

A05-1615 and A05-1631

STATE OF MINNESOTA

IN SUPREME COURT

In the Matter of the Welfare of the Child of G.W. and T.T.B., Parents

**BRIEF OF AMICI CURIAE BOIS FORTE BAND OF CHIPPEWA,
GRAND PORTAGE BAND OF CHIPPEWA, WHITE EARTH BAND OF CHIPPEWA,
UPPER SIOUX INDIAN COMMUNITY AND
PRAIRIE ISLAND INDIAN COMMUNITY**

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INTRODUCTION AND SUMMARY OF INTERESTS

The Court is asked to consider whether state permanency guidelines may be used to limit the jurisdictional preference for Indian tribal courts embodied in the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, et seq. (2006) (“the ICWA”). The District Court in this case denied a motion made by the Yankton Sioux Tribe to transfer the case to the Yankton Tribal Court based on the Court’s *sua sponte* determination that good cause existed to deny the transfer. The District Court ruled that the Tribal Court was an inconvenient forum and that the proceedings were at an “advanced stage”. The Court of Appeals reversed the decision and ordered the case remanded for an immediate transfer to the Tribal Court. The County and Guardian *ad Litem* sought review by this Court, which was granted. On review, the Appellants appear to have abandoned any argument based on inconvenient forum. Instead, they now ask this Court to determine that good cause existed not to transfer the case because the proceedings were at an advanced stage. In support of this argument, the Appellants urge this Court to rule that a proceeding is at an advanced stage, justifying a refusal to transfer, once the state 12-month permanency timeline is reached.

The Amici Indian Tribes assert their interest in this matter as the *parens patriae* of all of their minor member children.¹ Each Amicus Tribe has a social services department and tribal court charged with executing each Tribe’s sovereign responsibility for assuring

¹ As required by Minn. R. App. P. 129.03, the undersigned affirms that this brief is not authored in whole or in part by counsel for any party to this case, and no person or entity other than the *amici curiae* hereby represented has made any monetary contribution to the preparation or submission of this brief.

that its member children, wherever domiciled, are well cared for and connected in some meaningful way to their Tribe. The Amici Tribes are critically interested in the outcome of this case because their ability to protect member children in their own Tribal Courts depends on Minnesota State Courts' uniform and correct application of the ICWA, specifically in this case the jurisdictional provisions of Section 1911 of the Act. The Amici Tribes strongly support the conclusion of the Court of Appeals that the case should be remanded for transfer to the Tribal Court of the Yankton Sioux Tribe and that good cause does not exist to deny the children's parents' and the Tribe's unopposed request for transfer under Section 1911(b) of the ICWA.

The Amici Tribes also wish to clarify that the correct legal standard to be applied to the District Court's determination of whether good cause exists to deny a motion to transfer jurisdiction to a tribal court is the "clear and convincing evidence" standard rather than mere "abuse of discretion" applied by the Court of Appeals. Despite its use of a less rigorous standard, however, the Court of Appeals correctly concluded that good cause did not exist to deny transfer to the Tribal Court.

This Brief of the Amici Tribes addresses the following issues:

- I. The correct legal standard to be applied to the District Court's denial under 25 U.S.C. §1911(b) of a request for transfer of proceedings to tribal court is not whether the District Court abused its discretion in finding good cause to deny transfer, but whether clear and convincing evidence was presented to justify the denial.

- II. The Court of Appeals correctly concluded that good cause to deny transfer did not exist because:
- A. The Yankton Tribal Court is not an inconvenient forum and proceedings were not at an advanced stage, because the parents and tribe timely filed the motion for transfer prior to adjudication.
 - B. The Federal Adoption and Safe Families Act (ASFA) does not operate to restrict the ICWA's preference for tribal court jurisdiction, because such a result would defeat Congressional intent and trigger Federal preemption of inconsistent State law.

STATEMENT OF FACTS

The Amici Tribes defer to and adopt the statements of facts contained in the Briefs of Appellee-parents and the Yankton Sioux Tribe, but set forth the following procedural timeline in support of the arguments and analysis contained herein:

November 21, 2003	First Petition for custody filed by County.
December 23, 2003	Petition for Permanency filed by County.
January 15, 2004	Amended ICWA Notice to Yankton Sioux Tribe based on father's enrollment.
April 23, 2004	Tribe's unopposed motion to intervene.
July 16, 2004	County's Amended Petition to terminate parental rights of Yankton Sioux father.
July 22, 2004	Parents and Tribe file motion to transfer jurisdiction to Tribal Court of Yankton Sioux Tribe.

LEGAL BACKGROUND

The ICWA was enacted by Congress as an express limitation on state courts' jurisdiction over Indian children, in recognition of "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people." 25 U.S.C. § 1901. The ICWA's Congressional findings state "that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(2). The findings go on to state --

that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.

25 U.S.C. § 1901(4). The findings further state that "the States ... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5).

Congress adopted express provisions establishing mandatory and presumptive deference to tribal court jurisdiction, codified in 25 U.S.C. § 1911. Section 1911(a) provides that Indian tribes possess exclusive jurisdiction when an Indian child is a ward of the tribal court, or when an Indian child is a resident or domiciled on the reservation, except when jurisdiction is otherwise vested in the State by existing Federal law. Section 1911(b) establishes a preference for tribal court jurisdiction in cases where an Indian child is not a resident of, or domiciled on, the child's reservation:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, *shall* transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

25 U.S.C. § 1911(b) (emphasis added). Section 1911(c) recognizes an Indian tribe's right to intervene at any stage in applicable proceedings, and Section 1911(d) requires that full faith and credit be accorded the acts, records, and judicial proceedings of Indian tribes in such proceedings. The entirety of Section 1911 displays Congress's clear preference for and deference to Indian tribal courts in Indian child custody proceedings.

In 1979, the Department of Interior promulgated guidelines for state courts in implementing the ICWA. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Dep't Interior 1979). While these guidelines do not have the force and effect of a federal regulation, they have been consulted by the appellate courts of this State when analyzing issues arising under the ICWA. *See Matter of Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994); *In re Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. App. 2000), review denied (Minn. Nov. 15, 2000). The guidelines provide that, among other reasons, "good cause" may exist when the proceeding was at an advanced stage *and* the petitioner did not file the petition [to transfer] promptly after

receiving notice of the hearing.” Guidelines for State Courts C.3(b)(i), 44 Fed. Reg. 67,591. (emphasis added).²

The United States Supreme Court has decided only one case involving the interpretation of the ICWA, Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). In *Holyfield*, the Court cited the ICWA’s Congressional findings to hold that an Indian child’s “domicile” must be interpreted according to a uniform federal standard in order to meet Congress’ objectives in protecting the separate, distinct interests of Indian tribes, families, and children. The Court invalidated the adoption of twin babies who were eligible for enrollment in the Mississippi Band of Choctaw Indians because the Tribal Court had exclusive jurisdiction because the children were domiciled on the reservation. The twin children in *Holyfield* had never lived on the Choctaw reservation and, in fact, their mother had gone to considerable trouble to avoid tribal jurisdiction – taking the children 200 miles away from the reservation to surrender them for adoption to a non-Indian couple. Nevertheless, the Court held that the children’s Indian tribe had a distinct interest to assert under the ICWA in preserving ties to its members. The Court

² In the State of Minnesota, the eleven federally recognized tribes and the Minnesota Department of Human Services have entered into an agreement (“The Tribal/State Agreement”), which *inter alia* gives “good cause” the same meaning given in the BIA’s Guidelines for State Courts. The Tribal/State Agreement further provides: “The DHS and the Tribes agree that these BIA Guidelines, as interpreted by the courts, require that, whenever an LSSA [Local Social Service Agency] or any other party opposes a transfer of jurisdiction, such party has the burden of establishing good cause not to transfer and must provide a written explanation of its opposition to the tribe(s) and to the parties who support the transfer.” The Tribal/State Agreement is posted online at the Minnesota Department of Human Services web site: http://www.dhs.state.mn.us/main/groups/children/documents/pub/dhs_id_004205.hcsp (viewed June 24, 2006).

invalidated the childrens' adoption on the grounds that the State lacked jurisdiction because a mother's domicile determines her children's domicile, under Federal law, and -- inasmuch as the mother was domiciled on the Choctaw reservation -- the ICWA's provision for exclusive tribal jurisdiction was applicable. Hence, even the biological mother's extraordinary efforts to place the children in a non-Indian home off-reservation did not override the Mississippi Band of Choctaw Indians' independent right under the ICWA to assert its exclusive jurisdiction over the adoption of the children. Holyfield, 490 U.S. at 53. Thus, the Supreme Court has expressly recognized and affirmed Congress's deference to the jurisdiction of Indian tribal courts as codified in 25 U.S.C. § 1911.

ANALYSIS

- I. **The correct legal standard to be applied to a trial court's denial, under 25 U.S.C. § 1911(b), of a request for transfer of jurisdiction to tribal court is not whether the trial court abused its discretion in finding good cause to deny transfer, but whether clear and convincing evidence was presented to justify the denial.**

Although agreeing with the outcome of the Court of Appeals' decision in this case, the Amici Tribes wish to stress that in Indian child custody proceedings in Minnesota the evidentiary standard for appellate review of a trial court's denial of a motion to transfer jurisdiction to a tribal court should be "clear and convincing evidence". The Amici Tribes submit that this Court should join the courts of a number of other States in holding that Section 1911's presumption in favor of tribal court jurisdiction precludes a trial court's discretionary determination of good cause to the contrary. See Interest of T.I. and T.I., 707 N.W.2d 826, 834 (S.D. 2005) (reversing a South Dakota State Court's application of

an “abuse of discretion” standard in favor of the “clear and convincing evidence” standard). *See also In Re A.P.*, 961 P.2d 706, 713 (Kan. 1998); *In Re Dependency of E.S.*, 964 P.2d 404 (Wash. App. 1998); *In Re Adoption of S.W.*, 41 P.3d 1003, 1013 (Okla. Civ. App. 2001); *In Re M.E.M.*, 635 P.2d 1313, 1317 (Mont. 1981). *See generally, Guidelines for State Courts*, 44 Fed. Reg. 67,584 C.3 (1979) (“The burden of establishing good cause to the contrary shall be on the party opposing the transfer.”). Section 1911(b) gives a “veto power” over requests for transfer to the same parties who have standing to request transfer, that is an Indian child’s parents or Indian custodian, and the Indian child’s tribe. The jurisdictional provisions of the ICWA are central to the protections that Congress intended to provide Indian children, their parents and their tribes, and they are one of the most important limitations that Congress imposed on state courts. As the United States Supreme Court explained in *Holyfield*:

At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a) establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child “who resides or is domiciled within the reservation of such tribe,” as well as for wards of tribal courts regardless of domicile. Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation....

Holyfield, 490 U.S. at 36. The abuse of discretion standard is, therefore, contrary to Congressional intent and the ICWA’s statutory presumption in favor of tribal court jurisdiction. Nowhere in the ICWA does Congress recognize an independent interest of state courts in exercising continued jurisdiction, and that is not surprising since the ICWA was intended as a limitation on state jurisdiction, not an expansion of it. If no party

opposes a request for transfer and neither party presents evidence of good cause to deny it, then the Court *shall* transfer proceedings to tribal court. Creating a discretionary standard in this context would conflict with the mandatory language of the statute and should be rejected.

II. The Court of Appeals correctly concluded that good cause to deny transfer did not exist because:

A. The Yankton Tribal Court is not an inconvenient forum, and proceedings were not at an advanced stage because the parents and tribe timely filed the motion for transfer prior to adjudication.

The Court of Appeals correctly held that good cause to deny transfer of jurisdiction to the Yankton Sioux Tribal Court could not be found on the basis of a *forum non conveniens* rationale merely because the Tribal Court is four hundred miles away from Hennepin County.³ “Inconvenience” may be asserted by a *party* who is prejudiced by the distant location of the Tribal Court, but the State Court itself has no such interest to assert. In this case, both parents requested the transfer to Tribal Court and no party objected to it. The Court of Appeals, therefore, correctly stated: “Without evidence of undue hardship, distance alone cannot defeat a transfer of jurisdiction to tribal court.” T.T.B., 710 N.W.2d 799, 806 (Minn. Ct. App. 2006).

The Court of Appeals also correctly held that the proceedings were not at such an advanced stage as to deny the transfer of jurisdiction to the Tribal Court. The motion to

³ These arguments are asserted in the alternative to the principal objection to the District Court’s decision, which is that the Court had no legal basis to find “good cause” where none of the parties with the statutory authority asserted the objection.

transfer was timely filed after notice of the hearing. The BIA's Guidelines and the Tribal/State Agreement describe circumstances in which the advanced stage of proceedings may operate to overcome the ICWA's preference for tribal court jurisdiction: "Good cause not to transfer proceedings exists if ... the proceeding was at an advanced stage *and* the petitioner did not file the petition promptly after receiving notice of the hearing." Guidelines for State Courts C.3(b)(i) (emphasis added). As the Court of Appeals explained, the filing in this case occurred only six days after the filing of the County's amended petition to terminate parental rights, well within the deadline for filing pretrial motions and before the permanency trial. T.T.B., 710 N.W.2d at 806.⁴ No other basis for denying the transfer of proceedings to the Tribal Court was invoked by the District Court. Upholding the District Court's determination that the proceedings were at an "advanced stage" only eight months after the foster care placement, six days after the County's amended petition requesting termination of the father's parental rights, and prior to the adjudicatory hearing, clearly would defeat Congressional intent by contributing to inconsistent rather than uniform application of the ICWA's mandatory deference to tribal

⁴ The South Dakota Supreme Court has ruled that in determining whether a motion to transfer a termination of parental rights proceeding is timely, the Court must look to how long the termination petition has been pending, not the duration of the foster care placement proceeding. The Court explained that the ICWA clearly states that foster care placement proceedings and termination proceedings are each subject to transfer and, if the time line runs always from the foster care placement, the point in which the termination or parental rights petition is filed would always be and "advanced state of the proceedings." In the Interest of A.B., 663 N.W.2d 625 (S.D. 2003), cert denied 124 S.Ct. 1875 (2004). In fact, many courts routinely allow **post-adjudication** transfers to tribal court, because tribal courts are better equipped for post-adjudication disposition and are less able, financially, to accommodate lengthy trials. B.J. Jones, THE INDIAN CHILD WELFARE HANDBOOK 42 (ABA Section of Family Law 1995).

court jurisdiction in 25 U.S.C. § 1911(b). Therefore, the Court of Appeals was correct to hold that good cause did not exist to deny transfer.

B. The Federal Adoption and Safe Families Act (ASFA) does not operate to restrict the ICWA's preference for tribal court jurisdiction, which would defeat Congressional intent and trigger Federal preemption of inconsistent State law.

The Appellants also argue that State permanency guidelines adopted pursuant to the federal Adoption and Safe Families Act, Public Law 105-89 (ASFA) should be applied to the ICWA's jurisdictional transfer provisions to determine whether a case is at an "advanced stage". But the Amici Tribes submit that the application of State law to limit the rights of Tribes guaranteed by the ICWA would be inconsistent with precedent interpreting the ICWA, and with federal preemption principles where tribal rights are concerned, and should be rejected by this Court.

The ASFA was passed in 1997 to address Congressional concerns that a prior Federal law, the Adoption Assistance and Child Welfare Act of 1980, encouraged states to adopt foster care and adoption laws that elevated parental rights at the expense of children. 42 U.S.C. § 670 (2006); People ex rel J.B., 670 N.W.2d 67 (S.D. 2003). ASFA, like the predecessor statute, authorizes federal appropriations for funding State child welfare programs if certain program requirements are met. 42 U.S.C. § 471 (2006). In order for a State to be eligible for payments under ASFA, it must have a plan approved by the Secretary of the United States Department of Health and Human Services that, *inter alia*, provides exceptions -- "aggravating circumstances" as defined by State law -- to the State's duty to provide "reasonable efforts" toward reunification of children with their

parents. The purpose for the exception is to expedite permanent placement for children who might otherwise be subjected to chronic instability “in the system” and suffer emotionally as a result. *See People ex rel J.S.B.*, 691 N.W.2d 611, 617 (S.D. 2005); *J.B.*, 670 N.W.2d at 70. The ASFA provides that, in order to be approved, a State plan must include a provision that if, after a hearing, aggravating circumstances are found to exist, a permanency hearing must be held within 30 days.

The United States Department of Health and Human Services promulgated federal regulations implementing ASFA on January 25, 2000. In those regulations, the agency responded to a comment suggesting that there might exist a conflict between the ICWA and the ASFA, relative to efforts that are required to avoid the separation of a family. The agency responded that --

Some commenters also requested that we explain how the provisions of the Indian Child Welfare Act work in the context of the ASFA. Although we can affirm that States must comply with ICWA and that nothing in these regulations supersedes ICWA requirements, we cannot expound on ICWA requirements since they fall outside of our statutory authority.

65 Fed. Register 4020, 4029 (January 25, 2000)(emphasis supplied).⁵

The South Dakota Supreme Court recently addressed, for the second time, the argument that ASFA conflicts with ICWA. In *People ex rel J.S.B.*, 691 N.W.2d 611, 617 (S.D. 2005), the Court held that, contrary to the arguments of the State’s Department of Human Services (DHS), ASFA did not relieve the State of its independent duty under the

⁵ This agency interpretation of the ASFA is entitled to substantial deference by this Court. *See Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The United States Department of Health and Human Services has not even *suggested* that if a State plan under the AFSA defers to the ICWA that the State will be considered out of AFSA compliance.

ICWA to provide “active efforts” (as opposed to “reasonable efforts” under ASFA) toward reunification of the child and parent. The decision had its foundation in three distinct rules of statutory construction. First, the ICWA contains no exception to its “active efforts” requirement that would justify its implicit modification by Congress via the ASFA, which lacks any language repealing or modifying the ICWA. Second, when two statutes appear to conflict, the more specific statute controls in applicable proceedings and, so, because ICWA is a law that applies to a specific population of Native peoples, compared with ASFA’s application to the general population, the ICWA controls. Third, when interpreting a statute pertaining to Indians, the United States Supreme Court has stated, “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit...” Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). Therefore, the South Dakota Supreme Court concluded that ASFA did not override or diminish the requirements of the ICWA in Indian child custody proceedings. People ex rel J.S.B., 691 N.W.2d 611 (S.D. 2005). The Amici Tribes believe that the South Dakota Supreme Court’s analysis is sound and should be applied in this proceeding. As in *J.S.B.*, the Appellants here would have this Court limit the ICWA’s jurisdictional provision based on State law adopted pursuant to the ASFA. As the South Dakota Supreme Court did in *J.S.B.*, the Amici Tribe’s urge this Court to reject this limitation and determine that tribal rights to seek the transfers of jurisdiction to tribal courts should not be limited by the ASFA and state law adopted pursuant thereto.

Furthermore, the Amici Tribes submit that Appellant's argument should be rejected because the ICWA preempts inconsistent state laws with respect to Indian child custody proceedings. In Adoption of Halloway, 732 P.2d 962 (Utah 1986), a case quoted extensively by the United States Supreme Court in its *Holyfield* decision, the Utah Supreme Court refused to interpret the state's child-abandonment law to the detriment of the ICWA, explaining (as cited by the U.S. Supreme Court):

To the extent that [state] abandonment law operates to permit [the child's] mother to change [the child's] domicile as part of a scheme to facilitate his adoption by non-Indians while she remains a domiciliary of the reservation, it conflicts with and undermines the operative scheme established by subsections [1911(a)] and [1913(a)] to deal with children of domiciliaries of the reservation and weakens considerably the tribe's ability to assert its interest in its children. The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children.

Holyfield, 490 U.S. at 53 (quoting Halloway, 732 P.2d at 969).

As the court in *Halloway* acknowledged, a "broad test of preemption is to be applied" to cases involving Indian affairs:

State law cannot be permitted to operate as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress....If it does, state law is preempted....And even if Congress did not intend to preempt state domicile law, state law must bow when the application of that law brings the state and federal policies into conflict.

732 P.2d at 967 (citations omitted). In Indian law cases, the United States Supreme Court has established the construct that “State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.” White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); *See also generally* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). The United States Supreme Court in *Holyfield* cemented the preemption analysis in the context of interpreting the ICWA, which requires that this Court reject the Appellant’s argument that the jurisdictional structure set forth in 25 U.S.C. § 1911 should be limited by inconsistent state law.

Here, it is precisely the intention of the Appellants that State permanency guidelines should be applied to limit Tribal rights guaranteed by the ICWA. County’s Brief at p. 12; Guardian ad Litem’s Brief at p. 7. This Court has been asked to adopt the State’s permanency guidelines as a statute of limitations for motions to transfer jurisdiction under the ICWA. The Appellants urge this Court to limit controlling federal law with Minnesota State law. Such a result would significantly limit both the Tribal rights guaranteed by the ICWA generally and the jurisdictional provisions of 25 U.S.C § 1911 specifically. In addition, such a result would diminish tribes’ statutory right to intervene as a party at any stage of the proceedings (25 U.S.C. 1911(c)), since some of

the tribes' rights as a party could already have been foreclosed. Finally, such a result would defeat uniform application of the ICWA by subjecting rights thereunder to the various states' permanency laws. That is a potential result that the United States Supreme Court expressly addressed and rejected in Holyfield. *See* 490 U.S. at 43. Because the application of the State's permanency guidelines would diminish Tribal rights guaranteed by the ICWA, those guidelines are preempted as a matter of federal law, and the Appellant's argument relying on those guidelines should be rejected.

Amicus curiae National Association of Counsel for Children ("the NAAC") proffers the argument that the statutes enacted in Minnesota to qualify for funding under ASFA must be superior to the ICWA, suggesting that the 12-month permanency timeline under Minnesota law overrides or diminishes the ICWA's preference for tribal court jurisdiction as set forth in 25 U.S.C. § 1911(b). The NAAC's analysis, however, is fatally flawed for a number of reasons. First, the Court must note that the argument is irrelevant to the facts in this case. The NAAC argues that the twelve-month Minnesota guideline defeats a party's ability to seek transfer, because it should constitute a *de facto* "advanced stage of the proceeding". Yet, the motion for transfer of jurisdiction in this litigation was brought only *eight months* after the initial foster care placement, and only six (6) days following the filing of the County's Amended Petition to terminate the parental rights of the father. In fact, the NAAC appears to acknowledge that the argument is irrelevant since, under its analysis, the motion was still timely, although the Court would have had to transfer the case promptly. *See* NAAC Brief at p. 21.

In addition, NAAC invites the Court to interpret the ICWA contrary to rote canons of statutory construction, suggesting that the broader statute, the ASFA, should prevail over the more specific statute, the ICWA, in Indian child custody proceedings, and that a statute of general application should control a statute applying specifically to Indian people. No Court has adopted a such inverted construction of federal statutes, and this Court should reject the invitation, just as the South Dakota Supreme Court did in People ex rel J.B., 670 N.W.2d 67 (S.D. 2003).

Finally, the NAAC argues that this Court should attempt to harmonize some perceived conflict between the statutes.⁶ But the harmonization it suggests is nothing of the sort. Rather, its proposed resolution would subordinate the ICWA to the ASFA with respect to jurisdictional transfers, diminishing the force and effect of the ICWA in violation of the canons of construction for resolving statutory conflicts. *See, e.g., People ex rel J.B.*, 670 N.W.2d 67 (S.D. 2003) (interpreting ASFA and ICWA coextensively); Adoption of Bernard A., 77 P.3d 4 (Ala. 2003); State v. M.L.L., 61 P.3d 438 (Ala. 2002). The Amici Tribes respectfully suggest that this Court should reject the Appellants argument, just as other Courts who have considered the matter have done.

⁶ The suggestion that the statutes are in conflict is, of course, undermined by the interpretation of the agency implementing the statute, the United States Department of Health and Human Services, which expressly stated that the ASFA has no impact on the ICWA. See discussion at p. 12, *supra*.

CONCLUSION

The District Court erred in denying an unopposed motion to transfer jurisdiction, asserting *sua sponte* its own “interest” in continuing its jurisdiction. Its decision violated the ICWA’s clear preference for tribal courts in cases involving Indian children. The Appellants now argue that the District Court’s decision should be rehabilitated by applying State law to the ICWA. But rights afforded to Indian Tribes and parents of Indian children pursuant to 25 U.S.C. §1911(b) may not be diminished by application of State law, and to the extent that State law is inconsistent with the broad goals of the ICWA, State law is preempted as a matter of federal law.

The Appellant’s argument also would result in the ICWA being applied differently from state to state, which would be inconsistent with United States Supreme Court precedent. As the Supreme Court explained at length in *Holyfield*, inconsistent state interpretations of “domicile” would defeat Congressional intent to preserve Indian tribes and families in enacting the ICWA. Adopting the District Court’s analysis as the appropriate standard would undermine Congressional deference to, and preference for, Tribal Court jurisdiction by denying an unopposed, joint request for transfer based on State permanency guidelines.

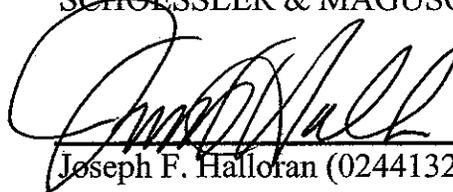
Finally, the District Court’s determination that the proceedings were at an “advanced stage” only eight months from the initial foster care placement, six days after the County filed its amended petition to terminate parental rights, and prior to adjudication, was simply wrong. The parents and the Tribe acted promptly and appropriately to secure the

transfer of jurisdiction and any suggestion to the contrary is divorced from reality and is discredited by the timeline of events reflected in the Court record.

For the foregoing reasons, the Amici Tribes respectfully request that this Court apply the clear and convincing evidentiary standard to the issue of good cause not to transfer the case, and affirm the Court of Appeals' decision to remand the case for immediate transfer to the Yankton Sioux Tribal Court.

Respectfully submitted on June 30, 2006 by:

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STATE OF MINNESOTA

IN SUPREME COURT

In the Matter of the Welfare of the

CERTIFICATION
OF BRIEF LENGTH

Child of T.T.B. and G.W., Parents

Appellate Court
Case Number: Nos. A05-1615 and A05-1631

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with proportional font. The length of this brief, excluding the table of contents and table of authorities is 19 pages and the text of the brief contains 4,760 words. This brief was prepared using Microsoft Word 2003 software.

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