

**ABSENTEE SHAWNEE TRIBE OF OKLAHOMA
P. O. Box 1747
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CIVIL PROCEDURE

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TABLE OF CONTENTS

SectionName

GENERAL PROVISIONS

1	Scope of This Act
2	Jurisdiction in Civil Actions
3	Title of this Act
4	Force of the Tribal Common Law
5	Definitions
6	No Effect Upon Sovereign Immunity
7	Declaratory Judgment
8	Court Costs Not Charged to Tribe
9	Effect of Previous Court Decisions
10	C.F.R. Not Applicable
11	Laws Applicable to Civil Actions
12	Court Action When No Procedure Provided

CHAPTER ONE
COMMENCEMENT OF ACTION:
PLEADINGS, MOTIONS AND ORDERS

101	Commencement of Action
102	One Form of Action
103	"Claim" Defined
104	Notice of Pendency of Action
105	Notice of Pendency Contingent Upon Service
106	Special Notice for Actions Pending in Other Courts
107	Pleadings Allowed; Form of Motions
108	General Rules of Pleading
109	Pleading Special Matters
110	Form of Pleadings, Motions, and Briefs
111	Signing of Pleadings
112	Defenses and Objections - When and How Presented - By Pleadings Pleadings or Motions - Motion for Judgment on the Pleadings
113	Final Dismissal on Failure to Amend
114	Counterclaim and Cross Claim
115	Counterclaim: Effect of the Statutes of Limitation
116	Counterclaims Against Assigned Claims
117	Third Party Practice
118	Amended and Supplemental Pleadings
119	Pre-Trial Procedure; Formulating Issues
120	Lost Pleadings
121	Tenders of Money or Property
122	Dismissal of Actions

<u>Section</u>	<u>Name</u>
CHAPTER TWO PROCESS, SUMMONS, FILING OF PLEADINGS AND OTHER PAPERS	
201	Issuance of Summons
202	Form of Summons
203	Who May Serve Process Personally
204	Service of Process by Mail
205	Service by Publication
206	Publication Service Upon Parties and the Unknown Successors of
207	Publication Notice for Recovery of Money
208	Publication Notice in Quiet Title Actions
209	Completion of Publication Service
210	Entry of Default on Party Served by Publication
211	Vacating Default Judgments Where Service is by Publication ^{ved,}
212	Certain Technical Errors Not Grounds for Vacating Judgment ^{iuc}
213	Meaning of "Successors" for Publication Purposes
214	Minimum Contacts Required for Effective Long Arm Service
215	Consent is Effective Substitute for Service
216	Service Pursuant to Court Order
217	Manner of Making Personal Service
217.1	Effect of Service of Some of Several Defendants
218	Service Upon Party Not Inhabitant of or Found Within the
219	Territorial Limits of Effective Service
220	Return of Service of Process
221	Alternative Provisions for Service in a Foreign Country
222	Subpoena
230	Summons, Time Limit for Service
231	Service and Filing of Pleadings and Other Papers
240	Computation and Enlargement of Time
241	General Cases in Which Extraterritorial Service Authorized
242	Legal Newspaper

CHAPTER THREE
PARTIES

301	Parties Plaintiff and Defendant: Capacity
302	Joinder of Claims, Remedies, and Actions
303	Joinder of Persons Needed for Just Adjudication
304	Permissive Joinder of Parties
305	Misjoinder and Non-Joinder of Parties
306	Interpleader
307	Class Actions
308	Derivative Actions by Shareholders and Members
309	Intervention
310	Substitution of Parties

SectionNameCHAPTER FOUR
DEPOSITIONS AND DISCOVERY

401	General Provisions Governing Discovery
402	Depositions Before Action or Pending Appeal
403	Persons Before Whom Depositions May Be Taken
404	Stipulations Regarding Discovery Procedure
405	Depositions Upon Oral Examination
406	Depositions Upon Written Questions
407	Use Of Depositions In Court Proceedings
408	Interrogatories to Parties
409	Production of Documents and Things and Entry Upon Land for
410	Physical and Mental Examination of Persons
411	Requests for Admission
412	Failure to Make Discovery: Sanctions

CHAPTER FIVE
WITNESSES

501	Issue and Service of Subpoena for Witnesses
502	Subpoenas - Contents
503	Subpoena for Deposition
504	Subpoena for Agency Hearings
505	Witness May Demand Fees - Exception
506	Disobedience of Subpoena
507	Attachment of Witness
508	Punishment for Contempt
509	Discharge When Imprisonment Illegal
510	Requisites of Attachment — Order of Commitment
511	Examination of Prisoner
512	Prisoner's Custody During Examination
513	Witness Privileged
514	Witness May Demand Fees Each Day — Exception
515	Special Provisions for Tribal Agencies

SUBCHAPTER A
TESTIMONY UNDER PRIVILEGE AGAINST PROSECUTION

550	Privilege For Committee Testimony
551	Procedure for Claiming Privilege
552	Oaths
553	Penalties
554	Disgrace as Ground for Refusal to Testify
555	Prosecution
556	Fees and Mileage

SectionNameCHAPTER SIX
JURORS

601	Meeting for Selection of Jurors
602	Court Clerk's Jury Selection Roll
603	Preparation of Jury Wheel
604	Drawing General Jury Panel
605	Use of Jury Panel
606	Certifying and Sealing Lists
607	Oath and Delivery of Envelopes
608	Sealing and Retaining Juror Name Cards
609	Refilling Wheel
610	Summoning Jurors
611	On-Call System Jurors
612	Drawing Trial Jurors From Panel
613	Qualifications and Exemptions of Jurors
614	Substantial Compliance
615	Oath to Jury
621	Discharge of Employee for Jury Service — Penalty
622	Civil Liability — Damages

CHAPTER SEVEN
TRIALS

701	Trial Defined
702	Trial of Issues
703	Jury Trial of Right
704	Trial by Jury or by the Court
705	Assignment of Cases for Trial
706	Consolidation; Separate Trials

SUBCHAPTER A
IMPANELING JURY

721	Summoning Jury
722	Causes for Challenging Jurors
723	Examination of Jurors
724	Alternate Jurors
725	Order of Challenges
726	Challenges to Jurors — Filling Vacancies
727	Alternate Method of Selecting Jury
728	Oath of Jury
729	Juries of Less Than Six — Majority Verdict

SectionNameSUBCHAPTER B
TRIAL PROCEDURE

731	Order of Trial
732	Taking of Testimony
733	Exceptions Unnecessary
734	Instruction to Jury — Objection
735	Uniform Jury Instructions
736	Objections to Instructions — Copies to Parties
737	View by Jury
738	Deliberations of the Jury
739	Admonition of Jury on Separation
740	Information After Retirement
741	When the Jury may be Discharged
742	Re-trial
743	Proof of Official Record
744	Determination of Foreign Law
745	Appointment and Duties of Masters

SUBCHAPTER C
VERDICT

751	Findings by the Court
752	Delivery of Verdict
753	Requisites of Verdicts
754	General and Special Verdict
755	Special Verdict and Interrogatories
756	Jury Must Assess Amount of Recovery
757	Motion for a Directed Verdict and for Judgment Notwithstanding

SUBCHAPTER D
MISCELLANEOUS TRIAL PROVISIONS

771	Provisions Applicable to Trials by Court
772	Trial Docket
773	Trial Docket for Bar
774	Order of Trial of Cases Docketed
775	Time of Trial
776	Continuances
777	Trial by Judicial Panel
778	Bifurcated Jury Trials

CHAPTER EIGHT
PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

801	Seizure of Person or Property
802	Receivers Appointed by Tribal Courts
803	Deposit in Court

<u>Section</u>	<u>Name</u>
804	Process in Behalf of and Against Persons not Parties
805	Security — Proceedings Against Sureties
806	Execution
SUBCHAPTER A	
INJUNCTIONS	
811	Injunction Defined
812	Cause for Injunction — Temporary Restraining Order
813	Temporary Restraining Order; Notice; Hearing; Duration
814	Temporary Restraining Order — Service
815	Preliminary Injunction
816	Preliminary Injunction — Criteria
817	Form and Scope of Injunction or Restraining Order
818	Employer and Employee; Interpleader; Constitutional Cases
818	Security
820	Use of Affidavits
821	Injunction by Defendant
822	Injunction is Equitable
823	Modification of Preliminary Injunction
824	Modification of Permanent Injunction
825	Injunctions Tried to the Court
826	Enforcement of Restraining Orders and Injunctions
SUBCHAPTER B	
REPLEVIN	
831	Order of Delivery — Procedure
832	Penalty for Damage of Property Subject to Order of Delivery
833	Undertaking in Replevin
834	Replevin Bond — Value
835	Order of Delivery
836	Order Returnable
837	Execution of Order
838	Re-delivery on Bond
839	Exception to Sureties
840	Proceedings on Failure to Prosecute Action
841	Judgment — Damages — Attorney Fees
842	Officer May Break Into Buildings
843	Compelling Delivery by Attachment
844	Improper Issue of Order of Delivery
845	Joinder of Cause of Action for Debt — Stay of Judgment
SUBCHAPTER C	
ATTACHMENT	
851	Grounds for Attachment
852	Attachment Affidavit
853	Attachment Bonds

<u>Section</u>	<u>Name</u>
854	Order of Attachment
855	When Returnable
856	Order of Execution
857	Execution of Attachment Order
858	Service of Order
859	Re-delivery on Bond

SUBCHAPTER D
GARNISHMENT

SUBCHAPTER E
PROVISIONS RELATING TO ATTACHMENT AND GARNISHMENT

SUBCHAPTER F
RECEIVERS

892.1	Appointment of Receiver
892.2	Persons Ineligible
892.3	Oath and Bond
892.4	Powers of Receiver
892.5	Investment of Funds
892.6	Disposition of Property Litigated
892.7	Punishment for Disobedience of Court
892.8	Vacation of Appointment by Supreme Court

SUBCHAPTER G
EMINENT DOMAIN

893.1	Who May Exercise Authority
893.2	What Property May be Condemned by Eminent Domain
893.3	Condemnation of Property
893.4	Complaint
893.5	Process in Eminent Domain
893.6	Appearance or Answer
893.7	Amendment of Pleadings
893.8	Substitution of Parties
893.9	Dismissal of Action
893.10	Deposit and Its Distribution
893.11	Costs

CHAPTER NINE
JUDGMENT

901	Judgments — Costs
902	Default
903	Offer of Judgment

CIVIL PROCEDURE

<u>Section</u>	<u>Name</u>
904	Judgment for Specific Acts - Vesting Title
905	Summary Judgment
906	Declaratory Judgments
907	Entry of Judgment
908	New Trials - Amendments of Judgments
909	Relief from Judgment or Order
910	Harmless Error
911	Stay of Proceedings to Enforce a Judgment
912	Disability of a Judge
913	Civil Forfeiture
914	Judgment against Infant
915	Judgments as Liens
916	Discharge of Money Judgment Liens
917	Additional Cash Deposits
918	Reversal by Supreme Court
919	Interest on Money Judgments
920	Exempt Property
920.1	Payment of Judgments from Individual Indian Moneys

SUBCHAPTER A FOREIGN JUDGMENTS

921	Definition
922	Filing and Status of Foreign Judgments
923	Grounds for Non-Recognition
924	Notice of Filing
925	Stay of Execution of Foreign Judgment
926	Fees
927	Optional Procedure

SUBCHAPTER B EXECUTION

931	Executions -Defined
932	Kinds of Executions
933	Property Subject to Levy
934	Property Bound after Seizure
935	Execution Must Be Issued Within-Five Years
936	Priority among Property
937	Priority among Executions
938	Levy by Priority
939	Who Makes Levy
940	When Levy Void
941	Penalty for Unlawful Levy
942	Levy on Property Claimed By Third Person
943	Re-Delivery to Defendant
944	Notice of Sale of Chattels
945	Further Levy -When Property Taken Insufficient
946	Filing and Indexing of Execution
947	Waiver of Appraisement

<u>Section</u>	<u>Name</u>
948	Return of Appraisalment
949	When Lien Restricted
950	Notice of Sale of Realty
951	Confirmation of Sale
952	Police Chief's Deed
952	Advance of Printer's Fees
953	Demand for Printing Fees
954	Place of Sale
955	Other Executions of Realty Not Sold
956	Levy on Realty Under Several Executions
957	Deed by Successor of Officer Making Sale
958	Payment to Defendant of Overplus After Sale
959	Reversal of Judgment After Sale of Interest in Land
960	Execution on Judgment in Favor of Tribe
961	Reappraisal Where Realty Twice Advertised for Sale
962	Return of Execution
963	Principal and Surety
964	Hearing on Assets
SUBCHAPTER C	
CONTRIBUTION	
971	Joint Debtors or Sureties
972	Joint Tortfeasors — Contribution — Indemnity — Exemptions — Release, Covenant Not to Sue, Etc.
SUBCHAPTER D	
COSTS	
981	Affidavit in Forma Pauperis
982	False Swearing in Such Case
983	Costs Where Defendant Disclaims
984	Certain Costs Taxes at Discretion of Court
985	Costs to Successful Party as Matter of Course
986	Costs in Other Cases
987	Several Actions on Joint Instrument
988	Clerk to Tax Costs
989	Cost of Notice or Other Legal Publication
990	Attorney Fees Taxable as Costs
991	Costs Defined
992	Authority of Court to Fix Cost Rates
CHAPTER TEN	
LIMITATION OF ACTIONS	
1001	Limitations Applicable
1002	Limitation of Real Actions
1003	Persons Under Disability - In Real Property Actions

<u>Section</u>	<u>Name</u>
1004	Limitation of Other Actions
1005	Persons Under Disability in Actions Other Than Real Property Action
1006	Absence or Flight of Defendant
1007	Limitation of New Action After Failure
1008	Extension of Limitation
1009	Statutory Bar Absolute
1010	Law Governing Foreign Claims
1011	Limitation of Building Construction Tort Claims

CHAPTER ELEVEN
FAMILY RELATIONS

1101	Recording of Marriages and Divorces
1102	Tribal Custom Marriage and Divorce
1103	Tribal Custom Adoption
1104	Determination of Paternity and Support
1105	Determination of Heirs
1106	Approval of Wills

SUBCHAPTER A
STATUTORY DIVORCE

1111	Grounds for Divorce
1112	Residence of Plaintiff or Defendant
1113	Personal Jurisdiction
1114	Custody of Children, Disposition of Property
1115	Orders Concerning Property, Children, Support and Expenses
1116	Care and Custody of Children
1117	Preference of Child
1118	Paternity Determination
1119	Interest on Delinquent Payments
1120	Restoration of Wife's Maiden Name
1121	Disposition of Property
1122	Effect of Divorce
1123	Remarriage and Cohabitation
1124	Punishment for Certain Remarriage and Cohabitation
1125	Remarriage Within Six Months
1126	Time When Judgment Final
1127	Avoidance of Marriage of Incompetents
1128	Alimony Without Divorce
1129	Evidence
1130	Setting Aside of Divorce Decree
1131	Termination of Money Payments
1132	Mailing of Alimony and Support Payments
1133	Modification of Decree
1134	Effect on Common Law Divorce

SectionNameCHAPTER TWELVE
FORCIBLE ENTRY AND DETAINER

1201	Forcible Entry and Detention
1202	Powers of Court
1204	Issuance and Return of Summons
1205	Service of Summons
1206	Constructive Service of Summons
1207	Answer or Affidavit by Defendant
1208	Trial by Court
1209	Procedure Where No Jury Available
1210	Attorney Fee
1211	Writ of Execution - Form - New Trial
1212	Stay of Execution
1213	Forcible Entry and Detainer Action on Small Claims Docket
1214	Affidavit Form
1215	Summons - Form

CHAPTER THIRTEEN
HABEAS CORPUS

1301	Persons Who May Prosecute Writ
1302	Application for Writ
1303	Writ Granted
1304	Direction and Command of Writ
1305	Delivery to Tribal Police Chief
1306	Service on Party Other Than Tribal Police Chief
1307	Service When Person Not Found
1308	Return and Enforcement of Writ
1309	Manner of Return
1310	Proceedings in Case of Sickness or Infirmary
1311	Hearings and Discharge
1312	Limits on Inquiry
1313	Writ Upon Temporary Commitment
1314	Writ May Issue to Admit to Bail
1315	Notice to Interested Persons
1316	Powers of Court
1317	Officers Not Liable for Obeying Orders
1318	Issuance of Warrant of Attachment
1319	Arrest of Party Causing Restraint
1320	Execution of Warrant of Attachment
1321	Temporary Orders
1322	Issuance and Service on Sunday
1323	Issue of Process
1324	Protection of Infants and Insane Persons
1325	Security for Costs Not Required

SectionNameCHAPTER FOURTEEN
MANDAMUS

1401	Functions of Mandamus
1402	Writ Not Issued Where Remedy at Law
1403	Forms and Contents of Writs
1404	When Peremptory Writ of Issue
1405	Petition Upon Affidavit
1406	Allowance and Service of Writ
1407	Answer
1408	Failure to Answer
1409	Similarity to Civil Action
1410	Recovery by Plaintiff
1411	Damages Bar Further Actions
1412	Penalty for Refusal or Neglect to Perform

CHAPTER FIFTEEN
QUO WARRANTO

1501	Quo Warranto - Relief Obtainable by Civil Action
1502	Grounds for Action
1503	Persons Who May Bring Action
1504	Judgment is Contest for Office
1505	Judgment for Plaintiff
1506	Enforcement of Judgment
1507	Separate Action for Damages
1508	Corporations

CHAPTER SIXTEEN
SMALL CLAIMS PROCEDURE

1601	Small Claims
1602	Small Claims Affidavit
1603	Preparation of Affidavit
1604	Service of Affidavit
1605	Date for Appearance
1607	Counterclaim or Setoff
1608	Actions for Amounts Exceeding in Excess of Two Thousand Dollars
1609	Attachment or Garnishment, Other Matters
1610	Trial by Court
1611	Payment of Judgment
1612	Appeals
1613	Fees
1614	Costs
1615	Judgments Rendered Under Small Claims Procedure
1616	Fee for Docketing Judgments
1617	Other Actions In Small Claims Court

CIVIL PROCEDURE

GENERAL PROVISIONS

Section 1. Scope of This Act

This Act governs the procedure in the Courts of the Tribe in all suits of a civil nature whether cognizable as cases at law or in equity except where a law or ordinance of the Tribe specifies a different procedure. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

Section 2. Jurisdiction in Civil Actions

The Tribal Court may exercise jurisdiction over any person or subject matter on any basis consistent with the Constitution of the Tribe, the Indian Civil Rights Act of 1968, as amended, and any specific restrictions or prohibitions contained in Federal law.

Section 3. Title of this Act

This Act shall be known as the Code of Civil Procedure.

Section 4. Force of the Tribal Common Law

The customs and traditions of the Tribe, to be known as the Tribal Common Law, as modified by the Tribal Constitution and statutory law, judicial decisions, and the condition and wants of the people, shall remain in full force and effect within the Tribal jurisdiction in like force with any statute of the Tribe insofar as the common law is not so modified, but all Tribal statutes shall be liberally construed to promote their object.

Section 5. Definitions

Unless a different meaning is clearly apparent from the context, the term:

(a) "Chief Executive Officer" shall mean the Governor of the Absentee Shawnee Tribe, unless a different meaning is attributed to this term in an

CIVIL PROCEDURE

agreement with another Indian Tribe which provides for the operation of an intertribal Court.

(b) "other Indian Tribe" shall mean any Federally recognized Indian Tribe other than this Tribe.

(c) "real property" or "non-trust interest in real property" shall mean any interest in real property within the Tribal jurisdiction other than the Indian trust title held by the United States for the use of any Indian or Indian Tribe, or the fee title to any land held by any Indian or Indian Tribe which is subject to a restriction upon alienation imposed by the United States. Nothing in this Act shall be construed as affecting or attempting to affect the trust or restricted title to trust or restricted Indian land.

(d) "reservation" means the last recognized reservation boundaries of the Tribe irrespective of whether they have been disestablished.

(e) "Executive Committee" means the Executive Committee of the Absentee Shawnee Tribe of Oklahoma unless a different meaning is attributed to the term by an agreement with another Indian Tribe providing for the establishment of an intertribal Court.

(f) "Tribal jurisdiction" means all Indian Country as defined in 18 U.S.C. §1151 whether within or without the reservation which is subject to the jurisdiction of the Tribe.

(g) "Attorney General" means the Tribal Attorney, Tribal Court Prosecutor or other appropriate legal advisor as designated by the Executive Committee.

Section 6. No Effect Upon Sovereign Immunity

Nothing in this Act contained shall be construed to be a waiver of the sovereign immunity of the Tribe, its officers, employees, agents, or political subdivisions or to be a consent to any suit beyond the limits now or hereafter specifically stated by Tribal law.

Section 7. Declaratory Judgment

The Court, in any actual controversy before it, shall have the authority to declare the rights of the parties in that suit in order to resolve disputes even though a money judgment or equitable relief is not requested or not due. In particular, the Court may issue its declaratory judgment recognizing Tribal common law marriages and divorces, and provide for the custody of children and division of property in such divorces.

CIVIL PROCEDURE

Section 8. Court Costs Not Charged to Tribe

The Tribe, its officers, employees, agents, or political subdivisions acting in their official capacity shall not be charged or ordered to pay any Court costs or attorney fees under this Act, but if these entities prevail in the action, the cost which such entities would have been required to pay may be charged as costs to the losing party as in other cases.

Section 9. Effect of Previous Court Decisions

All previous decisions of the Courts of the Tribe, insofar as they are not inconsistent with this Act, shall continue to have precedential value in the Tribal Court.

Section 10. C.F.R. Not Applicable

Any and all provisions of Part 11 of Title 25 of the Code of Federal Regulations as presently or hereafter constituted are declared to be not applicable to the Tribe.

Section 11. Laws Applicable to Civil Actions

(a) In all civil cases, the Tribal District Court shall apply:

(1) The Constitution, Statutes, and Common Law of the Tribe not prohibited by applicable Federal law, and, if none, then

(2) The Federal law including Federal common law, and, if none, then

(3) The laws of any State or other jurisdiction which the Court finds to be compatible with the public policy and needs of the Tribe.

(b) No Federal or state law shall be applied to a civil action pursuant to paragraphs (2) and (3) of Subsection (a) of this Section if such law is inconsistent with the laws of the Tribe or the public policy of the Tribe.

(c) Where any doubt arises as to the customs and usages of the Tribe, the Court, either on its own motion or the motion of any party, may subpoena and request the advice of elders and councilors familiar with those customs and usages.

CIVIL PROCEDURE

Section 12. Court Action When No Procedure Provided

In any case in which no specific procedure is provided for by Tribal law or Court rule the Court may proceed in any lawful fashion not inconsistent with Tribal law, the rules of the Court, or the Indian Civil Rights Act.

CIVIL PROCEDURE

CHAPTER ONE

COMMENCEMENT OF ACTION: PLEADINGS, MOTIONS AND ORDERS

Section 101. Commencement of Action

A civil action is commenced by filing a complaint with the Court.

Section 102. One Form of Action

There shall be one form of action to be known as a "civil action".

Section 103. "Claim" Defined

As used in this Act, the term "claim" means any right of action which may be asserted in a civil action or proceeding and includes, but is not limited to, a right of action created by statute.

Section 104. Notice of Pendency of Action

Upon the filing of a complaint in the District Court, the action is pending so as to charge third persons with notice of its pendency. While an action is pending, no third person shall acquire an interest in the subject matter of the suit as against the plaintiff's title, except as provided in Sections 105 and 106 of this Act.

Section 105. Notice of Pendency Contingent Upon Service

Notice of the pendency of an action shall have no effect unless service of process is made upon the defendant within one hundred twenty (120) days after the filing of the petition.

Section 106. Special Notice for Actions Pending in Other Courts

No action pending in either state or federal court, or the court of any other Indian Tribe, shall constitute notice with respect to any real property or personal property located within the Tribal jurisdiction until a notice of

CIVIL PROCEDURE

pendency of the action, identifying the case and the court in which it is pending and giving the legal description of the land affected, or the description of the personal property and its location (if known) affected by the action, is filed of record in the office of the Clerk of the Tribal Court.

Section 107. Pleadings Allowed; Form of Motions

(a) **Pleadings.** There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Section 117; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the Court may order a reply to an answer or a third-party answer.

(b) Motions and Other Papers.

(1) An application to the Court for an order shall be by motion which, unless made during a hearing or trial, shall:

- (i) be made in writing;
- (ii) state with particularity the grounds therefore; and
- (iii) set forth the relief or order sought.

The requirement of a writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Section 111 of this Act.

Section 108. General Rules of Pleading

(a) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **Defenses; Form of Denials.** A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. Denials shall fairly meet the substance

CIVIL PROCEDURE

of the averments denied. He may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. When he intends to controvert all averments in a pleading, including averments of the grounds upon which the Court's jurisdiction depends, if any, he may do so by general denial subject to the obligation set forth in Section 111. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.

(c) **Affirmative Defenses.** In pleading to a preceeding pleading, a party shall set forth affirmatively each of the following defenses relied upon:

- (1) Accord and satisfaction;
- (2) Arbitration and award;
- (3) Assumption of risk;
- (4) Contributory negligence;
- (5) Discharge in bankruptcy;
- (6) Duress;
- (7) Estoppel;
- (8) Failure of consideration;
- (9) Fraud;
- (10) Illegality;
- (11) Injury by fellow servant;
- (12) Laches;
- (13) License;
- (14) Payment;
- (15) Release;
- (16) Res judicata;
- (17) Statute of frauds;
- (18) Statute of limitations;

CIVIL PROCEDURE

(19) Waiver;

(20) Any other matter constituting an avoidance or affirmative defense.

When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the Court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) **Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) **Pleading to Be Concise and Direct; Consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(2) A party may set forth and at trial rely upon two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or other grounds. All statements shall be made subject to the obligations set forth in Section 111 of this Act.

(f) **Construction of Pleadings.** All pleadings shall be liberally construed so as to do substantial justice.

Section 109. Pleading Special Matters

(a) **Capacity.** It is not necessary to aver or assert the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the Court, if necessary. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and that party shall have the burden of proof on that issue.

(b) **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

CIVIL PROCEDURE

(c) **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence of conditions precedent shall be made specifically and with particularity.

(d) **Official Document or Act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **Judgment.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) **Time and Place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special Damage.** When items of special damage are claimed, they shall be specifically stated, but specific amounts need not be alleged in order to obtain judgment in the amount to which the party is entitled.

Section 110. Form of Pleadings, Motions, and Briefs

(a) **Caption; Names of Parties.** Every pleading shall contain a caption setting forth the name of the Court, the title of the action, the file number, and a designation of the type of pleading in the terms expressed in Section 107(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties. In the initial third party complaint, counterclaim, cross-claim, motion and petition in intervention or a pleading by a party suing or being sued in a representative capacity, appropriate designations of all affected parties shall be made and their names stated. Thereafter, papers relating to such matters may contain only the name of the first party in each category with an appropriate indication of other parties.

(b) **Paragraphs; Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings, or motions, or briefs. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by Reference; Exhibits.** Statements in a pleading, or motion, or brief may be adopted by reference in a different part of the same pleading or in another pleading or in any motion or brief. A copy of any

CIVIL PROCEDURE

written instrument which is an exhibit to a pleading, or a motion, or a brief is a part thereof for all purposes.

Section 111. Signing of Pleadings

Every pleading of a party represented by an licensed attorney or advocate shall be signed by at least one attorney or advocate of record in his individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney or advocate shall sign his pleading and state his address and telephone number. Except when otherwise specifically provided by Rule or statute, pleadings need not be verified or accompanied by affidavit. The English and American Common Law Rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is not applicable in the Tribal Courts. The signature of an attorney or advocate constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this Section it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this Section an attorney or advocate may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Section 112. Defenses and Objections - When and How Presented-By Pleadings or Motions - Motion for Judgment on the Pleadings

(a) When Presented.

(1) A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, except when service is made under any one of Sections 216, 218 or 221 of this Act and a different time is prescribed in the order of Court, or under the statute of the Tribe.

A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the Court, within 20 days after service of the order unless the order otherwise directs. The Tribe or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the Attorney General (or the Chief Executive Officer of the Tribe if there is no Attorney General) of the pleading in which the claim is asserted, provided that no default judgment shall be entered against the Tribe, and upon affidavit of the Chief Executive Officer of the Tribe that the Tribe has no attorney but that an attorney contract is pending approval with the Bureau of Indian Affairs,

CIVIL PROCEDURE

the Court shall allow the Tribe to answer within twenty (20) days after approval of the Attorney contract or within sixty (60) days after service, whichever is later.

The service of a motion permitted under this Section alters these periods of time as follows, unless a different time is fixed by order of the Court: (1) if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the Court's action; (2) if the Court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(2) Within the time in which an answer may be served, a defendant may file any entry of appearance and reserve twenty (20) additional days to answer or otherwise defend. Any entry of appearance shall extend the time to respond twenty (20) days from the last date for answering and is a waiver of all defenses numbered 2, 3, 4, 5, and 9 of paragraph (b) of this Section, provided, that a waiver of sovereign immunity shall not be implied under defense numbered 9 of paragraph (b) of this Section since a defense based upon sovereign immunity is a defense to the subject matter jurisdiction of the Court and not a defense to the parties capacity to be sued.

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) Lack of jurisdiction over the subject matter;
- (2) Lack of jurisdiction over the person;
- (3) Improper venue or forum non conveniens;
- (4) Insufficiency of process;
- (5) Insufficiency of service of process;
- (6) Failure to state a claim upon which relief can be granted;
- (7) Failure to join a party under Section 303;
- (8) Another action pending between the same parties for the same claim;
- (9) Lack of capacity of a party to be sued; and
- (10) Lack of capacity of a party to sue.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party

CIVIL PROCEDURE

is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Section 905, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Section 905. Every motion to dismiss shall be accompanied by a concise brief in support of that motion unless waived by order of the Court.

(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Section 905, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Section 905. Every motion for judgment on the pleadings shall be accompanied by a concise brief in support of that motion unless waived by order of the Court.

(d) **Preliminary Hearings.** The defenses specifically enumerated (1)-(10) in subdivision (b) of this Section, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this Section shall be heard and determined before trial on application of any party, unless the Court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the Court is not obeyed within 10 days after notice of the order or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or make such order as it deems just. Such motions are not favored.

(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by this Act, upon motion made by a party within 20 days after the service of the pleading upon him or upon the Court's own initiative at any time, the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. If, on a motion to strike an insufficient defense, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for partial summary judgment and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by the rules relating to summary judgment.

(g) **Consolidation of Defenses in Motion.** A party who makes a motion under this Section may join with it any other motions herein provided for and then available to him. If a party makes a motion under this Section but omits therefrom any defense or objection then available to him which this Section permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision

CIVIL PROCEDURE

(h) (2) hereof on any of the grounds there stated. The Court may, in its discretion, permit a party to amend his motion by stating additional defenses or objections at any time prior to a decision on the motion.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue or forum non conveniens, insufficiency of process, insufficiency of service of process or lack of capacity of a party to sue is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this Section nor included in a responsive pleading or an amendment thereof permitted by Section 118(a) to be made as a matter of course or (C) if a permissive counterclaim is filed pursuant to Section 114(b).

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Section 303, and an objection of failure to state a legal defense to a claim, and a defense of another action pending may be made in any pleading permitted or ordered under Section 107(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it is determined, upon suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action.

Section 113. Final Dismissal on Failure to Amend

On granting a motion to dismiss a claim for relief, the Court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed which should normally be ten (10) days absent good cause for a shorter or longer time. If the amended pleading is not filed within the time allowed, final judgment of dismissal with prejudice shall be entered on motion except in cases of excusable neglect. In such cases amendment shall be made by the party in default within a time specified by the Court for filing an amended pleading. Within the time allowed by the Court for filing an amended pleading, a plaintiff may voluntarily dismiss the action without prejudice.

Section 114. Counterclaim and Cross-Claim

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action or

CIVIL PROCEDURE

(2) the opposing party brought suit upon his claim by attachment or other process by which the Court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any other counterclaim under this Section. A party pleading a compulsory counterclaim does not thereby waive any defenses the pleader may otherwise have which are otherwise properly raised.

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) **Counterclaim Exceeding Opposing Claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **Counterclaim Against the Tribe.** This Act shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the Tribe or an officer or agency thereof. A compulsory counterclaim does not waive the defense of sovereign immunity when made by the Tribe or an officer or an agency thereof. A permissive counterclaim waives the defense of sovereign immunity for the purpose of determining the permissive counterclaim stated by the Tribe, their officer, or agency, but does not waive such defense for any other purpose.

(e) **Counterclaim Maturing or Acquired After Pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the Court, be presented as a counterclaim by supplemental pleading.

(f) **Omitted Counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of Court set up the counterclaim by amendment, except that when such amendment is served within the time otherwise allowed for amendment without leave of the Court by Section 118(a) of this Act, he may set up such counterclaim by amendment without leave of the Court.

(g) **Cross-claim Against Co-party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) **Joinder of Additional Parties.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Sections 303 and 304.

(i) **Separate Trials; Separate Judgments.** If the Court orders separate trials as provided in Section 706(b), judgment on a counterclaim, cross-claim, or third party claim may be rendered in accordance with the terms of Section 901(b) when the Court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

CIVIL PROCEDURE

Section 115. Counterclaim: Effect of the Statutes of Limitation

(a) Where a counterclaim and the claim of the opposing party arise out of the same transaction or occurrence, the counterclaim shall not be barred by a statute of limitation notwithstanding that it was barred at the time the petition was filed, and the counterclaimant shall not be precluded from recovering an affirmative judgment.

(b) Where a counterclaim and the claim of the opposing party:

(1) Do not arise out of the same transaction or occurrence; and

(2) Both claims are for money judgments; and

(3) Both claims had accrued before either was barred by a statute of limitation; and

(4) The counterclaim is barred by a statute of limitation at the time that it is asserted, whether in an answer or an amended answer, the counterclaim may be asserted only to reduce the opposing party's claim.

(c) Where a counterclaim was barred by a statute of limitation before the claim of the opposing party arose, the barred counterclaim cannot be used for any purpose.

Section 116. Counterclaims Against Assigned Claims

A party, other than a holder in due course, who acquired a claim by assignment or otherwise, takes the claim subject to any defenses or counterclaims that could have been asserted against the person from whom he acquired the claim, but the recovery on a counterclaim may be asserted against the assignee only to reduce the recovery of the opposing party.

Section 117. Third-Party Practice

(a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him, or who is or may be liable to him on a claim arising out of the transaction or occurrence that is the subject matter of any one or more of the claim(s) being asserted against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Section 112 and his counterclaims against the third-party plaintiff and cross-

CIVIL PROCEDURE

claims against other third-party defendants as provided in Section 114. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Section 112 and his counterclaims and cross-claims as provided in Section 114. A third-party defendant may proceed under this Section against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. Any party may move to strike the third-party claim, or for its severance or separate trial.

(b) **When Plaintiff May Bring in Third Party.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this Section would entitle a defendant to do so.

(c) **Party Defendants in Real Property Actions.** In an action involving real property, any person appearing in any manner in the title thereto, or claiming or appearing to claim some interest in the real property involved, may be included as a party defendant by naming such person as a party defendant in the caption of the complaint; and when such person is made a defendant in the body of the complaint under the appellation of substantially the following words, "said defendant named herein claims some right, title, lien, estate, encumbrance, claim, assessment, or interest in and to the real property involved herein, adverse to plaintiff which constitutes a cloud upon the title of plaintiff and defendant has no right, title, lien, estate, encumbrance, claim, assessment, or interest, either in law or in equity, in and to the real property involved herein", that same is sufficient to include any and all claims, known or unknown, that such defendant may have in and to the real property involved in such case, it not being necessary to set out the reason for such claim or claims in the complaint or other pleading for such person being made a party defendant.

Section 118. Amended and Supplemental Pleadings

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served, including amendments to add omitted counterclaims or cross-claims or to add or drop parties. Otherwise a party may amend his pleading only by leave of the Court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the Court otherwise orders.

(b) **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they

CIVIL PROCEDURE

shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence. Where the pretrial conference order has superseded the pleadings, the pre-trial order is controlling and it is sufficient to amend the order and the pleadings need not be amended.

(c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the Attorney General, or his designee, or the Attorney General of the Tribe, or an agency or officer thereof who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) thereof with respect to the Tribe or any agency or officer thereof to be brought into the action as a defendant.

(d) **Supplemental Pleadings.** Upon motion of a party the Court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the Court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. A supplemental pleading will relate back to the original pleading if it arises out of the conduct, transaction, or occurrence set forth in the original pleading.

Section 119. Pre-Trial Procedure; Formulating Issues

(a) In any action, the Court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

CIVIL PROCEDURE

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

(b) The Court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The Court in its discretion may establish by Rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Section 120. Lost Pleadings

If a pleading be lost or withheld by any person, the Court may allow a copy thereof to be substituted.

Section 121. Tenders of Money or Property

When a tender of money or property is alleged in any pleading, it shall not be necessary to deposit the money or property in Court when the pleading is filed, but it shall be sufficient if the money or property is deposited in Court at trial, or when ordered by the Court.

Section 122. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff: By Stipulation. Subject to the provisions of Section 307 or Section 802 of this statute of the Tribe, an action may be dismissed by the plaintiff without order of Court

CIVIL PROCEDURE

(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion of summary judgment, whichever first occurs, or

(ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal without the consent of the defendants operates as an adjudication upon the merits when filed by a plaintiff who has once voluntarily dismissed, without the consent of the defendants, in any Court of any Indian Tribe, the United States, or any state an action based on or including the same claim, unless such previous dismissal was entered due to inability to obtain personal jurisdiction over an indispensable party or lack of subject matter jurisdiction in the Court in which the case was previously filed. If the plaintiff claims either or both of these exceptions, it shall so state in its notice of dismissal and shall apply to the District Court, upon notice to all adverse parties for an order determining that the previous dismissal was within one or both of the two stated exceptions and that the plaintiff is entitled to dismiss the current action without prejudice. The Court may grant such application in its discretion and allow the plaintiff to dismiss without prejudice on such terms as are just, due regard being had for costs, attorney fees, and inconvenience of the defendants, and any apparent motive to harass, embarrass, or delay the defendants.

(2) By Order of the Court. Except as provided in paragraph (1) of this subdivision of this Section, an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the Court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with this Act, any Court rule, or any order of the Court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the Court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The Court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the Court renders judgment on the merits against the plaintiff, the Court shall make findings as provided in Section 751(a). Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Section, other than a dismissal for lack of jurisdiction, or for failure to join a party under Section 303, operates as an adjudication upon the merits.

(c) **Dismissal of Counterclaim, Cross-Claim, or Third Party Claim.** The provisions of this Section apply to the dismissal of any counterclaim, cross-

CIVIL PROCEDURE

claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this Section shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.