

# **RULES OF 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 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 Chairperson of the Kickapoo Tribe of Indians of Oklahoma, unless a different meaning is attributed to this term in an 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 restricted Indian land.

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

(e) "Tribal Legislative Body" means the Business Committee of the Kickapoo Tribe of Indians 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. SS1151 whether within or without the reservation which is subject to the jurisdiction of the Tribe.

(g) "Attorney General" means the Tribal Attorney.

**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 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 recognizing Tribal common law marriages and divorces, and provide for the custody of children and division of property in such divorces.

**Section 8. Court Costs Not Charged to Tribe**

The Tribe, its officers, employees, agents, or political subdivisions acting in the 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 presidential 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 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.

**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.

## 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**

Notice of 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 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 order a reply to an answer or a third-party answer.

(b) **Motion 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, 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 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 proceeding 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;
- (19) Waiver;
- (20) Any one 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 averred generally.

(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 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 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 as 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 reply to a counterclaim, within 60 days after service upon the Attorney General ( or the Chief Executive 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. 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 is 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 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 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 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 (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 the 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 (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 or 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, its 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 Section 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

jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

**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 counter claimant 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 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-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 defendant 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 in 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 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 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:

- (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, at 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 any statute of the Tribe, an action may be dismissed by the plaintiff without order of Court

(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 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 harrass, 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 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 otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Section, other than dismissal for lack of jurisdiction, or for failure to join a party under this 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-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.