

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

LINDSEY K. SPRINGER

Plaintiff

Case No. 05-6387

Internal Revenue Service, et al.,

MOTION TO STAY MANDATE OF ORDER  
DATED MAY 1, 2007, OR ITS EQUIVALENT

Appellant, and on the defense, bar or otherwise, Lindsey K. Springer, moves this Court pursuant to Federal Rules of Appellate Procedure 41(d)(1)(2007) and Local Rule 41(b), and under the Court's discretionary power, for an Order staying the mandate or its equivalent, pending the outcome of Appellant's Petition for Rehearing and Rehearing En Banc, which is due 45 days from May 1, 2007, under Federal Rules of Appellate Procedure on basis the Panel has directed certain events to take place within the 45 days which if the Panel decision is either reversed by the Panel or reversed by the 10<sup>th</sup> Circuit sitting En Banc, those events would be moot regarding filing restrictions and sanctions imposed in Springer I.

PROCEDURAL BACKGROUND

There are three different cases pending before this Court all of which were disposed of by Panel decision dated May 1, 2007.

**Springer I** was decided by the Panel upon a finding the District Court lacked "subject matter jurisdiction under the AIA. [Anti-Injunction Act, 26 U.S.C. § 7421, (1998)]" Panel decision at 7. The Panel decided that the exception under section 7421(a), listing out section

6330(e) specifically, only applied to complaints seeking injunctive relief from the United States District Court “when the IRS initiates a levy during the statutory period of suspension that is triggered by the request for a CDP hearing.” Panel decision at 8, citing to *Hart v. U.S.* 291, F. Supp 2d 635, 645 (N.D. Ohio 2003). The Panel also concluded that “contrary to Springer’s argument, the exception [under 7421(a)] is not triggered by the mere issuance of a notice of intent to levy.” Panel decision at 9. In considering the “judicially created exception to the AIA” which the Panel held “allows an injunction if it is clear that ‘under no circumstances could the Government ultimately prevail,’” the Panel decided “Springer cannot meet either of these requirements.” *Id.* The two part test, the Panel held, was not met because (1) the government ultimately could prevail in levying Springer’s assets because the issue of his income tax liability for 1990-1995 was finally determined in his earlier suit, and section 6331(a) authorizes the IRS to impose the levy, and the levy could be sustained if the CDP hearing comported with applicable law. Second, the Panel concluded Springer could not show the absence of an adequate legal remedy because Springer had “availed himself of an adequate legal remedy concerning his liability-he litigated in the Tax Court and lost. The Panel noted that Appellant’s “ability to appeal the result of the CDP hearing under 26 U.S.C. § 6330(d)(1) provides him with an adequate legal remedy concerning the levy procedure.” Panel decision at 10

**Springer II** was decided on grounds the “Tax Court had exclusive jurisdiction over that case.” *Id.* This, the Panel determined, was based upon the “underlying tax liability concerning income taxes.” *Id.* The Panel also concluded that, even though the IRS Notice of Determination “directed him to appeal to a United States District Court” this “notice” “does not defeat the fact the district court lacked jurisdiction. Parties cannot confer subject matter jurisdiction.” Panel

decision at 10-11.

**Springer III** was decided on grounds “that the PRA creates a defense, not a private right of action, and therefore, we need not reach the alternative basis for the district court’s disposition, that the AIA barred<sup>1</sup> the action.” Id.

### **Springer I Sanctions**

The Panel decision also directed Appellant **pay** \$ 4,000.00 for appealing Springer I to the U.S. Department of Justice based upon a determination that appeal No. 05-6387 was “frivolous and brought for the purpose of delay.” The Panel concluded since Appellant filed a Petition in Tax Court that was dismissed on a “failure to state a claim” Motion of the Commissioner, “the tax court ruled against him, a judgment that is now incontestable.” Panel decision at 14 The Panel explained that although Appellant requested a CDP hearing “properly” he “challenged that hearing in a jurisdictionally defective action, Springer I, then took a frivolous appeal from the dismissal of that action.” Panel decision at 15

### **Springer III Sanctions**

\_\_\_\_\_The Panel decision also directed Appellant **pay** another \$ 4,000.00 regarding Springer III to the U.S. Department of Justice. The Panel concluded Springer III was “dismissed as a procedurally improper means of challenging the government’s power to impose penalties arising from the failure to file federal income tax returns for 1982-2006, and his appeal from that dismissal also was frivolous.”

Accordingly, the Panel concluded the outcome of both 05-6387 and 06-5123 was “obvious” and “Springer’s arguments are wholly without merit and these appeals were brought to

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<sup>1</sup>Which means what?

delay further the collection of his federal income tax liability for 1990-1995.” Id.

In footnote 6 the Panel also concluded that Springer II was also “jurisdictionally defective” and was “frivolous.” Id.

### **Filing Restrictions**

And finally, the Panel decision dated May 1, 2007, proposed filing restrictions upon Appellant because of the “view of his abusive pattern of filing frivolous or malicious actions and appeals pro-se, WE MUST RESTRICT SPRINGER’S ACCESS TO THE COURTS.” Panel decision at 18.

## **ARGUMENT FOR STAY OF MANDATE OR ITS EQUIVALENT IN SPRINGER I**

### **Springer I Issues**

1. Panel decision conflicts with 26 U.S.C. §§ 6330(a), (d)(1) and (e), 7491(a), (b), and (c), the Supreme Court’s decision in *Commissioner v. McCoy*, 484 U.S. 3,6-7 (1987), the 10<sup>th</sup> Circuit’s decision *Wyoming Trucking Ass’n Inc. v. Bentsen*, 82 F.3d 930, 935 (10th Cir. 1996), citing to *Enochs v. Williams Packing Test*, 370 U.S. 1, 7, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1961), with the D.C. Circuit in *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998) and the Paperwork Reduction Act of 1980 and 1995.

#### **A. The Panel decision ignores the entire applicable United States Code sections at issue.**

The Panel decision in Springer I ignored the plain meaning of section 6330, including section 6330(e) as well as 6330(d)(1), to which the Panel readily admits was amended during the pendency of Springer I and to which such change does not apply. The Panel decision acknowledges that Congress, when passing into LAW the “Restructuring and Reform Act of 1998” enacted both section 6330 and section 7491. The Panel says that its decision is based upon the newly held presumption that section 6330(e) was only intended to authorize the United States

District Court to have jurisdiction over an injunctive action brought under section 6330(e) if, and only if, some Agent of the IRS decided to seize property belonging to Appellant while the “suspension” was in place. The Panel decision that holds “contrary to Springer’s argument, the exception [under 7421(a)] is not triggered by the mere issuance of a notice of intent to levy.” Panel decision at 9 The Panel’s characterization of Appellant’s clear reading of the statute as “argument” ignores the obvious.

First, Appellant has never “argued” the “mere issuance of a notice of intent to levy” triggered the exception under section 7421(a). That construction is erroneous. The Panel stated that “[O]n March 2, 2005, the IRS sent Springer a notice of intent to levy his assets in order to collect the tax liability adjudicated in the earlier proceeding.” Panel decision at 4

Appellant argued the exception was not triggered until Appellant timely requested the Collection Due Process Hearing and it became apparent the Defendants were not going to perform their duties required under the new section 6330 (Panel called “Pre Levy Collection Due Process”).

**B. Panel decision conflicts with the Supreme Court’s decision in *Commissioner v. McCoy*, 484 U.S. 3 (1987)**

The Panel decision that the Tax Court decision “adjudicated in the earlier proceeding” “including interest and penalties” ignores the decision by the Supreme Court in *Commissioner v. McCoy*, 484 U.S. 3 (1987) which held that:

"The Court of Appeals in this case clearly exceeded its jurisdictional bounds. Its only jurisdiction, under § 7482(a), was "to review the decisio[n] of the Tax Court." The latter court's decision was that "there is a deficiency in the amount of \$22,159.72 in [respondent's] Federal estate tax." App. to Pet. for Cert. 28a. The Court of Appeals ruled that that decision was correct. Its duty, then, was to affirm

the decision. It was not empowered to proceed further to decide other questions relating to interest and penalty - questions that were not presented, and could not possibly have been presented, to the Tax Court - or to grant relief that the Tax Court itself had no jurisdiction to provide. " Id. at 7

“Interest on a tax deficiency is separately mandated by 26 U.S.C. § 6601(a). A penalty that accrues under § 6651(a)(3) is also separate and outside the scope of the petition to the Tax Court. The deficiency asserted here was not assessed, and could not have been assessed, until after the Tax Court had rendered its decision. See § 6213(a). The Tax Court is a court of limited jurisdiction and lacks general equitable powers. *Commissioner v. Gooch Milling & Elevator Co.*, [320 U.S. 418 (1943)]

at 6-7

**C. The Panel decision also conflicts with the 10<sup>th</sup> Circuits holding in *Wyoming Trucking Ass’n Inc. v. Bentsen*, 82 F.3d 930, 935 (10th Cir. 1996), citing to *Enochs v. Williams Packing Test*, 370 U.S. 1, 7, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1961)**

The Panel decision also conflicts with the 10<sup>th</sup> Circuits holding in *Wyoming Trucking Ass’n Inc. v. Bentsen*, 82 F.3d 930, 935 (10th Cir. 1996), citing to *Enochs v. Williams Packing Test*, 370 U.S. 1, 7, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1961) where the 10<sup>th</sup> Circuit characterized the Plaintiff’s claims as “Plaintiffs’....**defense**” to the “Anti-Injunction Act and the Declaratory Judgment Act argument is that this is not a civil suit for a tax refund, but a facial challenge to the constitutionality of the transportation fuels tax.”

Appellant raised the Paperwork Reduction Act “bar” as a defense to the AIA claims of the Defendants in Springer I as it was clear not only did Appellant have right to the relief he sought in Springer I, under no circumstances could the Government prevail in not performing their duty under section 6330 and as applicable under section 7491. The District Court may not have held everything Appellant sought was required but the District Court had jurisdiction to direct the Government to perform its duties under section 6330 which included subsection (c)(1).

The Panel mis-characterizes Springer I in that it claims Appellant was requesting a “variety of injunctive relief” including an impartial hearing’s officer be provided, the meeting be recorded, and “obtain verification that the underlying tax liability was computed in accordance with all applicable laws and administrative procedures as required by 26 U.S.C. § 6330(c)(1).” Panel decision at 5 These are not what Appellant requested the hearing officer to do, these are what Congress directed the hearing officer to do. Appellant was seeking an Order directing the hearing officer to do his duty as mandated by Congress.

The Panel further mis-characterizes Appellant’s claims regarding the Bureau of Labor Statistics and the Bogus 1099. First, all the jurisprudence the Panel cites to regarding the Anti-Injunction Act and any exceptions were decided prior to both the Paperwork Reduction Act of 1980 and 1995, see *Enochs v. Williams Packing & Navigation Co.* 370 U.S. 1,7(1962) as well as the Restructuring and Reform Act of 1998; see *Nuttelman v. Vossberg*, 753 F. 2d 712, 714 (8<sup>th</sup> Cir. 1985); and *Souther v. Michlbachler*, 701 F.2d 131, 132 (10<sup>th</sup> Cir. 1983). Panel decision at 8

The 2004 decision in *Ambort v. U.S.*, 392 F.3d 1138, 1140 (10<sup>th</sup>) has nothing to do with the injunctive action Appellant sought in Springer I. The Panel citing *U.S. v. Sandoval*, 29 F. 3d 537, 542 n.6 (10<sup>th</sup> Cir. 1994) may allow for the Panel to “affirm on any grounds for which there is a sufficient record to permit conclusions of law” but that is premised upon making that affirmation upon the correct “law.”

“No legislative language can deprive a man of a fair hearing in the adjudication of his rights, or of his right to have a court decide whether the administrative agency acted within its jurisdiction; and, whether the agency through a lay tribunal applied the correct rule of law to the facts.” *Garvey v. Freeman*, 397 F.2d 600, 605 (10th Cir. 1968); quoting *Stark v. Wickard*, 321

U.S. 309, 310.

To this the Panel says Appellant had his hearing in Tax Court, “lost,” and so long as the “CDP hearing comported with applicable law” the IRS is authorized “to impose the levy.” Panel decision at 9. Congress decided Appellant had a right to a hearing, to an unbiased officer, to verification that “any applicable laws and administrative procedures have been met” and this was because Congress directed only the tax actually owed was to be collected.

Because the Panel incorrectly construed section 7421(a)’s exception under section 6330(e) to only apply if the IRS actually levies property during the “suspension” under section 6330, and because the verification under section 6330 was ushered in at the same time section 7491 burden of proof was shifted to the Secretary, in 1998, the Panel decision that Appellant was barred by the AIA to bring Springer I, notwithstanding section 6330(e) listed by Congress as an exception to the AIA, was an inconceivable and erroneous conclusion of law and should result in reversal by the Panel. To say that the injunction allowed by section 6330(e) only applies if the IRS levies property during the “suspension” period renders section 6330 meaningless.

To hold the outcome of the kitchen sink decision the District Court issued was so clear Appellant should not have appealed that decision defies logic, a plain reading of the law, and the equity principals Congress intended to address in the passage of the Restructuring and Reform Act of 1998. The very Paperwork Reduction Act the Panel in Springer III said could only be raised as a defense, was precisely what Appellant did in Springer I and the Panel ignored it’s Springer III holding when that holding should have been applicable to Springer I.

The Panel decision to “res judicata” and “bar” “Springer challenges the fact of his liability for income taxes, interest and penalties for 1990 through 1995” again completely ignores

the Supreme Court's decision in *Commissioner v. McCoy*, 484 U.S. 3, 6-7 (1987) which held that the only jurisdiction the Tax Court had during the Notice of Deficiency stage was to decide the deficiency. It could not decide additional issues of interest and penalties.

**D. The Panel decision conflicts with *Taylor v. Allan*, 204 F.2d 485, 486 fn. 4 (10th Cir. 1953)**

The Panel points to *Taylor v. Allan*, 204 F.2d 485, 486 fn. 4 (10th Cir. 1953) for the conclusion Appellant had two options either to pay the erroneous statistical tax and bogus 1099 and sue for refund or petition the tax court and seek “redetermination under section 6213(a).

Panel decision at 14

The Panel spent much time emphasizing that the decision by the Tax Court is “incontestible.” Id. In *Taylor*, this 10<sup>th</sup> Circuit said:

“The Congress has provided ample machinery for the settlement of income tax controversies. **If dissatisfied with the assessment made by the Commissioner, the taxpayer may, without paying the tax, petition the Tax Court for a redetermination...**”

However, the Supreme Court in *McCoy* said that:

“Interest on a tax deficiency is separately mandated by 26 U.S.C. § 6601(a). A penalty that accrues under § 6651(a)(3) is also separate and outside the scope of the petition to the Tax Court. **The deficiency asserted here was not assessed, and could not have been assessed, until after the Tax Court had rendered its decision.** See § 6213(a). The Tax Court is a court of limited jurisdiction and lacks general equitable powers. *Commissioner v. Gooch Milling & Elevator Co.*, [320 U.S. 418 (1943)]

If the 10<sup>th</sup> Circuit believes that the assessment is what Appellant took to Tax Court and the Supreme Court said that the assessment could not be rendered until after the Tax Court rendered its decision, then how does the Panel square its decision to conclude that penalties and

interest, which is separate from the Tax Court jurisdiction under *McCoy*, over the original Petition to Tax Court, are “incontestable?”

In *Flora v. U.S.*, 362 U.S. 145 (1960)(round 2) the Supreme Court explained what the function of the Tax Court was to accomplish:

“The House Committee Report, for example, explained the purpose of the bill as follows:

The committee recommends the establishment of a Board of Tax Appeals to which a taxpayer may appeal prior to the payment of an additional assessment of income, excess-profits, war-profits, or estate taxes. Although a taxpayer may, after payment of [159] his tax, bring suit for the recovery thereof and thus secure a judicial determination on the questions involved, he can not, in view of section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax.

Id. 158-159

The Panel points to section 6665(a)(2) for the proposition that “Because penalties and interest arising from the failure to pay taxes are assessed as taxes, see 26 U.S.C. § 6665(a)(2), the AIA bars action to seek to enjoin their assessment.” Panel decision at 8 Section 6665 is entitled “Applicable Rules” to which the PRA “does not prevent the promulgation of a rule, only its enforcement.” *Dithiocarbamate Task Force v. EPA*, 98 F.3d 1394, 1405 (D.C. Cir. 1996). See also, *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998)

Though the Panel used the term “bar” to prohibit Springer I and II, it relies upon two cases that concluded penalties were subject to the AIA. Both cases are from 1985 in the 8<sup>th</sup> Circuit and 1983 in the 10<sup>th</sup> Circuit. Both cases were not addressing any issues Appellant raised in Springer I or II. In 1990, while interpreting the Paperwork Reduction Act of 1980, the Supreme Court said in *Dole v. United Steelworkers*, 494 U.S. 26 (1990) “[W]hile the grammar of

this text can be faulted, its meaning is clear: **the public is protected under the Paperwork Reduction Act** from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information for an agency **or provide information to an agency.**” at 40.

To this, the Panel says the public is not protected in opposition to the Supreme Court decision in *Dole*. In *CIR v. McCoy*, 484 U.S. 3 (1987) the Supreme Court continued by saying the “estate, of course, was not without an opportunity to litigate the validity of the interest and the late-payment penalty. **The proper procedure was for respondent to pay the interest and penalty and sue for their refund in an appropriate federal district court or in the Claims Court.** at 7.

If Appellant has right to pay the interest and penalty and then sue for a refund, then how is the taxes, penalties, and interest, “res judicata?” How is it incontestable? Since 1998, Congress shifted the burden during any “collection” of any “taxes, interest and penalties” to the Secretary under section 7491. This is the entire purpose of section 6330 and why it is entitled Collection Due Process Hearing. To section 7491, the Panel’s decision is silent. To the issue of whether this section falls under 6330(c)(1) the Panel decision is silent. Section 7491 says in “any court proceeding” for all three subsections. To this the Panel decision is silent. 44 U.S.C. § 3512 says “at any time” as the Panel recognizes. Panel decision at 13

**E. The Panel decision conflicts with the D.C. Circuit in *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998)**

The Panel concluded that *Center for Safety v. National Hwy Traf.* 244 F.3d 144, 150 (D.C. Cir. 2001), citing to *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998)

held that section “3512 may only be invoked as a defense ‘at any time during the ongoing proceedings.’ Panel decision at 13 This the Panel said in relation to Springer III only. That is not what the D.C. Circuit said. It actually said:

The Paperwork Reduction Act directly addresses when a claim can be raised. Although it does not expressly refer to claims arising after submission of the information, the statute provides that “[t]he protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto.” 44 U.S.C. § 3512(b) (Supp. IV 1998). In *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 31 (D.C. Cir. 1998), we explained that, by explicitly allowing parties to raise a Paperwork Reduction Act claim at any time during ongoing proceedings, the Paperwork Reduction Act “prevents an agency or court from refusing to consider a [Paperwork Reduction Act] argument on the ground that it is untimely.”

The D.C. Circuit said the PRA allows a “claim to be raised” at any time during on going proceedings and finished by saying “the Paperwork Reduction Act ‘prevents an agency or court from refusing to consider a [Paperwork Reduction Act] argument on the ground it is untimely.’”

Yet, this is precisely what the IRS did administratively in Springer I to which Springer I sought to address, it was refusing to consider Appellant’s PRA claims. The District Court refused to consider those PRA claims in Springer I. And this Panel, sitting “de novo review,” likewise refused to consider either the PRA claims or the meaning of the term “bar.”

How can someone raise a Paperwork Reduction Act claim under section 3512 too late?

It is true in *Saco River’s* holding it only “involved a Paperwork Reduction Act defense that was raised when the party had not submitted the information. However, the expansive language of the Paperwork Reduction Act itself, along with this court's explication in *Saco River*, militates against the Center's position and supports our finding that a Paperwork Reduction Act claim can be raised after information has been submitted. *Id.* at 150

No where in either *Center for Safety v. National Hwy Traf.* 244 F.3d 144, 150 (D.C. Cir. 2001), or *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998) did the D.C. Circuit say that the Public Protection Provision can only be raised as a “defense.” The Panel’s construction of *Center for Safety v. National Hwy Traf.* 244 F.3d 144, 150 (D.C. Cir. 2001), and *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998) is clearly an erroneous interpretation of those decisions. The Panel’s decision not to consider “e novo” the affect of its “preclusive” determination and its apparent intent to say in a footnote that “res-judicata” “bar those actions to the extent Springer challenges the fact of his liability for income taxes, interest and penalties” is problematic for the Panel. Panel decision at 11, fn. 5

The Panel directs *MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 831 (19<sup>th</sup> Cir. 2005) for its noted application of “res judicata” in Springer I and II. The test under this “doctrine” is:

The doctrine of res judicata, or claim preclusion, will prevent a party from relitigating a **legal claim that was or could have been the subject of a previously issued final judgment.** *Id.* at 1467. Under Tenth Circuit law, claim preclusion applies when three elements exist: (1) a final judgment on the merits in an earlier action; (2) identity of the parties in the two suits; and (3) identity of the cause of action in both suits. *Wilkes v. Wyo. Dep't of Employment Div. of Labor Standards*, 314 F.3d 501, 504 (10th Cir. 2003). If these requirements are met, res judicata is appropriate unless the party seeking to avoid preclusion did not have a "full and fair opportunity" to litigate the claim in the prior suit. *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 n. 4 (10th Cir. 1999).[fn6]

First, to the extent the Panel says that the subject of interest and penalty were the “subject” of a previous final judgment ignores the decision by the Supreme Court in *Commissioner v. McCoy*, 484 U.S. 3,6-7 (1987) which held that interest and penalties could not have been the subject of a Petition to Tax Court. (Interest on a tax deficiency is separately mandated....A penalty ..... is also separate and outside the scope of the petition to the Tax Court.

**The deficiency asserted here was not assessed, and could not have been assessed, until after the Tax Court had rendered its decision.** See § 6213(a). The Tax Court is a court of limited jurisdiction and lacks general equitable powers. *Commissioner v. Gooch Milling & Elevator Co.*)

The Panel decision also ignores the Restructuring and Reform Act of 1998 which says that the IRS must verify any applicable law and administrative procedures have been met as well as under section 7491, “in any court proceeding” the “burden of proof” shifts to the Secretary (1) where a “taxpayer introduces credible evidence”; (2) when “any item of income was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers”; and (3) with respect “to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.”

The underlying purpose of section 6330 was that only the amount of tax legally owed was to be the subject of any levy by the IRS. Section 6330(c)(2) holds that “In general, The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including...” By listing these “in general” by no means places a limit upon what can be “raised.” Section 6330(c)(2)(B) likewise says challenges to the underlying tax liability can be made if the person “did not otherwise have an opportunity to dispute such tax liability.” To these words the Panel is silent.

Congress passed section 7491 while Appellant was on appeal to the Supreme Court over usage of the Bureau of Labor Statistics. Since July of 1998, until March, 2005, Appellant heard nothing from the IRS over the claims they currently make. Appellant has never been allowed to challenge the claims made by the IRS under section 7491 and the burden of proof remains with the Secretary. To each of these issues the Panel decision remains silent.

#### **F. Panel decision in Springer III conflicts with Springer I and II.**

There can be no doubt Appellant has right to raise the Paperwork Reduction Act protection “at any time” and for the Panel to conclude otherwise is simply erroneous and conflicts with itself. Likewise, section 7491 also applies in “any court proceeding” and the application of issue preclusion by the Panel is clearly erroneous.

The Panel’s decision not to consider “de novo” the affect of its “preclusive” determination and its apparent intent to say in a footnote that “res-judicata” “bar those actions to the extent Springer challenges the fact of his liability for income taxes, interest and penalties” is also clearly erroneous. Panel decision at 11, fn. 5

In *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998) it was argued that “applying the PRA amendments to th[at] case contravenes the principle that retroactivity is not favored in the law.” Id. The Panel in *Saco River* noted, however, “in determining whether a statute has retroactive effect it is necessary ‘to examine the temporal relationship between the statute and the activity the statute is meant to govern.’” Id. citing to *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, 104 F.3d 1349, 1352 (D.C. Cir. 1997).

In *Saco River* that Panel held “Section 3512(b) requires that, from October 1, 1995 onward, agencies and courts entertain arguments that would otherwise have been barred either by a statute of limitations or by the proponent's failure to have made the argument at an earlier stage in the administrative or judicial process.” Id. In *Saco River*, “the Commission had dismissed PortCell's PRA defense as untimely without ruling upon the merits of it; the PRA amendments merely required the Commission, when the issue was raised anew, to make that ruling. Because Section(s) 3512(b) governs only the conduct of litigation after the effective date of the statute

and does nothing to reopen matters litigated before that date, it does not offend any norm against retroactive lawmaking.” Id.

Nor was the statute at issue in *Saco River* retroactive “merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law.” Id. citing to *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994).

“By permitting parties to raise the PRA issue ‘at any time’ in ongoing proceedings, the statute does not ‘impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.’” *Landgraf*. at 280. “Rather, it simply prevents an agency or court from refusing to consider a PRA argument on the ground that it is untimely.” *Saco River*, supra

Both section 7491, as to the bogus 1099 under subsection (a), and the statistical information under subsection (b), as well as the penalties sought by the Commissioner under subsection (c) are not preclusive from being considered during on going administrative process. There has never been any ruling on the merits of applying section 7491 to Appellant’s case for 1990 through 1995, or the bogus 1099, or the penalties sought under section 7491(c) which includes penalties and interest. The decision by the Tax Court dismissed Appellant’s case for failure to state a claim for which relief could be granted. Appellant has never had an opportunity to challenge the IRS claims based upon the violations of the Paperwork Reduction Act. Congress required the Commissioner to inform the public on the Form 1040. The 1995 Form did not comply whatsoever nor do any other forms. The IRS’s contempt for the Paperwork Reduction Act is obvious. A Stay of the preclusive and all other constructed affects of Springer I is warranted for the reasons herein.

### **Sanctions in Springer I**

The Panel imposed a \$ 4,000 Sanction to be negotiated in terms between the Government and Appellant within 30 days of the Court's May 1, 2007 decision. Appellant has a right to appeal the Panel decision to both the Panel, as will be done timely, to the entire Court sitting En Banc, if necessary, which would be done if the Panel decides not to correct the erroneous errors in its decision, and to the Supreme Court based upon the Panel's refusal to address the law, and its conflict with itself, the 10<sup>th</sup> Circuit, the D.C. Circuit and Supreme Court of the United States. Appellant has sent the Order of this Panel to many attorneys all of which agree with Appellant that this Court's decision in Springer I was both wrong on the facts, wrong on the law, and wrong on its issue preclusive application to taxes, penalties and interest avoidance.

### **Filing Restrictions**

The Panel decision directed Appellant in all three cases to file within 10 days any objections to the Panel's lengthy proposed filing restrictions which included in passing the statement that the "fact of Springer's liability for federal income taxes, penalties, and interest for 1990 through 1995 and the government's right to collect that liability, matters that are not subject to further litigation" in describing a "preclusive" effect of the Tax Court's determination in *Springer v. Comm'r*, No. 26045-96 (T.C. Feb. 10 1997)(unpublished).

In conclusion, the Panel directed in its May 1, 2007 Order that Appellant "within 30 days of the date of this order and judgment is filed, Springer shall make arrangements with Appellees counsel for payment of the sanctions. It is further ordered that Springer shall pay the sanctions in accordance with those arrangements."

Since it is clear the issues of interest and penalty and use of statistical information and

bogus 1099 were not raised in the prior Tax Court case that this Court did not consider because of a prior sanction against Appellant are subject to further litigation under the Supreme Court's decision in *Commissioner v. McCoy*, 484 U.S. 3,6-7 (1987), *Dole v. United Steelworkers*, 494 U.S. 26, 33-40 (1990) , *Flora v. U.S.*, 362 U.S. 145 (1960) the 10<sup>th</sup> Circuit's decision *Wyoming Trucking Ass'n Inc. v. Bentsen*, 82 F.3d 930, 935 (10th Cir. 1996), citing to *Enochs v. Williams Packing Test*, 370 U.S. 1, 7, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1961), and the Paperwork Reduction Act of 1980 and 1995, the D.C. Circuit in *Saco River Cellular, Inc., v. FCC.*, 133 F.3d 25,31 (D.C. Cir. 1998), as well as the 10<sup>th</sup> Circuit in *Taylor v. Allan*, 204 F.2d 485, 486 fn. 4 (10th Cir. 1953), and because this Panel decision is contrary to 26 U.S.C.§§§§§§ 6330(a), (d)(1) and (e), 7491(a), (b), and (c), and under 44 U.S.C. § 3512, an Order staying the Order of May 1, 2007, pending the outcome of a Petition for Rehearing and if required, Rehearing En Banc, is justified regarding Springer II.

#### CONCLUSION

Appellant respectfully request the Panel issue an Order staying the decision entered May 1, 2007, pending both Panel Rehearing and if needed, for Rehearing En Banc in Springer I.

Respectfully Requested

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Lindsey K. Springer  
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Tulsa, Oklahoma 74135  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 17, 2007, I sent a copy of Appellant's Motion for Stay of Mandate or its Equivalent in Springer I by first class mail to:

U.S. Department of Justice  
Laurie Snyder  
Appellate Section-Tax Division  
P.O. Box 502  
Washington D.C. 20044

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature