

David R. Boyajian, OSB #112582

Email: dboyajian@schwabe.com

Darien S. Loiselle, OSB #925796

Email: dloiselle@schwabe.com

SCHWABE, WILLIAMSON & WYATT, P.C.

1211 SW 5th Ave., Suite 1900

Portland, OR 97204

Facsimile: 503.796.2900

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

**COLUMBIA RIVER STEAMSHIP
OPERATORS' ASSOCIATION,**

Plaintiff,

vs.

PORT OF ASTORIA,

Defendant.

No. 3:19-cv-01478

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

(33 U.S.C. § 5; 42 U.S.C. § 1983, U.S.
CONST., ART. I, § 10, CL. 3, U.S. CONST.,
ART. 1, § 8, CL. 3)

Plaintiff Columbia River Steamship Operators' Association ("CRSOA"), by their
undersigned attorneys, for their complaint herein, allege as follows:

SUMMARY OF ACTION

1.

This action challenges, under the Constitution and the laws of the United States, the

legality of taxes, styled as a “Harbor Maintenance Fee” by the Port of Astoria (“Transit Tax” herein), imposed as a condition of innocent passage *past* or by the Port of Astoria on vessels engaged in the interstate and international commerce of the United States. CRSOA seeks a declaration that Port of Astoria’s Transit Tax is unlawful and a permanent injunction against the assessment and/or collection of this Tax.

2.

The Transit Tax revenues (assessed against vessels that do *not* call at or otherwise avail themselves of any services from the Port of Astoria) will be used to fund, according to the Port, maintenance for the Port of Astoria’s Berth 1. Berth 1 is part of the Port’s commercial operation, and vessels choosing to tie up alongside pay dockage fees to the Port of Astoria, per the terms of a contractual relationship governed by the Port of Astoria’s Tariff. Berth 1 receives several commercial calls throughout the year, most notably from passenger cruise ships, and collects fees for those vessel calls. The revenues generated by those dockage fees don’t keep up with the Berth’s maintenance, such that Berth 1 is a failing piece of infrastructure and a failing commercial enterprise.

3.

The Transit Tax, on the other hand, is assessed against most (not all) commercial vessels *passing by* the Port of Astoria, and it bears no relationship to costs created by or services provided to passing vessels. Indeed, the vessels do not cost the Port a penny, nor do they request or receive any benefits or services from the Port of Astoria—they just get a bill.

4.

Plaintiff alleges that the Transit Tax is illegal under federal constitutional and statutory protections. Plaintiffs seek declaratory and injunctive relief barring the continued assessment

and/or collection of the Transit Tax, in whole or in part.

PARTIES

5.

Plaintiff Columbia River Steamship Operators' Association is a not-for-profit association organized under the laws of the State of Oregon, with its principal place of business in Portland, Oregon. Established in 1922, the CRSOA includes members representing ship owners, vessel operators, vessel agents, towing, bunkering, and launch companies, and seafarers' centers, as well as facilities and ports along the Columbia/Willamette/Snake River and Oregon Coast River Systems.

6.

The mission of the CRSOA is to facilitate trade, provide business leadership, exercise principles of environmental stewardship, serve as an industry focal point, and promote operating policies and practices that are safe, reliable, efficient, and cost effective. Put simply, the CRSOA's purpose is to make the ports in the Columbia River region increasingly attractive for commercial ships and shippers to come and do business.

7.

This is accomplished by working closely with Federal, state, and city governments, with Federal and state legislators, with ports, pilots, and shippers, with agricultural and industrial organizations, and with trade associations, unions, and others to ensure that quality services are provided at competitive prices safely, secure, reliably, and efficiently.

8.

Defendant, the Port of Astoria, was and is a duly authorized Oregon Municipal Authority and is a person amenable to suit pursuant to 42 U.S.C. § 1983, et seq.

JURISDICTION AND VENUE

9.

Jurisdiction is conferred upon this Court for resolution of the substantial constitutional questions presented herein by virtue of 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3), which provide, in part, that the District Court shall have original jurisdiction over any civil action authorized by law to be commenced by any person to: “Redress the deprivations under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege, or immunity secured by the Constitution of the United States...”

10.

This suit is also founded on 42 U.S.C. § 1983, which provides, in part, as follows: “Every person who under color of any statute, ordinance, regulation, custom, usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to a deprivation of any rights, privileges, immunity secured by the Constitution shall be liable to the party injured in an action at law or in equity or other proper proceedings for redress.”

11.

CRSOA’s claims for declaratory relief are founded on Rule 57 of the Federal Rules of Civil Procedure, as well as 28 U.S.C. § 2201, which provides, in part, that: “... any Court of the United States upon filing of an appropriate pleading, may declare the rights and other legal relations of any other interested parties seeking such declaration, whether or not further relief is or could be sought...”

12.

Jurisdiction to grant injunctive relief is conferred upon this Court by virtue of 28 U.S.C. §

2202, which provides, in part, that: “Further necessary or proper relief on a declaratory judgment or decree may be granted after reasonable notice and hearing against any adverse party whose rights have been determined by such judgment...” In addition, jurisdiction for injunctive relief is found in this Court’s inherent equitable powers to enter relief necessary to enforce its orders, opinions, and judgments.

13.

Venue is properly laid in this district pursuant to 28 U.S.C. § 1391(b). Plaintiff and Defendant are located in this district, and most or all of the events or omissions giving rise to these claims occurred and continue to occur in this district.

GENERAL ALLEGATIONS

14.

Beginning on July 1, 2019, the Port of Astoria has assessed and collected (or attempted to collect) a \$300 Transit Tax from most every commercial vessel greater than 250’ in length that transits the federal navigation channel that happens to pass by the Astoria waterfront.

15.

Many of CRSOA’s members own, operate, charter, load cargo onto, provide goods or services to, or act as local agents for commercial vessels greater than 250’ in length that enter the Columbia River, requiring that they pass by the Astoria waterfront, while engaged in interstate and international commerce.

16.

The Transit Tax discriminates against self-propelled commercial vessels over 250’. Vessels under 250’, commercial fishing vessels, non-commercial vessels, and government vessels are specifically exempted. Barges, while not exempted and no matter their length—many

are over 250' LOA—are inexplicably not being assessed the \$300 Transit Tax.

17.

The Transit Tax bear no reasonable relationship to any actual costs incurred by Port of Astoria to provide any services to the assessed vessels. In fact, the assessed vessels neither request nor receive any services from the Port of Astoria. Nor do the assessed vessel communicate in any way with the Port of Astoria—the only contact the vessels have with the Port of Astoria is when their local husbanding agents receive a \$300 invoice.

CLAIMS FOR RELIEF

First Cause of Action

(Violation of the Tonnage Clause of the United States Constitution)

18.

Plaintiffs incorporate the allegations of paragraph 1 through 17 above as though fully set forth herein.

19.

The Tonnage Clause of the United States Constitution, U.S. Const., art. I, § 10, cl. 3, provides, in pertinent part, that “No State shall, without the Consent of Congress, lay any Duty of Tonnage ...”

20.

The Constitutional prohibition against tonnage duties embraces all taxes and duties regardless of their name or form, even though not measured by tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port. See, e.g., *Clyde Mallory Lines v. State of Alabama ex rel. State Docks Comm’n*, 296 U.S. 261, 266 (1935).

///

21.

The Port of Astoria's Transit Tax is a charge for the privilege of entering, trading in, or lying in a port and, thus, are subject to the Constitutional prohibition against laying "any Duty of Tonnage."

22.

A Duty of Tonnage may be found permissible under the Tonnage Clause only to the extent that: (a) the proceeds of such a duty are used for services rendered to and enjoyed by the vessel (such as pilotage), (b) such services enhance the safety and efficiency of interstate commerce, and (c) the duty places minimal burdens on interstate commerce. See, e.g., *id.*

23.

The amount of the Transit Tax greatly exceeds the value of services rendered by Port of Astoria to the assessed vessels, in that ***no*** services are rendered to these vessels.

24.

The Port of Astoria asserts that it will use the proceeds of the Transit Tax for purposes that do not enhance the safety and efficiency of interstate commerce and navigation. Instead, the revenue will be used, Port of Astoria asserts, to perform overdue maintenance on Berth 1. Berth 1 is a commercial enterprise; to the extent it cannot sustain itself it is doomed to fail. The Transit Tax is a veiled attempt to push that shortfall onto the maritime industry which has deemed Berth 1 generally unsuitable for its uses. It cannot sustain itself with dockage revenue, like any other dock must.

25.

The Transit Tax, in whole or in part, burdens interstate commerce by treating transiting vessels like floating ATM machines.

26.

The Transit Tax imposed and/or sought to be imposed by Port of Astoria is excessive, unreasonable, or otherwise violative of the Tonnage Clause of the United States Constitution.

27.

The CRSOA and its members face irreparable harm if the Court does not enjoin Port of Astoria from assessing and/or collecting the challenged Transit Tax, and they have no adequate remedy at law because, among other things, the international reputational damage to the Columbia-Snake River System as a desirable port call will be wide-reaching and difficult if not impossible to repair.

Second Cause of Action

(Violation of Rivers and Harbors Appropriation Act of 1884, as amended, 33 U.S. C. ~ 5)

28.

Plaintiffs incorporate the allegations of paragraphs 1 through 27 above as though fully set forth herein.

29.

The Rivers and Harbors Appropriation Act of 1884, 33 U.S.C. § 5, as amended by the Maritime Transportation Security Act of 2002, Pub. L. 107-295 (Nov. 25, 2002), states:

- (b) No taxes, tolls, operating charges, fees, or any other imposition whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the rights to freedom of navigation on those waters, except for —

- (1) fees charged under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. § 2236); or
- (2) reasonable fees charged on a fair and equitable basis that —
 - (A) are used solely to pay the cost of a service to the vessel or water craft;
 - (B) enhance the safety and efficiency of interstate and foreign commerce; and
 - (C) do not impose more than a small burden on interstate or foreign commerce.

30.

The CRSOA's members' vessels—indeed, most all commercial vessels transiting by Astoria—operate at all times on navigable waters subject to the authority of the United States and under the right to freedom of navigation on those waters.

31.

The Transit Tax is not imposed under section 208 of the Water Resources Development Act of 1986 (33 U.S.C. § 2236).

32.

The Transit Tax collected or sought to be collected by Port of Astoria:

- (a) does not constitute reasonable fees charged on a fair and equitable basis;
- (b) is used for purposes other than to pay the cost of services requested by or provided to vessels transiting past Astoria;
- (c) does not enhance the safety and efficiency of interstate commerce; and
- (d) imposes burdens on interstate commerce.

33.

Port of Astoria has earmarked revenue obtained from the Transit Tax to fund project(s) that fall outside the scope of expenditures permitted under 33 U.S.C. § 5, including general maintenance and upgrades to the Port of Astoria's commercial facility at Berth 1, for which Port of Astoria charges dockage and usages fees from vessels which *choose* to dock there.

34.

The Transit Tax imposed and/or sought to be imposed by Port of Astoria violates the Rivers and Harbors Appropriation Act of 1884, as amended, 33 U.S.C. § 5(b).

Third Cause of Action

(Violation of the Commerce Clause of the United States Constitution)

35.

Plaintiffs incorporate the allegations of paragraphs 1 through 34 above as though fully set forth herein.

36.

The right to trade and travel is a fundamental right under the United States Constitution's Commerce Clause, U.S. Const., art. I, § 8, cl. 3, and under the Privileges and Immunities Clause, U.S. Const., Amend. XIV, § 1.

37.

A Transit Tax or similar charge imposed on vessels engaged in interstate travel violates their right to travel and trade if it (a) discriminates against interstate commerce, (b) is not based upon a fair approximation of use, or (c) is excessive in relation to the cost to the government of the benefits conferred.

///

38.

The Transit Tax, including the manner in which the fee is levied and/or applied by Port of Astoria, discriminates against interstate commerce and against some vessels/operators as compared to others.

39.

The amounts and collections of the Transit Tax are not based upon a fair (or any) approximation of the use of local government/Port of Astoria services by transiting vessels.

40.

In practice, the Port of Astoria has sought the collection of the Transit Tax only from a narrow subset of vessels, most if not all of which are engaged in interstate commerce.

41.

The Port of Astoria does not assess the Transit Tax against fishing vessels, vessels under 250' in length, non-commercial vessels, government vessels, or barges (regardless of overall length).

42.

The Transit Fee imposed and/or sought to be imposed by the Port of Astoria is excessive and otherwise violates the right to trade and travel.

Fourth Cause of Action

(Violation of Rights Protected by the Constitution under 42 U. S. C § 1983 and Supremacy

Clause Article VI, Clause 2 of the U.S. Constitution)

43.

Plaintiffs incorporate the allegations of paragraphs 1 through 42 above as though fully set forth herein.

44.

The Supremacy Clause states that "[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof ...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const., art. VI, cl. 2.

45.

The Port of Astoria's Resolution Amending Port of Astoria Terminal Tariff No. 11 and Implementing a Harbor Use Fee represents an impermissible effort by the Port of Astoria to impose a duty of tonnage on vessels. In particular, this resolution and tariff amendment conflicts with federal law and the United States Constitution, and otherwise impedes the accomplishment and execution of the full purposes and objectives of federal law and the U.S. Constitution.

46.

The Port of Astoria's Transit Tax violates the Supremacy Clause, and is invalid.

47.

By charging Transit Tax that greatly exceeds the value of services rendered to transiting vessels (none are requested or rendered), the Port of Astoria has deprived and continues to deprive the CRSOA and its members of their rights under the Tonnage Clause, in violation of 42 U.S.C. § 1983.

48.

Moreover, under the Supremacy Clause of the United States Constitution, the imposition of the Transit Tax, its assessment, collection, and threatened enforcement by the Port of Astoria violates 42 U.S.C. § 1983.

///

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. A declaration, pursuant to 28 U.S.C. § 2201, that:
 - (a) the challenged Transit Tax violates the Tonnage Clause, the Supremacy Clause (by virtue of its violation of 33 U.S.C. § 5), and the Commerce Clause of the United States Constitution;
 - (b) the Port of Astoria has deprived the CRSOA and its members of federal rights under color of state law in violation of 42 U.S.C. § 1983;
 - (c) the Port of Astoria is legally barred from imposing or collecting the Transit Tax to the extent that revenues therefrom are excessive or otherwise impermissible in any amount; and
 - (d) the Port of Astoria is legally barred from imposing or collecting the Transit Tax,
 - (e) the Port of Astoria is legally barred from any or further use of Transit Tax revenue to fund activities, maintenance, and/or improvements that are unrelated to and do not benefit transiting vessels or approximate their use Port of Astoria facilities.
2. A permanent injunction, pursuant to 28 U.S.C. § 2202, prohibiting Defendants from:
 - (a) imposing, assessing, or collecting the Transit Tax to the extent that the amount thereof is excessive or otherwise impermissible;
 - (b) imposing, assessing, or collecting the Transit Tax, in any amount; and
 - (c) using Transit Tax revenue to fund activities, maintenance, and/or improvements that are unrelated to and do not benefit transiting vessels or

approximate their use Port of Astoria facilities.

3. An award of Plaintiff's costs and attorney's fees under 42 U.S.C. § 1983; and

4 For such other and further relief as this Court deems just and equitable.

Dated this 13 day of September, 2019.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ David R. Boyajian
David R. Boyajian, OSB #112582
Darien S. Loiselle, OSB #925796
Facsimile: 503.796.2900
Of Attorneys for Plaintiff