2477 right-of-way is limited by the established" road use on the date the statute is repealed. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735 (10th Cir. 2005), *as amended on denial of reh'g* (Jan. 6, 2006). *Hodel* established that the width of the roads could be "widened" where necessary in light of present travel and safety needs. *Sierra Club v. Hodel*, 848 F.2d 1068, 1083-84 (10th Cir. 1988) *overruled by Vill. of Los Ranchos De Albuquerque v. Marsh,* 956 F.2d 970 (10th Cir. 1992). *Hodel* also emphasized that the "reasonable and necessary" standard had to be considered by applying traditional uses for which the right-of-way was created in the first place. *Hodel*, 848 F.2d at 1084. Because the district court did not apply *Hodel* and SUWA standards to North Swag and Swallow Park Roads, the Tenth Circuit remanded the question to the lower court.

Moreover, the court reversed the district court finding that allowed for unspecified future improvements to the rights-of-way of the three roads. The court used SUWA's argumentation that the land management agency had to be consulted to ensure the improvement was "reasonable and necessary," and that in the event of disagreement, the matter should be reserved to courts. *SUWA*, 425 F.3d at 748.

Olga Knight

Ala. Dep't of Revenue v. CSX Transp. Inc., 132 S. Ct. 1136 (2015) (holding that a railroad carrier can prove discrimination under the Railroad Revitalization and Regulation Reform Act ("4-R Act"), 49 U.S.C. § 11501(b)(4), by showing that a rail carrier receives a different tax treatment, without sufficient justification, than one applied to a "similarly situated" competitor, but a showing that an alternative, roughly equivalent tax applies to such competitors renders a tax disparity nondiscriminatory).

Alabama taxes businesses and individuals for the purchase or use of personal property. The State applies this tax, at the general tax rate of 4%, to railroads' purchase or use of diesel fuel for their rail operations. Motor carriers were exempt from the tax made on purchases and uses of diesel fuels. Instead, the motor carriers paid a 19-cent per gallon fuel excise tax on diesel. However, water carriers paid neither the sales nor the fuel excise tax on diesel fuel. Respondent CSX Transportation, a rail carrier operating in Alabama and other states, argued that the asymmetrical tax discriminated against rail carriers and violated the 4-R Act. CSX sought injunctive relief against the State of Alabama with respect to the collection of tax on its diesel purchases.

Previously, the District Court and the Eleventh Circuit both rejected CSX's discrimination claim against the State of Alabama. The Supreme Court reversed, rejecting Alabama's defense that sales and use tax exemptions cannot discriminate under the 4-R act. On remand from the Supreme Court, the District Court rejected CSX's discrimination claim. The Eleventh Circuit reversed, holding that CSX could establish discrimination by showing that Alabama taxed rail carriers differently than their competitors, which included motor carriers and water carriers, and rejected Alabama's argument that a fuel excise tax offset the sales tax, thereby eliminating any discriminatory effect.

The Supreme Court reversed again. The Court held that the Eleventh Circuit properly concluded that a comparison class of competitors consisting of motor carriers and water carriers was appropriate, and differential treatment vis-à-vis that class would constitute discrimination. Therefore, the Court rejected Alabama's argument that the only appropriate comparison class for a subsection (b)(4) claim is all general commercial and industrial taxpayers. The Court concluded that when a railroad alleges it is targeted for worse tax treatment than local businesses, the railroad's competitors in that jurisdiction are the comparison class.

However, the Court overturned the Eleventh Circuit in part, holding that an additional tax on third parties may justify an otherwise discriminatory tax. Therefore, the Eleventh Circuit improperly refused to consider Alabama's tax-based justification. The Court remanded to the Eleventh Circuit to consider whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption. The Court similarly rejected CSX's claim that because subsection (b)(4) uses "tax" in the singular, the appropriate inquiry is whether the challenged tax discriminates, not whether the tax code as a whole does. The Court determined that a challenged tax would be discriminatory if it treated railroads differently from other similarly situated taxpayers without sufficient justification. Therefore, if there were roughly comparable taxes among the carriers, there would be no discrimination. The Eleventh Circuit was also directed to consider Alabama's alternative justifications for its decision to exempt water carriers from the sales and use tax, since water carriers pay neither tax.

Justice Thomas filed a dissenting opinion, joined by Justice Ginsburg. Justice Thomas expressed that in order to violate subsection (b)(4), "a tax exemption scheme must target or single out railroads by comparison to general commercial and industrial taxpayers." Based on Justice Thomas's reading of subsection (b)(4), to establish a discriminatory tax against a rail carrier, the rail carrier would have to show it was singled out for unfa-

vorable treatment as compared to commercial and industrial taxpayers. Because the railroad was unable to prove that the tax "targeted or singled out" the rail carriers compared to other taxpayers, Justice Thomas concluded there was no discrimination.

Mackenzie Shields

Brueningsen v. Resort Express Inc., No. 2:12–cv–00843–DN, 2015 WL 339671, at *1 (D. Utah Jan. 26, 2015) (holding that (1) under the Fair Labor Standards Act ("FLSA") an employer may retain cash tips when it does not take a tip credit; (2) Defendants were subject to the Motor Carrier Act exemption to the FLSA overtime requirement; (3) Plaintiff's common law claims were preempted by the FLSA and failed on the merits; and (4) Defendants Park City Transportation and Premier Transportation, Inc. did not have an employer-employee relationship with the Plaintiffs.)

All the Plaintiffs, except for Plaintiff Michael Power, were employed by Resort Express as van drivers, operating 15-passenger vans. Resort Express had control over work conditions, policy, and compensation. Plaintiffs drove customers on behalf of Resort Express, as well as Park City Transportation, Inc. ("PCT") and Premier Transportation, Inc. ("PTI") (collectively, "Defendants"). Defendants filed a motion for partial summary judgment on: (1) Plaintiffs' claim that Defendants violated the Fair Labor Standards Act by retaining non-cash tips; (2) Plaintiffs' claim (except Plaintiff Michael Power) that Defendants violated the FLSA by failing to pay overtime wages; (3) Plaintiffs' claims for conversion, unjust enrichment, and quantum meruit; and (4) all Plaintiffs' claims against Defendants Park City Transportation and Premier Transportation, Inc.

The Court first addressed Plaintiffs' claim that Defendants violated the FLSA by retaining non-cash tips. They asserted that they enjoyed a legal property right to all non-cash tips under Department of Labor ("DOL") regulation 29 C.F.R § 531.52, which the DOL authorized under §203(m) of the FLSA. However, a court will not defer to an agency's statutory interpretation if Congress has clearly and directly spoken on the issue. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Applying step one of the two-prong *Chevron* analysis, the Court held that Congress had directly spoken on the issue of when an employer is required to turn over all tips to an employee, and therefore deference would not be given to the DOL's interpretation of §203(m). The Court further stated the statutory language is clear and