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SUPREME COURT OF FLORIDA

CAROLE FRANCIS HOUGHTALING,

Petitioner,

v.

SEMINOLE TRIBE OF FLORIDA,

Respondent.

CASE NO. 79,177

DISTRICT COURT OF APPEAL,
2ND DISTRICT NO. 91-01508

PETITIONER'S AMENDED REPLY BRIEF

Respectfully submitted,

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REPLY BRIEF

COMES NOW, Petitioner, CAROLE FRANCES HOUGHTALING, (hereinafter referred to as Petitioner), and files this her Reply to Respondent's Answer Brief.

ISSUES

I. DOES SECTION 285.16, FLORIDA STATUTES (1989), PROVIDE FLORIDA COURTS WITH JURISDICTION TO RESOLVE CIVIL SUITS BROUGHT AGAINST THE SEMINOLE TRIBE? Seminole Tribe of Florida v. Houghtaling, 589 So.2d 1030, 1033 (Fla. 2d DCA 1991)

II. WHETHER THE CERTIFIED QUESTION PRESENTS AN ISSUE OF GREAT PUBLIC IMPORTANCE FOR RESOLUTION BY THIS COURT.

SUMMARY OF ARGUMENT

Public Law 280 and Florida Statute 5285.16 grant jurisdiction to Florida courts to adjudicate private civil disputes between non-Indians and Indian tribes which arise on Indian reservations in this state. However, the scope of the jurisdiction conferred is limited. Public Law 280 specifically excludes state regulation and taxation of Tribes or its members and further prohibits state regulation or control over hunting and fishing rights. In addition, matters involving integral tribal customs or operations should not be resolved in state court, such as issues involving tribal membership or disputes among tribal members themselves. Other civil causes of action arising on Indian reservations may be adjudicated by Florida Courts if the issues involve civil laws of general application, including but not limited to contract and tort.

The distinction urged by the Tribe between the term "Tribes"

and "Indians" is not supported by any United States Supreme Court decision and is not consistent with the terms of Public Law 280. Public Law 280 provides exemptions for taxation, regulation and hunting which would not be required if Tribes were not included within the Act's purview. In addition, to adopt the Tribe's interpretation would defeat the very purposes of the legislation which were (1) to provide an adequate forum for redress of private wrongs; (2) to provide for uniform application of state laws on the reservation as elsewhere: and (3) to prevent lawlessness upon reservations. The state must intervene for the protection of the public and utilize the grant of authority under Public Law 280 for the purpose to which it was intended.

The doctrine of sovereign immunity was developed as a shield to protect the Tribes. It should not be used as a sword by the Tribes to insulate themselves from liability for their own commercial ventures. In applying the proper Public Law 280 analysis, with its built-in exemptions for Tribes, this Court will ensure the protection of the public while simultaneously protecting those Tribal interests which the doctrine of sovereign immunity safeguards.

ARGUMENT

I. DOES SECTION 285.16, FLORIDA STATUTES (1989), PROVIDE FLORIDA COURTS WITH JURISDICTION TO RESOLVE CIVIL SUITS BROUGHT AGAINST THE SEMINOLE TRIBE?

Public Law 280 was an express grant of plenary jurisdiction to those states which passed legislation in accordance therewith. 28 U.S.C. 51360 (1970), 67 Stat. 588 (August 15, 1953). United States v. Dave, 696 F.2d 1305 (11th Cir. 1983). The cession of criminal jurisdiction and limited civil jurisdiction was a plenary grant of authority and encompassed a broad range of activities taking place on Indian reservations. Florida accepted jurisdiction by enacting Florida Statute §285.16; and the state policy is that Florida law will be uniformly applied on the reservation as elsewhere. 1972 Op. Att'y Gen. Fla. 072-403 (November 13, 1972); 1977 Op. Att'y. Gen. Fla. 077-29 (March 23, 1977).

Respondent has reached deep into the recesses of American History to cite Cherokee Nation v. Georgia, 30 U.S. (5 Pet,) 1 (1831); United States v. Kagama, 118 U.S., 6 S.Ct.1109, 30 L.Ed. 228 (1886); and United States v. Sandoval, 231 U.S. 28, 34 S.Ct.1, 58 L.Ed. 107 (1913), all of which predate Public Law 280. Recent cases and legislation have changedthe status of Indian sovereignty to the extent that the analyses applied by those Courts are no longer applicable. The reciprocity provided to the Tribes under Public Law 280 ensures that not only non-Indians, but also Indians and Tribes, will have access to an adequate forum for redress of injuries. Thus, Tribes may utilize the state court forum pursuant to Public Law 280 jurisdiction. See e.g., Bryan V. Itasca County,

Minnesota, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) (Indian sued over imposition of personal property tax on his mobile home).

In spite of the fact that the Tribe itself may invoke Public Law 280 jurisdiction in state court, the Seminole Tribe would have this Court hold that the Tribe could not be sued pursuant to Public Law 280. Sovereign immunity evolved to protect Indians and tribes from state usurpation of Indian ways and customs: however, the Seminole Tribe and others now invoke the doctrine as a sword to insulate the Tribe from liability.

The plight of the Seminole Tribe and others during the early 19th Century evokes sympathy, but legislation has been enacted and great strides have been made to elevate Indian status to those rights and privileges commonly enjoyed by all United States citizens.[1] The picture painted by the Tribe in its Answer Brief is a stereotypical one that no longer applies to the Indian and his community.

The Tribe also rests its argument upon antiquated analysis that no longer applies in Public Law 280 jurisdictions or that has

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[1] Indian communities are no longer dependent upon the United States for food, contrary to the quoted portions of United States v. Kagama, 118 U.S. 375 (1886), cited in the Respondent's brief. In addition, Federal assistance has been provided to the Tribes to assist them in commercial ventures. Maryland Cas. co. v. Citizens Nat'l Bank of W. Hollywood, 361 F.2d 517 (5th Cir. 1966)(United States deposited $100,000.00 for the Seminoles from a revolving credit fund with the Bureau of Indian Affairs). The Indian Civil Rights Act also ensures that Indians will enjoy the same rights and privileges as United States citizens under the United States Constitution. 25 U.S.C. §1301 et seq. (1968).

limited application under the facts of this case. It has also injected cases which were decided under other statutes not applicable to this case, such as the Indian Civil Rights Act[2]; the Indian Child Welfare Act[3]; and the Indian Self Determination Act[4]. This Court must scrutinize the authorities cited by the Tribe which do not apply to the issues here, for the scope of state jurisdiction varies from state to state and, within each state, the proper analysis turns upon the facts of the case and the legislation conferring jurisdiction, Attention to the intent of Congress in enacting Public Law 280 and the scope of the law as set forth in Bryan v. Itasca, supra, supports the assertion of jurisdiction by Florida courts to adjudicate a personal injury claim which arose at the Seminole Bingo Hall in Tampa.

Contrary to the Tribe's assertion, the distinction it urges between "Indians" and "Tribes" has not been recognized by the United States Supreme Court. The Tribe cites Bryan v. Itasca County, Minnesota, 426 U.S. 373, 96 S.Ct. 2012, 48 L.Ed. 2d 710 (1976), in support of its position. However the Bryan opinion provides that state court jurisdiction does not extend to state regulation over tribal enterprises. While the Supreme Court held

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2 25 U.S.C. §1301 et sea. (1968).

3 25 U.S.C. §1901 et sea. (1978).

4 25 U.S.C. 2450 et sea. (1975).

that the state could not tax Indian personal property', the Court set forth the parameters of state court jurisdiction pursuant to Public Law 280. The thrust of the jurisdictional grant of authority lay in the state court's power to resolve civil disputes. Bryan, 426 U.S. at 373.

The Tribe cites other cases suggesting the issue has already been determined by other courts, but close scrutiny of those cases shows that the Tribe is in error. In Oklahoma Tax Comm'n V, Citizen Band of Potawatomi Indian Tribe of Oklahoma, 111 S.Ct. 905, 112 L.Ed. 2d 1112 (1991), the Supreme Court did not even address the issue of whether a Tribe may be sued in state court under Public Law 280 jurisdiction. The Oklahoma Tax Commission case was a regulation case, clearly exempted from the scope of Public law 280 by virtue of 28 U.S.C. §1360(b). In addition, Justice Rehnquist noted at the beginning of the opinion that Oklahoma was not a Public Law 280 state, as is Florida, Oklahoma Tax Commission, 111 S.Ct. at 908, and thus, the analysis does not apply to the instant case.

The Tribe also suggests that Marvland Casualty Co. V, Bank of West Hollvwood, 361 F.2d 517, 520 (5th Cir. 1966) supports its position as to sovereign immunity of the Tribe under Public Law 280 jurisdiction. However, the case does not even address the scope of Public Law 280 jurisdiction, nor does it interpret the law in

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[5] The issue before the Bryan court was whether the state could impose a personal property tax on an Indian's mobile home which was located on the Chippewa Tribe's Leech Lake Reservation in Minnesota. Bryan, 426 U.S. at 375.

any way. It rather focuses upon a §16 analysis under the Indian Reorganization Act. Maryland Casualty, 361 F.2d 517. Even if the case had been brought in state court pursuant to Public Law 280 jurisdiction, one could only speculate whether the state court would entertain jurisdiction of the suit.

Alaskan decisions cited by the Tribe further do not support its claims. Atkinson V. Haldane, 569 P.2d 151 (Alaska 1977); and Parker Drilling Co. v. Metlakatla Indian Community, 451 F.Supp 1127, 1138-1139 (D. Alaska 1978). Even the Atkinson Court acknowledged that, pursuant to the analysis adopted by the Supreme Court in Bryan V. Itasca County, supra, a wrongful death action might be encompassed within the term "private civil litigation." Atkinson, 569 P.2d at 166.[6] The Parker court erred by attempting to apply a regulation analysis to the facts of that case which did not arise in a state regulation context. Parker Drilling Co., 451 F.Supp. at 1139. The Parker court confused the application of a §16 analysis under the Indian Reorganization Act and the analysis under Public Law 280. Public Law 280 was enacted after the Indian Reorganization Act of 1934, and no portion of Public Law 280 or Florida Statute §285.16 indicates that §16 or §17 Tribes were excluded from its scope. In fact, it is apparent that Public Law

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[6] In Atkinson v. Haldane, supra, individual Indians sought to recover for the wrongful death of two Indians which occurred in an automobile accident on the reservation. There were no non-Indian players and the suit itself was properly suited to a tribal forum. Although the rationale applied by the Atkinson court was in error, the result obtained was correct because the controversy should have been restricted to the tribal forum. See also Cogo V, Central Council of Tlinget and Haida Indians of Alaska, 465 F.Supp. 1286 (D. Alaska 1979).

280 was intended to operate as an additional means of state jurisdiction over civil causes of action occurring on reservations. Bryan v. Itasca, 426 U.S. at 373.

The more enlightened approach was applied by the Federal court in Alaska in the 1988 case of Native Villase of Venetie I.R.A. Counsil V. Alaska, 687 F.Supp. 1380 (D. Alaska 1988). The Native Villase court correctly noted that Public Law 280 "strip[s] tribal courts of most of their traditional jurisdiction". Native Villase, 687 F.Supp. at 1382.[7]

Petitioner does not assert that every civil dispute which falls within the purview of the state's jurisdiction under Public Law 280 is a proper subject for resolution by state courts. Certain matters which affect a Tribe's integral operations, such as its decisions to grant membership', or controversies which involve no non-Indian parties, should properly be resolved by tribal courts. See Oliphant V. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

If Florida may properly exercise jurisdiction over civil suits involving Indians, how much more so is public policy favored when it is the Tribe itself who is sued. If the Tribe's contention is applied, Petitioner could sue the manager of an Indian gaming

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[7] The Native Villase court refused to recognize concurrent jurisdiction in the tribal forum where the Tribe had failed to meet the statutory requirements to obtain jurisdiction of child custody cases under the Indian Child Welfare Act, 25 U.S.C. §1901 et seu. (1978). Native Village, 687 F.Supp at 1382 and 1400.

[8] Santa Clara Pueblo V. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed. 106 (1978)(suit by female tribal member against tribe because tribe refused to admit her daughter as a member)

establishment in state court and have state law applied; while she must sue the Tribe, who holds the purse strings, in a Tribal forum, if in fact one exists, applying tribal laws. There also exists a greater likelihood of prejudice against litigants who sue an Indian Tribe in Tribal Court. See Native Village, 687 F.Supp. at 1393.

In addition, regulation cases do not provide a proper analysis to be applied in a personal injury claim under Public Law 280 jurisdiction. The Tribe cites e California Bd. of Equalization, 757 F.2d 047 (9th Cir. 1985), a regulation case brought by a Tribe to determine whether the state could regulate taxation of cigarettes on sales to non-Indians. However, regulation and taxation are express exemptions from the state jurisdiction conferred under Public Law 280. 28 U.S.C. §1360(b).

The Tribe has placed great emphasis upon Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), and Askew v. Seminole Tribe of Florida, Inc., 474 So.2d 877 (Fla. 4th DCA 1985). Neither opinion applies to the facts of this case. Askew concerned the state's ability to tax; and Butterworth involved state regulation of Indian bingo enterprises. Askew, 474 So.2d at 877, Butterworth, 658 So.2d at 311. Both issues fall within an express exemption under Public Law 280[9], and neither supports the Tribe's claim that the Florida courts may not exercise jurisdiction over the Tribe in a civil suit as presented here. The Askew case does not even address the scope of Public Law 280 jurisdiction; although

[9] 28 U.S.C. §1360(b).

its finding of no state jurisdiction would have been correct had the proper analysis been applied because of the express exemption as to taxation of Tribes.

Other courts have applied the Indian Reorganization Act analysis", much the same as the Second District Court in this case. See Askew, 474 So.2d at 879. Maryland Cas. Co. v. Citizens Nat'l Bank of W, Hollywood, 361 F.2d 517 (5th Cir. 1966); and Parker Drilling Co. v. Metlakatla Indian Community, 451 F.Supp. 1127 (D. Alaska 1978)[11]. However, had the Fourth District Court of Appeal in Askew applied a Public Law 280 analysis, it would have reached the same result because of Public Law 280's express exemption of Indian Tribe's from taxation. 28 U.S.C. §1360(b). Similarly, the Maryland Casualty case result may have been appropriate using a Public Law 280 approach because the case implicated integral tribal operations. The same, however, does not hold true in this case.

The Public Law 280 issues presented in the instant case were not before the Askew and Maryland Casualty courts. Had the Second District Court of Appeal properly applied a Public Law 280 analysis, the trial court's denial of the Tribe's Motion to Dismiss would have been upheld, because there exists no Public Law 280

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[10] Wheeler-Howard Act (Indian Reorganization Act), 48 Stat. 984 (1934)(Codified at 25 U.S.C. §476, et sea. (1979; amended 1988).

[11] The Parker Drilling case was a suit against a Tribe for injuries occurring at an airport operated by Tribe. The Court in Parker applied a §16 and 17 analysis, Public Law 280 was not addressed. Parker Drilling, 451 F.Supp. at 1130.

exemption for Tribes under these facts. This is a personal injury claim which arose out of the Tribe's commercial activities. No integral tribal function is affected by assumption of state court jurisdiction under such circumstances.

The Tribe also injects the case of Seminole Police Department v. Casadella, 478 So.2d 470 (Fla. 4th DCA 1985); however, that case does not address the issue of Public Law 280 jurisdiction and apparently rested upon the Santa Clara Pueblo v. Martinez decision, supra. However, Santa Clara Pueblo was a case brought under the Indian Civil Rights Act,[12] and New Mexico was not even a Public Law 280 state.[13]

The Tribe also cites Chemehuevi Indian Tribe V. California Bd. of Equalization, 757 F.2d 1047 (9th Cir. 1985), to support the distinction it urges between Indians and tribes. Although the Chemehuevi court discusses whether the Tribe in that case was a "person" within the meaning of the California Revenue and Taxation Code, no analogy should be drawn to Public Law 280, and this court is not bound by the California court's approach. Chemehuevi, 757 F.2d at 1054-1056. The Chemehuevi court erred in its analysis with regard to the application of Public Law 280 to Tribes to the extent that the opinion purports to apply to private civil disputes. Public Law 280 legislation and history, when viewed in toto, was designed to permit such suits by providing a forum. Bryan v.

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[12] 25 U.S.C. §1301 et seq. (1968)

[13] For a listing of states accepting jurisdiction pursuant to Public Law 280, see F. Cohen, Handbook of Federal Indian Law (1982), p.362, n.125.

Itasca, supra. To hold as California did in Chemehuevi would result in piecemeal enforcement of private rights and would vitiate the purpose of Public Law 280 and Florida Statute 9285.16. It is also contrary to the express public policy of the state to ensure uniform application of state laws. See Fla. Att'y Gen. Ops., supra.

The Tribe also points the court to definitions set forth in 25 U.S.C. §479, to support its claims that Tribes were not included within the scope of jurisdiction conferred upon the states under Public Law 280. Respondent's Brief, p.18. However, that statute specifically limits the application of the definition to specific provisions within the Indian Reorganization Act.[14] It does not apply to Public Law 280.

The very exemption which prohibits state taxation and regulation of Indian tribes expressly demonstrates that Congress intended for state jurisdiction to extend to Tribes as well as individual members. The statute provides that "[n]othing in this section shall authorize . . . taxation of any real or personal property . . . belonging to . . . any Indian tribe . . ., or shall authorize regulation of the use of such property . . . or shall deprive . . . any Indian tribe . . . of any right . . . with respect to hunting, trapping or fishing . . ." 28 U.S.C.A.

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[14] The statute provides:

"The term 'Indian' as used in sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title . . . (emphasis added)." 25 U.S.C.A. 479, 48 Stat. 988 (June 18, 1934).

§1360(b)(date). The intent of Congress is unequivocal. Tribes may be sued in civil suits under Public Law 280, otherwise there would have been no need for Congress to enact exemptions dealing with taxation, regulation and hunting rights.

The exemptions adopted by Congress in §1360(b), however, have led to many of the decisions discussed above which may, if not placed in proper perspective, muddy the proper analysis to be used in a Public Law 280 fact pattern. See Seminole Tribe of Florida v. Butterworth, supra.

This court should interpret Public Law 280 and Florida Statute 5285.16 in keeping with Congressional intent and the state policy enunciated by the Florida Attorney General. The statutes were designed to reduce lawlessness on the reservations; provide a forum for redress of private civil disputes between non-Indians and tribes for injuries occurring upon the reservation; and to provide for uniform application of state law on the reservation as elsewhere within the state. The issue is urgent; and the means are provided through Public Law 280 and Florida Statute 5285.16. The state cannot regulate or tax the Tribe, but it must, at the very minimum protect, its citizens and provide a forum for redress of injuries.

II. WHETHER THE CERTIFIED QUESTION PRESENTS AN ISSUE OF GREAT PUBLIC IMPORTANCE FOR RESOLUTION BY THIS COURT.

Jurisdiction of this Court was invoked pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). The issue presented is one of great public importance in the State of Florida at this

time. Current hearings held by the Senate Select Committee on Indian Affairs demonstrate the lack of adequate oversight of Indian gaming on Indian lands.[15] Seminole Indian bingo and other Seminole Tribe commercial ventures are big business. Currently, the Seminoles are negotiating the purchase of 6,000 acres of land north of Madison for a sixth reservation. See St. Petersburg Times article attached at Appendix A-1. The land is reported to be worth over $1.8 million. Id.

While the Petitioner does not dispute the ancestral heritage of the Seminole Tribe, the Tribe's past and the past acts of the Federal and State Governments do not give tribes absolute immunity to ride roughshod over the rights of the citizenry today. The issue before this Court is not the injustice or the inequity of the "Trail of Tears", but the protection of the public from what has become organized gambling in this state. Neither the Bureau of Indian Affairs, nor the National Indian Gaming Commission can currently oversee the explosion in Indian gaming establishments nationwide. In addition, the recently formulated Indian Gaming Regulatory Act is fraught with many difficulties, not the least of which is interpretation of rules and regulations.[16] Neither agency has the power to resolve private civil disputes between non-Indians and the Tribe which arise out of the Tribe's commercial ventures,

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[15] Senate Select Committee on Indian Affairs: Oversight Hearings on the implementation of the Indian Gaming Regulatory Act (February 5, 1992).

[16] Id.

nor do these agencies have the power to enforce rights and remedies under state law. The message must be sent from this State's highest court that the rights of the citizens and the public will be protected by the Florida judicial system and the Florida Seminole Tribe will not be able to insulate itself from the standards to which all businessmen in the State of Florida are held.

CONCLUSION

The Petitioner requests the Court to reverse the opinion of the Second District Court of Appeal as it applies to Public Law 280 upon the grounds set forth in her Initial Brief and her Reply Brief herein. In so doing, the Court must define the scope of authority granted to Florida Courts to exercise jurisdiction over civil causes of action arising upon the Indian reservations, including actions against the Tribe itself. Petitioner further requests the Court to remand this case to the trial court for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to Donald A. Orlovsky, Esquire, Servico Centre South, Suite 402, 1601 Belvedere Road, West Palm Beach, FL 33406, W. Douglas Berry, Esquire, Bayport Plaza, Suite 1100, 6200 Courtney Campbell Causeway, Tampa, FL 33607, the Honorable Robert H. Bonanno, Circuit Court Judge, Hillsborough County Courthouse, Tampa, FL 33602 this 20th day of March, 1992.

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SUPREME COURT OF FLORIDA

CAROLE FRANCIS HOUGHTALING,

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CASE NO. 79,177

DISTRICT COURT OF APPEAL,
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APPENDIX

TO

PETITIONER'S REPLY BRIEF

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Seminoles want North Florida land

Associated Press

HOLLYWOOD, Fla. — Members of the Seminole tribe have endorsed a proposal to buy 6,000 acres north of Madison for a sixth reservation.

Tribal officials cleared the idea with members last week at meetings on the five reservations.

The tribe still must negotiate with the property owner for the land, estimated to be worth $1.8 million, and petition the federal government to have the land — near the Georgia border between Tallahassee and Jacksonville — set aside as a reservation.

Seminole Indians were forced to leave their ancestral lands in North Florida almost 200 years ago.

"It's neat to be a piece of history," said tribal Chairman James Billie. "We were pushed down here almost 200 years ago. Five generations have been misplaced here."

Most of the tribe's 2,000 members would continue to live on the Hollywood, Big Cypress, Brighton, Immokalee and Tampa reservations. But the new land would provide room for the tribe's growing population to build homes, raise cattle and farm, he said.

Seminole Indians were forced to leave their ancestral lands in North Florida almost *200* years ago.

"It's neat to walk on that soil, to see the nuts, pears, apples and Indian herbs," Billie said. **"We're going back** home,"

The Seminoles, who once lived across the Southeast, fought three wars with U.S. troops in the 1800s to keep from being forced to move to Oklahoma, As federal pressure increased, the Seminoles moved south into the Everglades.

Billie proposes naming the new reservation for John Hicks, a prominent Seminole war leader.

"Tallahassee, Apalachicola, Gainesville — these are our homelands," he said. "Someone chased us off, and now we're coming back and buying it."