

The sole relevant issue at this point in the appeal is jurisdiction; specifically whether the trial court had proper subject matter jurisdiction over this personal injury action.

III. Discussion

Since subject matter jurisdiction constitutes the core element of any court's ability to adjudicate a case, it is black letter law that it is not waivable and cannot be created by consent of the parties. *See e.g.* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS (Fifth Ed., 1995) 27-31. As a necessary corollary, the issue of subject matter jurisdiction may be raised for the first time on appeal. *See e.g.* Federal Rule of Civil Procedure (FRCP) 12(h)(3) and Rosebud Sioux Tribe Law and Order Code Title IV, Rule 12(g).²

Since the issue of subject matter jurisdiction was not litigated below, there is a completely inadequate record as a matter of fact and law from which this Court might properly resolve this issue. For example, it is clear from the briefs on appeal and oral argument before this Court that it is now a hotly contested fact whether the accident took place on Todd County Road 310 or Bureau of Indian Affairs (BIA) Road 7. If it occurred on the former, it looks like a *Strate v. A-1 Contractors*³ situation and potentially no tribal jurisdiction.⁴ If it occurred on the latter, tribal court jurisdiction is a virtual certainty.

In addition to the *factual* questions relevant to discussing whether the case is *Strate*-like, there may be *legal* arguments that are pertinent to, perhaps even dispositive of, the jurisdictional question. These include (but are not limited to) for example whether the Ft. Laramie Treaty of 1868 or any other treaty or piece of federal legislation illuminates or fully resolves the issue. Again, it is worth noting that no such federal or treaty law existed in *Strate*.

IV. Conclusion

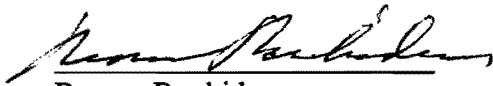
For all of the above stated reasons, the decision of the tribal court, wherein it *assumed* subject matter jurisdiction, is reversed and remanded for a full and complete hearing to establish both the necessary factual basis and sufficient legal rationale for a proper finding and conclusion as to subject matter jurisdiction.

² Rule 12(g) provides: Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action.

³ 520 U.S. 438 (1997) (tribal court does not have subject matter jurisdiction over tort action involving two non-Indians as the result of a car accident that occurred on a state highway within the reservation).

⁴ The Court employs the word *potentially* for several reasons. This case involves a tribal member and *A-1 Contractors* did not. In addition, the record in this case, at least to date, is completely devoid of the legal history of Todd County Road 310 as to the ownership of the underlying land, the granting of rights of way (if any) and the terms of such grants, etc. Therefore it is by no means clear at this point that Todd County Road 310 is legally identical to State Highway 8 in *Strate*.

IT IS SO ORDERED.



Ramon Roubideaux
Chief Justice



Patrick Lee
Associate Justice



Frank Pommersheim
Associate Justice

Dated May 10, 2002.

IN THE
SOUTHERN DISTRICT COURT OF TEXAS

The undersigned Clerk of the Court has caused the
Appellate Docket Card to be filed and
entered on the docket in
on the 13 day of June 2002
