e.g.*, *AWINC Corp. v. Simonsen*, 2005 UT App 168, 112 P.3d 1228 (unimproved mountain road); *Draper City v. Estate of Bernardo*, 888 P.2d 1097 (Utah 1995) (narrow and unpaved nine-mile road over mountain crest); *but cf.* *Bonner v. Sudbury*, 417 P.2d 646 (Utah 1966) (narrow, dead-end 350’ alley in Salt Lake City).

No Utah case has directly confronted the issue of heavily traveled, extensive private road networks within an urban or suburban area. As this Court determines the scope of the dedication statute, it should recognize that its ruling will govern urban and suburban private roads as well as rural private roads, since the dedication statute potentially reaches any “road, street, alley, lane, court, place, viaduct, tunnel, culvert, bridge, or structure.” *See* Utah Code Ann. § 72-1-102(7) (2006).

2. BYU's Private Roads

BYU owns over 500 acres of property in Provo, Utah. As shown in “Attachment 1” to this brief, many private roads cross BYU’s property and connect to public roads. At least ten major private roads, covering a combined distance of over six miles, connect to arterial streets or state roads in Provo, including University Avenue, University Parkway, Canyon Road, and 900 East. In addition to these major private roads, BYU also owns and maintains scores of other smaller roads and parking lots, many of which have direct access to public roads.

BYU paves and maintains all of its own roads and parking lots, without any financial or other assistance from the government. When BYU plows snow from its private roads, it also plows many of the surrounding public roads and intersections as a service to the community.

Around 30,000 students attend BYU, and thousands of faculty and staff work at BYU. In addition, BYU welcomes the public onto its campus for a variety of events, programs, and services. For example, the public regularly attends BYU’s sports events, plays, concerts, commencements and convocations, lectures, symposia, and conferences.

The public visits BYU's museums and special exhibits. The public also comes to BYU to rent sports equipment, buy ice cream or milk at the university creameries, shop at the BYU Bookstore, and eat at the many food establishments on campus.

On any given school day, tens of thousands of BYU students, BYU employees, and visitors drive to BYU, using BYU's private roads to arrive at their on-campus destination. Other members of the public use BYU's roads as they traverse Provo, typically as they travel east or west, but occasionally as they travel north or south. In addition to the many private vehicles that use BYU's private roads, the Utah Transit Authority currently runs seven different bus routes through East Campus Drive. One of the busiest bus stops in Utah County is situated directly east of the Wilkinson Student Center on campus.

BYU last commissioned a study of traffic patterns on campus in 1998. No attempt was made to distinguish between BYU students or employees and members of the general public. "Attachment 2" to this brief shows the study's findings of average daily traffic over a two-month period—March–April 1998. Overall, *every day* 61,000 cars either entered or exited BYU's roads from public roads. The results of that study are staggering, yet they likely represent an underestimate of the current volume of traffic across BYU's roads.

3. BYU's Road Closures

BYU has consistently closed all of its private roads to maintain private ownership. However, in order to allow as much public access as possible, without ceding ownership through the dedication statute, BYU has limited those closures to a 24-hour period over a

holiday once every year or once every several years. For the last several decades, that closure has occurred on Christmas Day. Until the early 1960s, the closures typically occurred over Labor Day weekend.

BYU last shut down all of its roads for a 24-hour period on Monday, December 26, 2005. (Christmas Day in 2005 was a Sunday, and closing campus roads that day would have prevented thousands of people from attending religious services held on campus.) “Attachment 3” shows East Campus Drive blocked off from traffic on 900 North on December 26, 2005. Similar blockades were set up at dozens of intersections and entrances to campus, and those blockades were patrolled by eight campus police officers.

4. The Court of Appeals’ Unworkable Balancing Test

The Court of Appeals’ balancing test is unworkable in the context of through-traffic urban and suburban private roads. When applied to traffic patterns at BYU, the Court of Appeals’ instruction to “weigh the evidence regarding duration and frequency that [traffic was restricted] against the frequency and volume of public use” borders on the absurd. This balancing instruction intimates that if BYU allows more public use than it restricts for a period of ten years, its private roads will be abandoned and dedicated to the public use. In effect, the balancing test converts the statutory text from “continuously used” to “used more often than not.”

It is currently difficult, if not impossible, to determine whether any particular BYU road usage is by a member of the university community or a by member of the general

public. BYU's road closures prohibit all traffic on campus, regardless of the driver's affiliation with BYU.

In order to document public usage, BYU would need to erect gates at every campus entrance. This approach may work in cloistered urban or suburban areas, such as a gated housing development, for which through-traffic is unnecessary. But completely gating off BYU's campus is an extreme and problematic proposal. Consider these issues: emergency service access would be complicated; sanitation removal routes would be affected, snow removal would be more difficult. Restricting or prohibiting public use entirely would be costly for the university, but the greater cost would be borne by the public through increased restrictions on participation in the university community.

Ultimately, under the Court of Appeals' balancing test, the only way BYU can ensure that its roads remain private is to limit public use to such an extent as to prevent meaningful participation in the university's varied offerings. The irony is that in its effort to reach out to the community and bridge the town-gown divide, BYU would put itself at risk of losing its private roads to the town entirely.

If left uncorrected, the balancing test will likely result in private property owners such as BYU cutting off significant amounts of beneficial public access in order to retain private road ownership. The balancing test proposes a fundamentally inefficient paradigm of road dedication analysis by penalizing private property owners who let the general public use their roads. As a matter of public policy, the public will generally be more restricted in its use of private roads than it would be if private property owners had a clear safe harbor for allowing public use.

5. The Uncertainty of Permissive Use

Of course, a private road is only abandoned and dedicated to the public if the public use is not permissive. However, as the Court of Appeals noted, “trial courts are given wide latitude to determine if use is permissive” due to the “highly fact dependent and somewhat amorphous” requirements of the dedication statute. Okelberry, 2006 UT App 473, ¶ 23, 153 P.3d 745 (quoting Heber City Corp. v. Simpson, 942 P.2d 307, 310 (Utah 1997)). Therefore, BYU cannot be certain that its public-welcoming actions will be construed as permitting public access, thereby defeating the public thoroughfare prong of the dedication statute. The only entirely safe route, then, under the balancing test, is for BYU to close off all private roads to the public.

B. A Clear Rule on “Continuously Used” Will Benefit Both Private Road Owners and the Public

1. A Proposed Clear Rule

BYU desires a predictable and clear rule, easily applicable ex ante, that determines when roads across private property are abandoned and dedicated to the public use. In particular, a bright-line rule on the “continuously used” prong is in the interest of both private property owners and the public. This case presents an ideal opportunity for this Court to articulate a bright-line rule for the dedication statute: timely action taken to exclude the public or limit public use precludes a determination that a road has been continuously used.

A clear rule will return proper focus to the text of the dedication statute. The proper question under the dedication statute is not whether some sampling of the public

has used a private road continuously without interruption, but whether *the road itself* has been continuously used. Utah Code Ann. § 72-5-104(1) (2006) (“A highway is dedicated and abandoned to the use of the public when *it* has been continuously used . . .” (emphasis added)).

2. Legal Effect of Unrebutted or Uncontradicted Evidence of Interruption

This Court granted certiorari on the following issue: “Whether the district court and court of appeals erred in their application of the standards for ascertaining a continuous use as a public thoroughfare pursuant to the Dedication Statute, Utah Code Ann. § 72-5-104.” Essentially, this Court has agreed to decide a pure issue of law in a case where the trial court assumed the truth of the petitioners’ facts regarding interruption of public use. This Court does not need to overturn any factual findings in order to rule in favor of petitioners.

The interruptive actions taken by petitioners in this case are clear and uncontested. Unlike *Heber City Corp. v. Simpson*, where “no evidence” of interruption was presented, since “[n]one of the witnesses testified to any interruption of the public’s use of the road,” the trial court in this case found that gates were generally kept closed and were periodically locked for several days at a time and that trespassers on the roads were asked to leave. 942 P.2d at 311, 312; *Wasatch County v. Okelberry*, 2006 UT App 473, ¶ 5, 153 P.3d 745. Similarly, in *Prisbrey*, the landowner took affirmative steps to interrupt public use of the road. The briefs of petitioners in this case and of the private landowner in *Prisbrey* provide further detail on the actions taken to interrupt continuous use of the private roads.

Any unrebutted or uncontradicted evidence of interruption within the requisite ten-year period, as a matter of law, should be sufficient to defeat the “continuously used” prong. As a logical matter, a private road cannot have been continuously used if the landowner has taken action to exclude the public or limit public use, even if only for a day.

3. Self-Serving Testimony

The Court of Appeals indicates that a clear rule would “disrupt the delicate balance embodied in the clear and convincing standard.” *Wasatch County v. Okelberry*, 2006 UT App 473, ¶ 17, 153 P.3d 745. The dedication statute apparently would be “eviscerated,” if “a property owner was [*sic*] able to defeat a dedication claim by simply providing self-serving testimony” regarding interruption. *Id.* The same potential of self-serving testimony, however, also applies to a party seeking to have a private road declared a public highway, particularly if a dedication claim can succeed with the testimony of a handful of people who were not prohibited from continuously using the road. In all cases, parties marshal evidence and testimony that best support their cause, but that does not necessarily make the testimony “self-serving.”

The Court of Appeals’ concern about self-serving testimony obfuscates the overriding issue—whether the road was continuously used by the public or not. Unrebutted or uncontradicted evidence of interruptions—found to be factually credible by the trial court—should as a matter of law be sufficient to defeat a dedication statute claim.

4. The Need for a Clear Rule

Road dedication issues are difficult enough for private property owners and government bodies without the hovering specter of a balancing test that is essentially unmoored from the text of the dedication statute. With a clear rule to guide them on the “continuously used” prong, trial courts and the parties can focus their attention in dedication statute cases on the interruptive action taken by private road owners.

Since the government already has other tools such as eminent domain at its disposal to convert private roads to public ones, since abandonment to the public use under Utah law is irreversible unless a governmental body abandons or vacates the public road by order (*see* Utah Code Ann. § 72-5-105(1) (2006)), and since public policy dictates that public use is most likely to be achieved and maintained if private road owners can allow that use without jeopardizing their property rights, there is no need for this Court to perpetuate any vestige of the Court of Appeals’ balancing test. There is, instead, a pressing need for this Court to articulate a clear rule to implement the clear language of the dedication statute.

CONCLUSION

The uncertainty caused by the Court of Appeals’ balancing test will ultimately, if left uncorrected by this Court, result in increased restrictions on public use of private roads. In order to maintain private ownership, landowners will need to seriously limit or entirely cut off public use. This Court should decide in favor of petitioners in this case and establish precedent that restricting access to some members of the general public defeats the “continuously used” prong of the dedication statute.

By so ruling, this Court will establish a clear line that is both sufficient for private landowners to prevent dedication and abandonment of their roads and definite enough for private landowners like BYU to keep their roads open to the general public. Anything less than a bright-line rule will signal to private property owners that their private roads are not safe from the dedication statute unless those roads are closed off entirely.

DATED this 15th day of May, 2007.

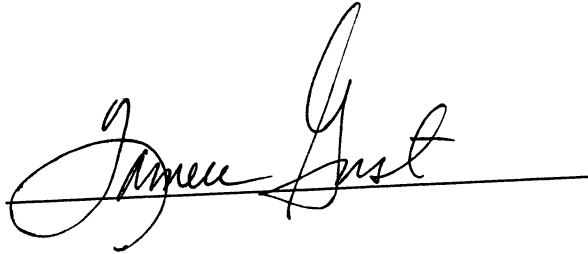
Michael R. Orme
MICHAEL R. ORME
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MAILING CERTIFICATE

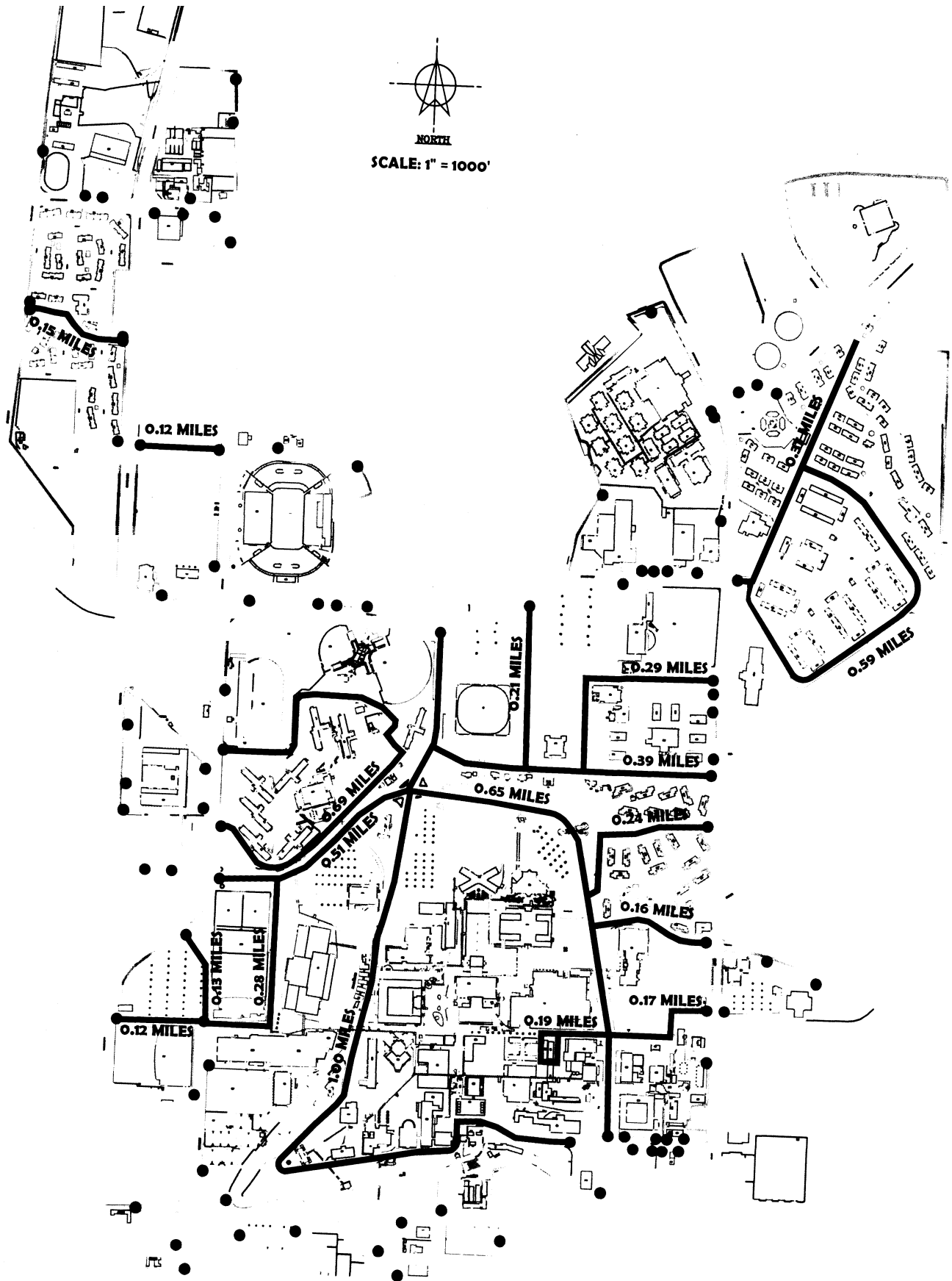
I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 15th day of May, 2007.

Thomas L. Low
Scott H. Sweat
Wasatch County Attorney's Office
805 West 100 South
Heber City, UT 84032

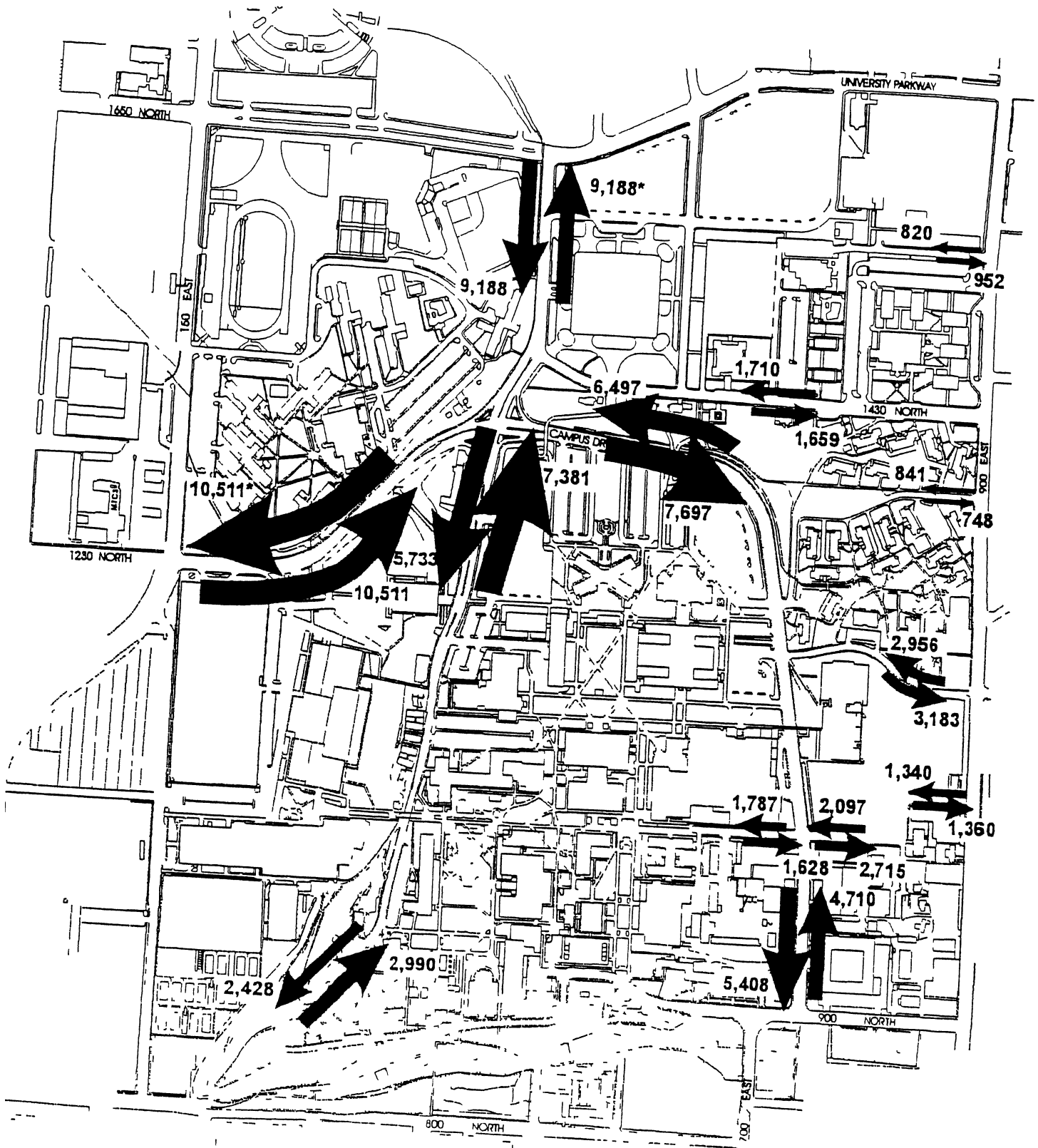
Don R. Petersen
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A handwritten signature in cursive script, appearing to read "James Gust", is written over a horizontal line.

Tab 1



Tab 2



700 NORTH

Average Daily Traffic
Brigham Young University

Tab 3

BYU CAMPUS IS
PRIVATE PROPERTY
ALL ROADS ARE CLOSED
TODAY TO PRESERVE
PRIVATE OWNERSHIP

