Greg Hicks:

First of all just to say a word of welcome to everyone. A little bit later, we’ll have an official ceremonial welcome from one of our speakers Djambawa Marawili from Northern Territories, Australia. And just to thank you all for coming and to say a little bit about what brings us here. Some of you are probably aware that there is a show that is just opening up at the Seattle Arts Museum: Ancestral Modern Aboriginal Art, the [inaudible] Collection. And it’s going to be open from the 31st officially through September 2nd at the Seattle Art Museum. And many of the images there involve presentations and representations of landscapes-space, place, people’s relationship with landscapes that sustain them. And we were offered the idea by Margaret Levy that there would be wonderful opportunity here because the art work has played a very important role in substantiating the claims of aboriginal people in Australia to their sense of landscape, their ownership of the natural resources on which they may have depended and been engaged with really through time immemorial. And so we were think that we’d have this opportunity to talk about this great problematic of how indigenous people go about demonstrating, substantiating their claims, the landscape, the resources in the legal forums that we all have-the courts of the United States, the courts of Australia. Just a very, sometimes difficult challenging process of how one presents understandings, things that are known in language that courts can hear and understand and hopefully respond to it in effort to try to do substantial justice after many years. And our speakers will all be engaging that in one way or another. Let me just say a few words of introduction to each of them. And I’ll be hanging back as our moderator. We have wonderful experts here very knowledgeable people with real subtle understandings of all of these processes and so we’ll be allowing ourselves just to be guided by them and being led to a better understanding of some of these issues.

A final word, just a plug to the Kempsie, Pflueger endowment for environmental advocacy here at the law school has provided some very helpful funding to make it possible for our visitors to come from so very far away and just to express our thanks to the Kempsie, Pflueger fund for providing some of the resources. Others have contributed, but just to acknowledge that…

The starting point is a case the Blue Mud Bay case so we are going to be starting off with that after I’ve introduced our speakers. It involved a rather remarkable development under Australian law in 2008 where historical fishing rights or rights to [[inaudible](agreed?)] resources were being claimed and established as the result of the litigation and one of our speakers was one of the leaders in insisting that the case be brought. There had been an earlier determination that the Aboriginal people might have ownership of the seabed itself on between the swings of tide. If you imagine the mean high tide and the mean low tide that those lands were owned when they were contiguous to aboriginal lands, they were owned by the aboriginal peoples. But what the Blue Mud Bay case established was actual ownership of the water resources themselves and of the creatures, of course that would live in those water resources. Hugely important as a practical matter for being able to control recreational fishing, commercial fishing in these tidal waters and also in the ocean creeks that flow inland from the ocean. And so a very significant victory that in many ways depended upon the introduction of this evidence and not just archeological evidence but contemporary images, contemporary artwork intended to describe, present, corroborate these claims of ownership. And so we will be looking as we go forward today at different efforts of this sort of how to present an understanding of ownership, connectedness, landscape, again in language that legal systems can
hear, understand, and hopefully respond to.

So let me introduce the members of our panel here and we’ll go forward from there and we’ll begin with the presentation Blue Mud Bay case. First of all, I’ll just go down as people are seated at the table here: Frances Morphy who is a fellow of the Center for Aboriginal Economic Policy Research at the Australian National University. She is a specialist and the anthropology and linguistics of the Yolngu speaking peoples of Northeast Arnhem Land in the Northern Territories of Australia. A specialist also, whose social and cultural and aspects of how aboriginal culture has come to be encapsulated in or nested within the generality of modern Australia, political culture and social culture. And in particular focusing on questions of homelands movement and native title to lands and natural resources. Then to Frances’s right is Djambawa Marawili, an artist, a leader of the Madarapa clan of the Yolngu people. And to say artist is to say too little. This is a person whose work is not only represented in collections and has been curated in leading collections not only in Australia and around the world, but whose artistry has really been used as a vehicle for the presentation of culture and really for the fighting of battles to vindicate aboriginal rights. He is a holder of the Australia Medal, a national award for his achievements in the arts and representations of aboriginal peoples. And the case that we are focusing on again, the Blue Mud Bay case, he was the coordinator of the Federal Court Sea claim, the set of actions that ultimately led to this victory in the Blue Mud Bay case. Then we have Will Stubbs who is the coordinator of cultural activities of the Bukanandlagandinmulka Center in the Northern Territories representing aboriginal artists in Australia in the ability to move their artistic production to the world at large, to get fair prices for the art as it goes into the art world and a major person in just this process of the presentation of culture through art and all that that carries with it.

Then we have Ron Whiteberg[inaudible] Who is the executive director of the Native American Law Center here at the University of Washington. Ron is knowledgeable in, has worked with Washington shellfish litigation and very grateful to have Ron with us today.

And finally, at the end, Natalie Landriff who is a staff attorney of the Native American Rights Fund. Natalie is the lead counsel in the second case that we are going to be hearing the most about today and that’s the Ayak against Gutierrez case. It’s an aboriginal fishing rights case that was brought to regain access to historical fishing areas by the Ayak, Tatyak, Keneka, Nengualek and the Port Graham peoples of Alaska. And I think one of the things we’re going to be listening for as the presentations unfold is the kinds of comparisons and contrasts that emerge as we look at two different dominant legal systems—the American and Australian and their engagements with aboriginal and indigenous rights and seeing how these different formal legal structures in a sense of make demands of native and indigenous claims what they have to say, what they have to be able to claim for themselves, the types of evidence that is viewed as significant and persuasive. This is of course one of the big challenges, is this ability to present a understanding of reality and an understanding of justice in terms that the legal system will be able to hear. And as we go forward, we’ll be getting a lot of points of contrast and connection between the Australian legal systems and American legal systems, forgive me, and their engagement with the presentation of indigenous rights claims both in the United States and in Australia.

So with that I’d like to just turn over the discussion to our panelists. We’ll begin with a presentation of the Blue Mud Bay story. But first, a greeting, a blessing, and welcome. Thank you again.

Djambawa Marawili:

This is just to bring us together and let our feeling can be really touching each and other by feeling heartbeats.

[Aboriginal blessing 9:42-13:14]
Thank you very much.

Frances Morphy:

Okay can everybody hear me okay? First of all I want to thank you for organizing this event for us. It is a great opportunity to hear what is going on in this part of the world as well as to tell you the story from Blue Mud Bay.

I thought I’d just give you a few little facts and figures about Australia’s Northern Territory just as a sort of context for Blue Mud Bay. The Northern Territory of Australia is pretty large. It’s not quite as big as Alaska but it’s a lot bigger than Texas. Its population is 192,000 people of whom one third are aboriginal people. And the majority of the nonindigenous population It’s concentrated in urban centers. The more I talk, the more you must be thinking, ‘sounds a little bit like Alaska’. I think the parallels are quite strong apart from the climate of course, which is probably as different from Alaska as it possibly could be. We’re in the tropics in the Northern Territory.

50% of the territory is freehold land, aboriginal freehold land, under the aboriginal land rights Act of the Northern Territory that was passed in 1976 and that includes 82% of the coastline which gives you some idea of how significant the Blue Mud Bay (this thing doesn’t seem to be working terribly well) the Blue Mud Bay case although it took places in a delimited part of Blue Mud Bay has relevance for 82% of the coastline of the Northern Territory. And here is a map of the Northern Territory just to give you an idea of where those lands are. The further north you go the more tropical it gets the further south you go, the more desert like it gets, the more arid. The area that we’re talking about today, this is Blue Mud Bay here and the case was actually run over this sort of top, the northern third of the Blue Mud Bay area. Though on this map, all the land that is grey and red is aboriginal land.

The Yolngu are sort of up, you can see on the map, on the sort of northeast corner of the Northern Territory. So we’re talking here about saltwater people, by and large. This map covers most of the territory of the Yolngu people and the Blue Mud Bay case was run over down here, these three bays here.

And I should explain at this stage is that the way we’re going to do this is I’m going to talk a little bit but when these two feel there is something that they want to add or put in, then I’m handing over the field to them.

Though the zones of interest in the Blue Mud Bay case were crucially the intertidal zone as was explained to us and so here is a map that shows the zones that were involved in the case. And that word at the top [inaudible] word[[inaudible]] which means: having the law. And as far as the Yolngu are concerned this whole area from the land to the intertidal zone and into the coastal waters has law, it has Yolngu law.

And now I’m coming to the bit where the others might want to chip in a bit. The map, the sort of conventional map is a little bit of the map that we drew up as part of the evidence for the claim. This took us five years, something like five years to map the whole area. And what I put this map on is to show how the sea is owned. It’s a complex story. Each of those different shaded areas are named parts of the sea that belong to different clans. And the area, the song that you just heard Djambawa singing refers to [inaudible]. The ancestral being [inaudible] is going through. So these are the tracks of ancestral beings and these are the area. So this [inaudible]is very important, creator ancestral being for Djambawa’s clan.

Djambawa:
I was just singing from Momoro towards the private water to the [inaudible] ancestral being. Because both sides, there is different patterns and design as you say, there is a door[inaudible]along there and also other side along there and here it’s, [inaudible]?what shall we call it? You know it’s just the saltwater going into [inaudible]into the river and [inaudible]?to become brackish water over there.

Frances:

So the way we drew the map was this is the wet season so, in the wet season [inaudible] is flowing strongly off the land and filling up the bay but in the dry season, this Momorro creeps back in and the Whittier goes back up. Because of the ecology of this coastline, the distinctions that white fellows make, as we call them, between land and sea is not a firm line in this area here. The two things are joined together and that the way that they join together is a very important part of the way that people think about country.

Djambawa Marawili:

Australian Aboriginal

Will Stubbs:

So the task of explaining to a court the differences in your cultural thought with western linear modalities is the same problem we confront here again today where we come to a new place and the problem that people on both sides of the cultural divide face every day and trying to explain to each other what it is they mean. One of the ways to understand what Frances and Djambawa and others including Professor Howard Morphy who is in the front row here, has achieved over that five year period was to transfer this bark painting into this map. So map making and the reverence for maps that is inherent in western culture somehow validates this painting which when western people can understanding this painting as a map, then they suddenly have regard for it and obviously in a court environment this is a necessary aspect to tie it to a western understanding of land. One of the ways to understand what’s happening in the bark painting which is also happening in the map in the way Frances and Djambawa were just talking about it is through the use of water as a modeling tool for modeling the philosophy of Yolngu thought. So the actions, interactions and behavior of water is a tool in Yolngu thought the same way, for instance numbers or binary thought processes are in western philosophical matrix, so when Frances and Djambawa say that this water doesn’t divide at the coastline as it does in western thought the two being distinct land and water and opposite. Land is a continuum just as land is a continuum in Yolngu thought and it’s actually present in this painting. So in this what Djambawa was talking about, the Momorro which he sung the oceanic [inaudible] saltwater flowing in towards what he called the brackish water it is talking about estuine, mixture of salt and fresh water. This is the Widdiar[inaudible] That Frances talked about that recedes during the dry season. This is depicted on the painting with the elliptical shapes passing down between these two snakes which are an embodiment of sand, of many things. One of the things he said, Yolngu thought is metaphoric, and poetic, and many leveled and the law is the same. And also, that makes it difficult to translate from one system to another. But this is a sand bar for instance, that’s ever-shifting in the mouth of this estruine waters that’s flowing through. That fresh water mixed with the salt goes into the coastal estate of[inaudible] and then flows out into the [inaudible]state we talked about from one half of the world from the [inaudible]half of the world. We probably needed to start with the binary[inaudible]system but we’ll just skip over that. And then when it gets there you can see at the mouth of the snake, the snakes do a lot of things, but they communicate with snakes in other estuine systems down the coast not depicted in this map through electricity, but another thing that’s happening in this instances is that you’ll see a shape underneath the mouth of the snake and this is a cloud shape, this is a familiar shape in Northeast[inaudible] languages, has as much rain as Seattle, but intensely in a four month period, probably has two
meters in a four month period and then no rain the entire rest of the season, so an extremely hot environment, tropical. And these wet season thunderheads sit on the horizon and they are a metaphor for the feminine, for the maternal. And whilst this painting is being in the geographical sense to map the geography of ownership of land in this vicinity, it’s also actually a spiritual map of the course of the spirit through the environment and in a cyclical way through eternity and what the water does when it gets to the edge of the [inaudible] horizon is that it transforms, still maintaining its essence as water, but it becomes water vapor, is taken up into the feminine cumulonimbus clouds sitting on the horizon which then sing their way to the escarpment and give birth to life-giving fresh water at the top of this water system. And in that summary, very brief parody of a summary, really compared to the complexity of the songs and law that it’s trying to communicate, you can understand why, then when Frances says that your conception of sea and land is not separate is inherent because this cycle which is the cycle that guarantees the perpetual existence of your grandmother’s spirit or soul cannot be broken at any point other than to jeopardize her continued existence as an eternal soul. So those of you who have a religious bent will understand the significance of that and the importance and the seriousness with which that needs to be protected and that’s why I suppose just picking up on what Frances was saying about the fact that there’s a continuum from fresh to salt and then into water vapor and back to rain and so on.

Frances Morphy:

Djambawa do you want to say anything more about this painting before I…

Djambawa Marawili:

There is three or five of [inaudible] there, [inaudible] is that one there another side too and I can see there is [inaudible] from in out to where the snake is. They are combined. When they get together not only just a pattern but in the land down south they have a relationship too. [inaudible]? these elements are mother and a child. [inaudible]? also, the patterns and the country all of those names and also those patterns and designs they are all tightly connected on [inaudible] country. And we call it [inaudible]? but you can see different names.

Frances:

These are all the Yolngu names, all around.

Djambawa Marawili:

The Yolngu names was given from our ancestors to grandfather to our father and then to us. It was passing it on. Early days where the European or [inaudible] came in, they didn’t know how to describe, my people didn’t know how to describe, they didn’t know how to use pen and pencil, but they did paint it like this just to show themselves that they had a right on that country by painting like this. And maybe later we might see the real old painting, would be on there is it? Yeah.

Frances Morphy:

So that’s a brief introduction to the complexity of the Yolngu system and this is what they were up against in Blue Mud Bay. This is settler Australian law or laws in the Blue Mud Bay case. The Blue Mud Bay case was very unusual because it was actually run under two laws. It was run both under the Native Title Act of 1996 and also under the earlier Land Rights Act, these are both commonwealth acts, but whereas native title applies to the whole of Australia, the Aboriginal Land Rights Northern Territory Act is specific to the Northern Territory. The land law, and land law relating to aboriginal people in Australia is incredibly complex there are many different laws. And
there were other laws that were at play in this case as well. There was the Northern Territories fisheries act and also the so called common law right to fish and the public right of navigation. All of these different bits of white law were at play in the courtroom that these guys had to give evidence in. And the big question, in contrast to the Yolngu way of looking at all of this, the white law is very compartmentalized, so there’s the land, the intertidal zone, and the coastal waters, but then there is the land of the intertidal zone and the water of the intertidal zone. And the big question at issue in this case was does this water count as sea, in which case it’s only covered by nonexclusive native title or is it covered by the land rights act because the land rights act goes down to the low water mark and that was the whole thing that this case was about. It was kind of like you know that game scissors, paper, stone, which law covers which law, which law beats which law. And it was entirely a case really about the Australian legal system which is what it is, it’s a hard thing for people to be witnesses in a case where what they are proving is their own law just so that it’s able to be translated and then subjected to this process. And it took three goes. It was heard under the conditions of the native title act which means that it was a federal law case. It was held under a federal judge. It then went to appeal to a full bench of the federal court and then finally to the high court of Australia. And the whole process took about five years. And in the end, the decision, the momentous decision was that yes indeed, the land rights act applies. And because the land rights act has a permit system, so this land is freehold land and therefor people come on without permission are trespassing, there is a process of permits which is administered by the land council. So the permit system applies now to this water but so does the Northern Territory Fisheries Act. So at the moment there is a kind of standoff while the northern Territory government tries to persuade these guys to give up the rights that they’ve just won to have permits over this area in exchange for cash, basically. And their first attempt to put this to people has been rejected. And so they are not presumably thinking about something else. We don’t know. We don’t know.

That’s it in a nut shell. I’ve just got a few

Djambawa Marawili:

[[inaudible]]

One of the things that we did at Blue Mud Bay. Family, we are really established there now, one of my family went up the coast and he found a crocodile had washed up by the fisheries and of course the crocodile in that area in [inaudible] Bay there is a story about crocodile who made the land at [inaudible] Bay. I’m talking about [inaudible]. That’s where one of my family found a crocodile head wash up on the bay and he came while my father was still alive and came ot tell us, ‘now look, what are we going to do with these fisheries now?’ ‘Why do we want to let these people shoot all the crocodiles?’ And that’s why we started. His name was[inaudible]. He’s one of my father’s nephew and that’s why we became to start to claim this bay. And it was pretty hard because of course anybody go into a bay and catch a lot of [inaudible] shoot all the crocodiles. But we declare in that place where we are, there is a very ancestral messages on the land that was given from our grandfather, from our ancestral being to our grandfathers as I said before, to us and we didn’t write it on the rule book or on the law book, but it is written in our minds and it’s always passing on to another generation who are becoming the owners. And that’s why we did start it to claim this place.

Will Stubbs:

And [inaudible] for the [inaudible] which at that time Djumbawa was the chairman of. And he brought his concern where he just explained that Waca was his [inaudible] his cultural manager has the authority to go into this very sacred place[inaudible] the crocodile’s nest Djumbawa’s [inaudible] ancestral spirit area from which the power of his clan was drawn which is the place that he can’t go into without proper permission and yet there was a camp established by a casual nonindigenous fisherman on this land in breach of the aboriginal Land Rights Act so he was
actually already breaking the law by running big nets across the creek and shooting all the crocodiles so that they wouldn’t interfere with his catch and in this instance severing the head of a crocodile and keeping that as a trophy in his camp with full sense of impunity and probably practical impunity in those days. It’s a sacrilege that’s difficult to convey. Perhaps you’ve probably got the sense of it by now. I don’t have to emphasize it too much, but it was an offense and Djumbawa as his father’s prime minister if you like had the responsibility to attempt to do something and what he did was groundbreaking and as he explained art is the text through which these laws are handed down and he was able to marshal a band of 48 artists responsible for multiple different areas along the entire coastline of Northeast[inaudible] so the key to the Yonglu history of political activism within this sea has been unity. And at every turn, they have been able to saddle up together side-by-side despite the fact that each of these laws have a different identity and that’s their point, when it comes to these instances, they struggle together and they presented a collection of infinite beauty called the Saltwater Collection which is now part of the Australian National Maritime Museum and that painting that we were looking at before is one item which was prepared by a senior man, [inaudible] . And he along with Djambawa were able to persuade people to release this secret information of the identity of their land and their connection to the sea. And I’ll just add one more thought that always helps me understand things that Djambawa himself explained to me many years ago that the land’s essence is complete, that it’s whole, that it has everything it needs to sustain itself, but it had one shortcoming if you like, it wasn’t able to express itself. And so in Djambawa’s words, it grew a tongue and that is the Yolngu people and they exist to express the identity of their land through song and dance and to speak on behalf of the land and that is their reason for being. And there is a certain humility there they are not saying that they are crucial to the land in any other regard. But large parts of Australia has had its tongue cut out and Djambawa to speak on behalf of the land in its broader definition including the season bring that home to completion and protect this birth right.

**Howard Morphy:**

While he’s got back to[inaudible]Can I say something that might clarify slightly[inaudible]case? It was held under two…As Frances said it was held under two different bodies of law, one was the Native Title Act and the other was the Northern Territory Land Rights Act. Actually it was quite difficult in many ways to prove ownership under the Native Title Act. Most other people thought that that would be a hard thing to prove. We were quite confident that it wouldn’t be because under the Native Title Act, what one has to demonstrate is connection to land over time and the maintenance of a body of law and custom. And as far as the Native Title claim was concerned, it was perfectly reasonable to operate that claim on the basis of that whole area from coastal water to land. And in the end they decided to operate that case on that basis. When it came to determining what kind of rights Native Title grants, it can move from anything to almost a form of land ownership to something that is relatively limited. So in the case of the sea, under Australian law, there are enormous constraints on what Native Title can grant you. In fact, those restraints are such that it can almost be meaningless. And up until that point in time, the government of the Northern Territory and the fishermen had said in the intertidal zone, then actually it’s the rights of the sea that operate when the tide is in. But under the Land Rights Act it said that the Yolngu own the land down to the low water mark so that there was this extraordinary contradiction between the fact that when the tide was out Yolngu owned the land and could drive people off. When the tide came in, then all the fisherman, all the crabsbers, everyone else came in and occupied that land. So there was an enormous tension. So there was a possibility of violating that. And also the thing that people were most worried about was the water themselves or the rivers that flow in because if they’d have lost this particular case, people may have said, well, the sea is contiguous with the river and in fact people could go up and down the rivers. So the context of the high court, the decision, as Frances implied, was what did they mean when they said people owned the land down to the low water mark? Did they really think that when the tide came in, it was no longer land? And the high court eventually made that judgment. We think that under the land rights act, when the parliament legislated that it was only land down to the sea, they meant that when the tide came in, it was still
their land. So that was the nub of the legal case in the high court that the [inaudible] but the Yolngu set place in the case was absolutely essential to establish their system of law and the reason that it didn’t seem so remarkable to us, that we were very confident that Yolngu would be able to do this, but aboriginal people have not been able to do that in nearly any other part of Australia. It was almost conceded by the opposition. At the end of the case, they said, ‘the case is so strong, we’ll accept that they actually do have native title over these areas but you’ll never get the intertidal zone’. And the high court returned that.

Audience 1:

Would you address how the courts came to take seriously the paintings as representation of law and ancient truth? Because it seems like that would not be easy.

Will Stubbs:

I was not involved in the court case directly. I know why they should have. I don’t know how they did. One thing I would just pickup from Howard. I don’t know how the geography is here, but in Northern Australia, we have 7 meter tides and I don’t know what the tidal range is here, but I think that’s quite a large range. Also we don’t have anything like your gradients so we’ve never seen mountains like you’ve got. It’s a very old flat continent and so seven meter tidal range in a flat place is a huge amount of area so that probably explains the significance that might not otherwise be, you know you’re really talking tens of kilometers of tidal range, thousands of square kilometers of tidal range47:01 and over the most rich areas, the ecosystem is a mangrove one, so everything happens in the mangrove. That’s where the mud crabs are, where the means of sustenance is. The area’s incredibly rich outside the intertidal zone. As Frances explained and as Djambawa was saying, that’s still Yolngu land as well but that is yet to be extracted from the Western system. I don’t know what the American system says but under British law, I think it’s the first time that any private group has owned the sea since before the magna carta. Howard’s grimacing, but it’s really close to that.

Howard Morphy:

It’s a technicality. I can answer that question. You partly answered it and Djambawa answered it. Just as all the names of people and places are in the songs, all the names are also in the paintings. So in the court case, a judge would have had, if you like, the map that we drew that had all of the place names and when Djambawa or other Yolngu would present their paintings, they likewise would have the same names in the painting. So the fact the analogy between their paintings and the maps were ones that actually stood up in the course of cross-examination. And the extraordinary thing was that we actually were aware of the nature that people might test the kind of evidence that Will was staying well the waters move in some places and in other places they don’t. So we did actually go with Djambawa on the sea. We mapped the ownership of these places, these areas of sea. We would in this boat see the sea’s being undifferentiated. Djambawa would say, very soon we’ll be going from Mudapa to Japu sea and we would go across, and there, you see, something has changed, we are now there. And when we tested that again, in other contexts, it was exactly the same place in relation to those sightings. Yolngu ownership of the sea is actually nearly as precise as the ownership of the land. But in areas where the sea itself changes, as they were talking about the movement of the fresh water because in the wet season, you determine who lands an area of land by whether you actually taste the fresh water on the surface that’s coming out of the river mouth. And the court accepted in that particular context that it was the characteristics of the water in the sea that was owned according to seasonality. So they accepted the nature of the flexible boundary in that case, but in many areas the boundaries are quite fixed.
I just wanted to go over into my. Those court[inaudible]they can go over[inaudible]On the same time, our people were doing arts on that time too. And also they were putting it on the story at the art center at Bucklanda. And while we were having that test case over at the court, we can always point that country, this is our country, this is our sea, this sea got name and beyond there the inside, there is a rock called that name. You can see the records from leaves coming out from [inaudible]bay going towards to the sea and into the sea. And this is what we were doing it. Of course it was really hard for them. Whereas for us it wasn’t really hard because we know the land, we know the sea, we know the rising of the clouds. We sing all those areas, song. We know all of those area’s song. We name our people[inaudible] Even I have three or four names. And that was really complicated for them to learn. But anyway, we told them if you don’t want to believe us, go to the art center there but this bay have this pattern you go and buy it. And they did.

Frances Morphy:

I just want to say a little bit too. There is a history to the use of bark paintings in legal cases in Australia. When the mine came, which we haven’t talked about, but there’s a big bauxite mine on the north of Blue Mud Bay and that happened before the Land Rights Act. And that land was excised against the will of the Yolngu people. And to try and stop that from happening, they sent a petition to parliament and that petition had a bark painting around it. So it’s well established in the Australian mind, I think including in the minds of lawyers that these paintings are like title deeds and that they are therefore admissible as real evidence in a court. Unlike, our map which we were not allowed to submit as evidence. It was deemed to be here say because they’d told us and we’d drawn it and somehow the opposition lawyers managed to get that argument through so that the map couldn’t actually be tendered as evidence, but the paintings could.

Will Stubbs:

I think while we’re looking at this painting over her, the Northern Territorians and you ask that question, ‘well how can you use that as evidence’, they’ll say ‘well can’t you see it’s there on the painting’. I suppose if we tried to break it down a little bit this is what this map is doing so what is happening in this painting is exactly what is happening in that map. So you can see different patterns there. Here, [inaudible]

In these wavy lines over here, this is the [inaudible] Ocean we were talking about that gives to the clouds that appear down at the bottom, the cloud shapes down at the bottom. And this is a design called [inaudible]which is indicating mangrove leaves banked up against the sandbar that’s going up through the middle. This is[inaudible] again. This is Djambawa’s half or[inaudible] . This is a painting from Gauadin and Gauadin’s identity and [inaudible]. But he has also depicted his mother, the balancing [inaudible], the [inaudible]from which all [inaudible]people spring, the [inaudible]. And that’s depicted on either side of this channel. And this is [inaudible]clan, [inaudible]. And here we have in Frances and Howard’s [inaudible], corresponding[inaudible] That I just talked about is the circular items, not [inaudible], but this map goes beyond this painting and goes back into the [inaudible]which is supporting the [inaudible]ocean as its child but we have that wavy line flooding into the bay there and interacting with the mangrove or estuine water coming out of the bay. So that’s how these paintings are readable. They are a text. As Djambawa said, they only are a dimension of the songs which are epic, incredibly voluminous, committed to memory. You heard one today. This is one tiny fraction of a fragment of a song that covers the entire land and as Djambawa and Howard and Frances have all said and Frances sort of refined it the other day, said, we were driving up through Stevens Pass, ‘People in the western system put their names onto a place, whereas in the Yolngu system, people’s names come from out of that place.’ So when Djambawa said he has three or four names, he is talking about his deeper names, some of which remain private, and those names are drawn directly from the songs. And in terms of contextual evidentiary proof of this, the first white fellow or pale skin that people acknowledge as having
come to this area was a guy called Matthew Flinders. In reading his journal, you see that he had an interaction with a man who stole an axe from his party called [inaudible]. And [inaudible], the [inaudible] we know who has passed away now quite a while ago so we can say his name. He is the father of the father of the father of that man who has gone to sleep because we are so boring. And in order to try to get the axe back Matthew Flanders captured a young twelve year old boy called Waka and they held Waka as a hostage to try and retrieve the axe and the Yolngu negotiated with him and said, ‘look we understand how upset you are. We bashed up Yungareen because he did the wrong thing. But unfortunately in a fit of pique after we bashed him up, he’s run away and taken the axe, so can we have Waka back please?’ And Waka in the course of it gave a word list to the partners, that’s getting off topic. Waka is the name of Djambawa’s cultural manager who found the crocodile’s head in the illegal fisherman’s camp at [inaudible]. So…

Djambawa:

There was another Waka beyond [inaudible] who was the man who came to land at the place at Blue Mud Bay during the [inaudible] they met one of the persons called Waka before the Flinders landed there and they met Waka. And the second time when we were going to the high court I took Waka number two. And they said, hey you Waka, yes, well this is another name too, than beyond there was a Waka name.

Will Stubbs:

But to complete that and because I don’t know the answer. I know that Waka would be named out of the songs, but I don’t know which song he is named out of. Which songs Waka’s name come from?

Djambawa:

Waka [inaudible]

Will Stubbs:

[inaudible]

Yeah, so now I just found out something which I didn’t know because there’s a lot of things I don’t know. But Waka’s name comes from [inaudible] and inland site 15 kilometers from where this map is inland in a fresh water area. So this illustrates a point that we’re getting at that is what Howard said, we did very good business at the out center because the lawyers came for three weeks and after three days they just went, ‘okay, alright, these guys own the land can we go shopping instead.’ That wasn’t the issue as Frances said, that the court case, the case was a self-involved, self-inquiry to its own navel about its own confusing mish-mash of laws, sorry if that’s offending you, that’s probably why we are here. The interesting analysis of the case is that in various legislative and judicial efforts to marginalize and minimize the rights of indigenous people over twenty or thirty years, by excluding from them this benefit or this right and creating special categories of right for these people it ended up, its flower, its blossom was this result which couldn’t have happened but for all of those little petty discriminatory efforts along the way. That’s my take on it and I think that it’s a wonderful instance. If this was ordinary people under ordinary law, ordinary law would say you can’t own the sea, go home.

Ron Whiteburg:

Thanks for asking me to be on the panel. I’m going to talk a little bit, sort of put on my hat as the law professor a little bit and then put on my hat as a member of one of the local tribes here in
Washington State which signed a treaty which was somewhat rare in that the tribes that signed it, we reserved the ability to go off of our Indian reservations to hunt and fish as we have. And I’m going to talk a little bit about the evidence that we present in treaty rights litigation. Prior to coming and becoming a law professor, I was attorney for my tribe, the Squaxin Island tribe, and was the attorney during the shellfish litigation where the United States on behalf of the tribes who signed the treaties negotiated by Isaac Stevens who was the first governor of the Washington territory, sued the state of Washington to reassert our rights to fish and hunt off reservation and I’ll talk a little bit about that.

But in order to do that I have to back to make sure that we understand. And we have quite a mixed audience here. So I want to give a little bit of a context for what’s been discussed form the point of view of the United States. The rules change a little bit when we get into Alaska, in many ways. But a lot of what happened down here affected what happened later in Alaska under the Alaska Native Claim Settlement Act and other things. Much of what happened here affected Australia through some of the underpinnings of for instance the Mabo case. So here what Natalie described was really a systematic use of law to restrict the ability of tribes to be able to claim rights post discovery. As many of you know, the United States was first colonized by England and England in order to acquire what was of value in North America which is essentially land, to be able to sell to people who wanted to come and settle, they engaged in treaties with the tribes on the East coast of the United States. The crown would negotiate a treaty with the tribal governments and the officials of those tribes to secede very large portions of land which England would then survey and then transfer over to the chartered companies which became our original colonies who then would sell parcels to settlers who had come over from England.

When the challenge came as to whether or not, the tribes had the ability to do that, to sell to the United States. And really the concept of what title the tribes have here at the time, the United States Supreme Court dealt with those issues in the three decisions that we now call the Marshall trilogy: The Johnson v. Macintosh, The Cherokee Nation V. Georgia, and [inaudible] v. Georgia. And I’m not going to go through all of those cases piece by piece. But from those really come the foundation of law as it relates to the United States and to the rights of Indians. And what Marshall said was well if we look back at the colonization practices started by the Catholic church, what happened was when the United States which at the time prior to discovery was in habited by non-Christian people, when it was discovered by a Christian country, title magically flowed to that discovering Christian country under international law. And what the non-Christian people retained was the right to use and occupy. So when we talk about the bundle of sticks, we’re talking about if you own a piece of property you have all these bundles of sticks. Upon discovery by Christians, non-Christian peoples lost that bundle except for the pieces to use and occupy it. But they could no longer sell it to anybody they wanted to. They could only sell it to the discovering Christian country. So if England made a discovery, England created a monopoly to be able to purchase, just the right to use and occupy by the non-Christian, indigenous people. In exchange for that, though, Marshall, sort of took and he gave, I guess and he said, well in exchange for that, though, the non-Christian people became dependent upon the discovering Christian country. And the Christian country had the duty to civilize them. In exchange for this magical transfer of title came the responsibility to teach and civilize these savage non-Christian people and that was the trade. And how all the United States and England prior was able to magically take title away from the people here. And that found its way I think in the [inaudible] decision as well. And we see that in other places cited by other courts looking at this issue.

The court also found through Cherokee Nation v. Georgia and [inaudible] v. Georgia that the tribes were sovereign. They were governments. They still retained the ability to act as sovereign governments unless they lost that ability unless it was taken away by the United States because they were no longer independent sovereigns, they were domestic dependent sovereigns: domestic to the United States and dependent upon the United States. And so they became in the view of the Supreme Court these lesser sovereigns under the control of the United States. As we go through the
cases after that we see refinement by the Supreme Court of this doctrine and one of them became the plenary power of congress. In that what they said was, the court said, well you know if the United States is going to be the trustee for these tribes, it has the ability to do what is right for them which means these tribes shouldn’t have the ability to just sue the united states when the united states wants to do something to them and so the United States congress has plenary power because it’s the trustee of the tribes and so basically what that means is congress can do anything it wants to the tribes here in the United States including terminating their sovereignty which they’ve done for more than a hundred tribes who were sovereign and then with an act of congress became not sovereign. Subject to a few rules of takings but generally, congress can just blip out the existence of a tribal government.

As time went on tribes began to assert saying this isn’t really fair. This isn’t really fair. You’ve come in and you’ve taken all of this land. You’ve executed these treaties and given us nothing in exchange for it except for the promise you won’t destroy us. And it’s not fair and we should be able to have some sort of compensation for it. So again, congress says, you’re right we should do something for you, so we’re going to create the Indian claims commission. And what they said was, we’re going to during a very short period of time allow you, the tribes to sue us, the United States, and exert your claims. But we’re going to put in a lot of rules. You can only go through the Indian Claims commission, it’s going to be a very short window, just, I can’t remember how many years, like five years. All claims have to be brought. If you don’t bring a claim in that five window period, it’s waived. So you’d better bring in all your claims. So it became this rush of tribes coming in and trying to get some sort of compensation for the land that was either taken from them without a treaty or taken by a treaty without adequate compensation.

The rules that they put in place, was again that same rule that we were talking about here. The tribe had to prove, you had to prove that it was exclusive to you. If it wasn’t exclusive to you, you can’t get money for it. So it can’t be an area where multiple tribes used resources, which was a lot of areas, where tribes would come together in areas where there’s abundance of certain things, and because even though there were rules, even though there were kinship ties, even though there was a very complex set of relationships that set who could be where, if it was more than one tribe, you couldn’t get compensation. So all of those lands became outside of the area of being compensated. The other thing that they said was well you can only be compensated for what the land was worth. This was all being done in the 1950’s. They said if the takings occurred in 1850, we’re going to calculate what the value land was in 1850, and 1850 it was worth $50,000, in 1950 you’re going to get $50,000. Even though $50,000 in 1850 may be $500,000 in 1950 value they created this weird fiction. And again, it shows the ability as long as you have the power to say and do it, you can do it, and they said that’s fine. Even though you’re going to give $50,000 in 1950, that’s a tenth of what it was really worth, we’re going to say it’s okay, and the United States said it was okay. And so during this period of time, all of the tribes, many of them, well not all of them, many of them made claims and from that point on, any claims that weren’t made were waived. So the ability to seek out original claims has been almost completely extinguished in the United States Which is what’s so exciting about what’s happening in Australia, because we’re seeing things happening in Australia that the united states through very complex and systematic steps has pretty much removed from the tribes here being able to exert any of those rights.

We have a few cases in Alaska, where the United States didn’t act in the same way as it did in the lower 48 where there are some arguments that can still be made. I’m a cynic because it’s all the same court, whether it’s Alaska or lower 48 it’s going to be the same court that makes the decision and as Natalie said, it’s a tough court to get through right now. It’s not very friendly to the tribes.

So in the United States now, you have sort of the area of enclaves which are the Indian Reservations. So the places where usually by treaty or by executive order which means that the president of the United States essentially said I’m going to take these lands out of public domain.
and turn them into a reservation or by statute where congress has passed a statute creating an Indian Reservation. Those three ways, treaty, executive order, or statute created these Indian Reservations, these enclaves throughout the United States where tribes have the most authority. On those reservations they have very high authority over our members. We can prosecute them for crimes. We can put them in our own jails, for instance. We can tell them what they can do on their lands. We canzone their property of their own property. We can set rules, tribal governments can set rules for decendancy. We can create probate codes and tell our members who can inherit what through our own laws. We can do about anything that the states can do on our people. We can’t for non-Indians. So the non-Indians who live on the reservation are fairly exempt from those things. We can’t prosecute them criminally. We can’t zone their properties. Tribes have tried and the United States Supreme Court has pretty much said no to that. We can’t tax them. If they come onto our Indian lands, we can tax them, but we also usually have to tax them the state tax and give the state its own money. So it becomes a situation to where it’s very difficult for tribes to make money off of taxation. But in those areas on the reservation when the tribe’s trying to regulate Indians, that authority is strong.

Off reservation, though in the lower 48, if the tribe wants to do something it has to be either something that they reserve through a treaty or something that they’re authorized to do by congress through statute. So I’m going to concentrate on what we have here on Washington State. Because we’re a little bit unusual in that we have treaties that the tribes reserved off reservation rights.

So in the 1850’s Isaac Stevens was the commissioner of Indian Affairs. He was appointed by the United States and the President to come out to the Washington territory and he was told, you need to go out there and you need to get cessions from all the tribes. You need to clear up this issue of this use and use and occupancy. And so he came in and between 1854 and 1855 he went through Washington State and negotiated and tried to get treaties for all of the land. At the time, the United States was leery of creating very big reservations, so they wanted the reservations to be smaller. So in Washington we have a lot of small reservations except for Colville and Yakima nation, the two bigger reservations. But Isaac Stevens generally wanted to create these little reservations and then he was encouraging the ability of the tribes to go off the reservation to hunt and fish because the United States didn’t want to pay for food. Because in other reservations where they didn’t have that same thing, usually the reservation ended up being land that wasn’t great for farming and so it was very difficult for the Indians to sustain themselves on these reservations, so the United States ended up having to pay for food. And the United States didn’t want to do that anymore. So they, as part of these negotiations, and part of something that the tribes here pushed for was the ability for Indians to continue to go out on the Puget Sound, onto the rivers, the Colombia River and off the coast to continue fishing, even though those weren’t on the Indian reservations. And so Isaac Stevens agreed to those. And so in all of Isaac Stevens treaties here in Washington is the clause that says that the tribes have the right to fish at all usual and accustomed grounds and stations in common with citizens of the territory.

After that, the state of Washington, when it became a state, began ratcheting down tribal ability to fish off reservation. They essentially said, well if you’re an Indian, you’ve got to go get a state fishing license just like everybody else and you have to stick by the state catch limits. Or if you want to fish commercially, you’ve got to pay the state a big commercial license fee and abide by all the rules. And the tribes here said but the treaty said is that we obtain that right, you shouldn’t have the ability to tell us what we can or can’t do with our fishing and the state disagreed. And by disagreeing, what it meant was if you go and do it, we’re going to arrest and throw you into state jail. Which many Indians did a lot. A lot of Indians got arrested here in Washington going out and fishing in defiance of the state. But the tribes can’t sue the state because the state’s sovereign and has immunity. So the tribes can’t just go into court and sue the state of Washington to enforce the treaties. The United States government, the federal government was the only government that could sue the state of Washington. So as more and more Indians threw themselves against the state game wardens and as more and more celebrities saw it, like Marlon Brando who started showing up at
these things and getting arrested, the United States started feeling the heat a little bit more. With folks like Bill Rogers, pushing at the attorneys, pushing at representing the tribes and representing individual Indians who were thrown into jail. I mean, Bill, you represented Billy Frank didn’t you? Just Puyallup. So the center of this fight was down around Nisqually and Puyallup down in south Puget Sound and Bill was one of the attorneys who was sitting there representing the tribes in this fight.

Finally the United States sued. Finally, they said enough is enough. And they sued the state of Washington to enforce the treaties which resulted in the United States versus Washington case which filed in 1968 and is still open. It’s not going anywhere. And every year we still have sub proceedings, still filings in United States v. Washington, either the state suing the tribes, which it can, the tribes, suing the state, which they can or the tribes suing each other which we do. And I’ll get into that a little bit, sort of the irony of the use of this and how we’re sort of turning on ourselves.

As we went through the U and A cases, the original cases it originally involved the salmon that was the focus. Even though the treaty doesn’t say salmon, it says the right to fish. The focus was on salmon. And the State of Washington really was pushing to try to really narrowly define where the tribes could fish, because it says the right to fish at all usual and accustomed grounds and stations. So we had to prove where those usual and accustomed grounds and stations were, which meant that we had to use everything that we had to prove it. And what was true was exactly what was said today. The statements of the elders were important but really what was important was that the statements in the stories of the elders had to be confirmed by the anthropologist. You had to have this coupling of the anthropologist with the elder statements. One didn’t work without the other. And they needed to really lineup before the court would give credence to what the stories were as to who fished where and what areas were primary to what tribes. Andover the years, the tribes here have gotten very good at that. We have our own anthropologists who work for us, work for the tribal governments either on contract of sometimes as employees that are constantly looking and trying to dredge the record, again the written record. Which is really interesting about the bark paintings, because they essentially act as a written record, which is unfortunately something that we didn’t have here. We didn’t have anything like that, which was such a systematic canvassing of Australia to tell where who came from where. We unfortunately didn’t have that, at least in this area. I’m not saying all of the United States, I don’t know. But here we didn’t have that. So a lot of it was on settler accounts, settler diaries. You know the Hudson Bay company, god love ‘em, they kept a lot of records of a lot of things and it’s a great place to go and read about what Indians came from where to sell fish and hides and all kinds of things and those are the things that swayed the court and made their decision, was those written records contemporary at the time of the signing of the treaties because the look at it as sort of a snapshot. What was the state at the time of the treaty and until you prove that you won’t win. And so using that record and using our elder testimony together is how we were able to show where we fished at the time.

Following the salmon case came the shellfish case. Because once we won that, so the United States sued the state of Washington, once they pierced the immunity of the state, all of the tribes intervened, so they became parties, so it no longer had to be just the united states suing, but all of the tribes that signed those treaties ended up as parties in the case and now can sue. We don’t have to get the United States to agree anymore. We individually can sue the state under the umbrella of US v. Washington.

So one of the things that was left out there was what are shellfish? And so the state immediately said, well shellfish aren’t fish. It says the right to fish at all usual and accustomed grounds and stations well that meant salmon, it didn’t mean shellfish. So we had to again, go through the same fight. We had to have anthropologists to come in to say no, when you say fish it was assumed it was shellfish. They looked at the minutes of the treaty negotiations, they looked at all of the
language around it, to try to sort of look back in time to make an understanding of what the Indians understood what was told to them, what they said at the time of the treaty. We convinced the judge that shellfish are fish under the treaty largely because, luckily, the clause says the right to fish at all usual and accustomed grounds and stations, huh, huh, huh, provided however, that shellfish not be taken from beds staked or cultivated by citizens of the territory. So luckily they mentioned shellfish in the treaty clause. And the court said, well the way you read it, shellfish must mean fish because the right to fish except for shellfish in areas staked or cultivated by citizens. So we were able to win that.

Then the next thing was the issue of subtitle. They said well, the state said, you know you didn’t have the technology to go underneath, past the low water mark and harvest shellfish there so all of those crab that are out there, all of those shrimp that are out there, all of those, you know near and dear to my heart because my tribe has a lot of geoduck and I’m a geoduck diver for my tribe, all of those geoduck are off limits. So you can’t take those. And so then we had to go and fight about that.

And I was telling Greg a little bit of a story. I’ll tell you a war story. My cousin was on the stand. My cousin Charlene is the head of our museum; she’s sort of our tribal museum. She keeps in our museum and our library every account that she can find from anywhere, ethno histories, elder stories and we teach our law students that in litigation you never ask a question that you don’t know the answer to, that’s a rule. And the assistant state attorney general broke that rule and he asked my cousin isn’t it true that there’s no record of Indians digging geoduck in the deeper water and she perked up and she’s a very shy woman, she’s not used to being on the stand, and some points she was like shaking during her testimony. But when he asked her that, she lit up, she goes no there are several accounts. You find these areas where the substrate was looser and it was at a low, low tide you could dive down with ropes and they would slip a noose around neck of the geoducks which is a large clam and tied to a float and then as the tide came in, the float would submerge and it would cause constant pressure on the geoduck which is a clam that can grow up to ten pounds by the way, and eventually over the course of a few days, it would pop out of the bottom and then they would go and grab the float and pull in the geoduck. He looked like somebody had just shot his dog. He did not expect that answer at all.

Audience2[inaudible]:

Ron I’m passing a photo of geoducks to our visitors.

Ron Whiteburg:

OH, you have a…Yeah, it’s a very obscene looking clam but it’s wonderful.

Now luckily the court agreed. And what they said was the tribes are reserved the right to fish and it doesn’t matter where the fish are, if it’s an area that they fish, they have the right to fish it. So if it’s sub tidal they can get it. If it means that today you have to strap on eight pounds of lead and attach yourself to a hose and drop down to ninety feet deep to dig it, if it’s in their area, they can do it. Which is great for us. And they also there was a discussion about the tidelands, about the intertidal being owned. Washington is unusual. Washington allowed the intertidal lands to be sold to private individuals so you as a private person can actually own from high to low, low tide here in Washington State, something that is unusual in the United States, but Washington is the exception. They ruled that all of the shellfish that occur on those privately owned tidelands, if they occur naturally, tribes own half of them. So that we are actually going onto private beaches and digging clams on there now. So it was a monumental ruling and one of the last wins we’ve had in a while. But luckily it was a big win.
So where we are today, unfortunately all of these tools that we learned fighting the state we are now using to fight each other. And as we’ve sort of defined these areas, again, where the tribes’ usual accustomed grounds and stations are complex and there are areas where multiple tribes fished. But now these things are worth a lot of money. Salmon is worth a lot of money. Geoduck is worth a lot of money. I went geoduck hunting and I got thirteen dollars a pound for geoduck because now China loves geoduck and they buy all of the geoduck we can harvest. So that demand, that commercial demand has resulted in tribes looking at where other tribes are fishing and has resulted in a lot of litigation between us to where there’s always cases in US v. Washington going on right now between tribes. We see tribes arguing over U and A, there’s a fight between the coastal tribes as to where tribes can fish for halibut on the coast and how far the Macaw tribe can go south in to Quinault area and where Quinault can go up in to Quileute. You have fights where multiple tribes fished but where one tribe was primary. We see the primary rights coming up to where there are certain areas where multiple tribes may have fished but one tribe controlled. And so if those tribes want to come in and fish that area, that one tribe has to give permission. We see just arguing over whether the line should be where it is. Lines have been set, and tribes are arguing well no it shouldn’t be there. It should be north of there. It should be south of there. It should be bigger or smaller.

So unfortunately, for the last fifteen years or so, those fights are ongoing. And now we’re taking it to hunting. Now we don’t have a US v. Washington case for hunting. And one of the reasons is that we can’t all agree on what tribes could hunt where, but we’re seeing disputes between the tribes over hunting areas. So it’s one of those areas where we’re very, very lucky in that we have the ability to hunt off of the reservation but it has created new controversies between us.

And where we go in the future is really probably the area of the environment. We’ve got all these fish and we’ve gotten the right to this. But every year more and more people move here and build houses and use water and the demand on the environment, we’ve seen from the time the case was done in 1969, the numbers of salmon that are coming back now are a fraction of what it was. And so as we fight, we’re fighting over less and less every year. All of these shellfish beds that we won in 1995 every year more and more of them become decertified because of pollution and we can no longer harvest them and sell the fish. So that’s the next fight. We had to fight to get it now we have to fight to protect it. Thanks.

[inaudible]

I was thinking maybe what we might do with our guests having come from so far and really having inspired us being together is just to let you guys talk a little bit if you’d like to about the road ahead as you see it or just to respond to the extended conversation that we’ve had. So I don’t know, Frances, Will Djambawa, Howard, others who would like to maybe give a sense of the road ahead and how things look from where we sit going forward. And then I’m sure that we’ve got both not only questions out here on the floor but maybe knowledge out here on the floor and to give a bit of our time that we have for any questions or comments that the audience might have.

Frances Morphy:

Shall I start off? I’ll say a little bit about where things are going in Australia now. Basically the time of land claims in the Northern Territory is over. All the unalienated crime land, everything that’s claimable has been claimed under the land rights Act. In the sense, this blue mud bay case, was the first in the kind of new battle about sea rights. It may have more to go particularly since the Northern Territory and the Aboriginal people have to work out some modus vivendi over rights to the intertidal zone.

Under native Title again, there have been many, many Native Title cases. Native title is a bit like
the kind of bundle of rights situation that you’re talking about. It’s become that through the law, through the precedence that have been set in cases. In a sense Native Title had been defined as it’s gone along through litigation. And there’s a move now because Native Title cases are a bit expensive there’s a big move to try and settle everything that’s left through negotiation. And that’s a kind of mixed blessing. It’s less expensive, but also in negotiation situation it’s the people with the biggest stick that usually manage to get the better deal and that means government rather than aboriginal people. There have been Native Title cases where people have litigated and lost because they haven’t been able to meet the standard of proof about continuation of law and custom from colonization, from when the European colonists got there. So increasingly the cases that are left area cases where people are most likely to lose because of those kinds of things. They’re the cases that are still to be run or still to be negotiated are mainly in the parts of Australia that have been settled for longest. To give the government credit, they’ve kind of recognized that there are groups that are not going to be able to get land through these legal processes. And so there’s a whole new kind of machinery beginning to roll into place, the Indigenous Land Corporation which is able to purchase land on behalf of aboriginal people for their use. But what’s happening is what always happens in Australia. The conditions under which people can use that land is very restricted. It’s like, yeah, we’ll buy this land, but it has to meet this business model. You have to run it as a kind of commercial operation, basically, however it’s a way of getting land back and it’s increasingly being used. The other big thing and this is happening in Arnhem Land too. If we go back to that map that big red areas on it, those are indigenous protected areas. They are part of the national reserve system. The indigenous Protected Area Regime does not confer any particular kinds of right in land. What it is is an agreement between a group of aboriginal people and the government to conserve that land, so we’re getting on to environmental stuff in fact is what’s happening. And so large areas of aboriginal lands in the Northern Territory are not part of this indigenous Protected Area system and so are lands that have been bought through the ILC system the purchase system to set up indigenous protected areas and this is one of the ways in which people in those areas of Australia where their land is not claimable through the courts can get a toe hold. It’s quite ironic because the kinds of land that are being purchased by the ILC are bits of agricultural land that have been so degraded by Western style agriculture, they can’t be used for that anymore, so then you kind of let the aboriginal people buy it back and kind of set it right again. That’s my cynical take on it, but it’s good. It’s a way of people getting their land back.

The indigenous protected area thing in the Northern Territory is very interesting because there are going to be indigenous protected areas over the entire ex-Arnhem Land Reserve, over the whole of Arnhem Land in pretty short time. And although at the moment these indigenous protected areas don’t have any kind of legal clout, there, they get monies to run ranger programs to conserve biodiversity, and get rid of feral animals and weeds, and stuff like that. But once the entire Arnhem Land is covered by these things and people get contracts from like the quarantine services and so on, you can kind of see a situation building where people might actually be able to contract for services that are to do with control of the coastline. That’s my hope is that’s how it’s going to go. So really the land claim and all the native title claim era is almost over and people are going to have to start looking at these other ways of getting more land back. And they’re never going to be able to do it in the places where white fellows really want to live.

Howard Morphy:

I’ll try and answer Natalie’s questions that she posed earlier on. It’s important there to recognize the difference between the native Title Law and Land Rights legislation because in your case of native title it is very similar to the way you were describing it. And certainly, the Blue Mud Bay case was not run on the basis of a bundle of rights but many cases are. And one of the reasons it needn’t be in blue Mud Bay because of the presence of indigenous people actually living in the land in continuity over time in large numbers. So in fact, you could actually run it in terms of more general principles which encompassed rights but were not necessarily treated as individual rights but as ones that were set in terms of more general principles. But what you’re saying is absolutely
right, that it doesn’t give in any sense something like freehold ownership, and the most important right that it gives may result in subsequent legislation is the right for compensation if rights are denied in some way or another. And that in the case of coastal peoples who are living very much on a coastal hunter gatherer economy could be quite a significant thing and that’s something that actually is acting as a deterrent for outside people using it. Which is why there haven’t been any compensation cases more or less yet. So we don’t actually know how strong that is going to be, but that’s an area where it would act strongly, but as far as the land rights act, the title is in [inaudible] which is the strongest form of title. And the reason I was sort of equivocating in relation to the issue of whether actually it was or was not a unique case that Yonglu were given those particular right is that there are some cases that are quite marginal which were like the kinds of cases that you were referring to in the context of Washington. So one of the things that legal courts were aware of is that if you weaken rights in fee simple, you endangered fee simple that other Australians have. And all the way around Sydney harbor and those particular kinds of places, there are actually people who own some of the richest most expensive houses in Australia that go right down to the water’s edge and it’s arguable that there could be ways in which, if you actually started to say that fee simple was weakened in this particular way so that it only operated for fifty percent of the day or whenever the tide was out that it could cause problems and there are certainly certain things to do with Western Australia as well. So but I don’t exactly what the legal case was, but I know that because the ownership in fee simple is such a strong title, it was one of the things that probably swayed the high court. And that was one of the things that the council and it was also something that the judge in the original case hinted at because he actually referred to the strength of fee simple that in some ways the lawyers thought set up the basis for the grounds of appeal and a likely success. I can’t really say more than that, but it is really quite unique in relation to the Northern Territory Land Rights Act which as Frances said gives the strongest title to indigenous Australians anywhere in Australia.

Natalie Landriff:

Speaking of sort of title rights. One of the things I wanted to raise, is one of the arguments was a couple of times it came up, although the ninth circuit was more savvy than this a couple of times it has come up that people have asked me, don’t you essentially have a conflict because you want to hunt and fish but these fishermen who already have permits have a right to fish there too. The answer is no they don’t. A fisheries permit is like a driving license. It’s a privilege, it’s not a right that can be taken away at any time without compensation for any reason. Usually there are standards that they can use to take it away. But once you show you have an aboriginal right, it is legally enforceable right and it supersedes any privileges that are issued by the government. So I frequently get asked that question and I wanted to make sure that people understood that distinction because that’s what we’re facing up in Alaska right now, is a lot of fishermen, trollers, others that hold these very large commercial permits saying well you can’t bring this litigation up here because we have a right to be here because they construe their fisheries permit as a right when it’s not. And that’s a case called Alliance of IFQs versus Brown saying it’s a privilege not a right.

Will Stubbs:

As Frances indicated [inaudible]won the Blue Mud Bay case and caused hysteria among the recreational fishers of the Northern Territory which is promoted as the home of the barramundi amongst other things and those very rich grounds we’ve talked about and probably at this point I’ll let Djambawa said from the very beginning why he wanted this right being not to stop people but to follow the law and seek permission.

Djambawa:

Where Blue Mud Bay is now, what we worked towards was from the beginning, we would have to
have our own right first because I think it is really important not to give the right to them but to show us the right first. So when we got the right back into our hands, now we are allowing the people to come and work with us like the crabbers and the recreation area they are coming to work with us now. And some of the fisheries which is not [inaudible]?land base, we will show them we will give them a certain permission to land on that land and this is what we did there in Blue Mud Bay, for quite a while it is starting up. In that case we know who are coming and who are going out and to interrupt all of those certain we can say, I’d say separate areas for them, they know where their area is now, they can just go across or go around and they’re going to put their ports or their nets and they already know now. This is like, what shall I say, like this university here, people are wanting to learn about the country. They are wanting to learn about the patterns and the designs and instead of going and building a big land base or a big fishing area where there is something there there is a patterns, the design and the stories we own. This is what’s the really main issue that we did. We were giving them to let the government clear in their minds instead of going and landing on the particular place where we do own it a personal thing in our lives. Did anybody understand my English?

Will Stubbs:

We’d like to really thank people for letting us come and learn and I think makes our mouth water to think of the sovereignty that you have of your tribal government and of your capacity to commercially export to countries that you have some permission to use and enjoy. Just as I’m sure it makes your mouth water to think of actually owning the things that you actually own. And I really hope I’d like to import a couple of slightly indigenous lawyers to our country which we are also short of. It’s wonderful to be in the company of people like yourselves. I think as a white fellow, pale faced, [inaudible] associate of indigenous people it’s been a marvelous pleasure to be here. I’d like to thank the University and those who helped to bringing us her. And look forward to some collaboration if not conspiracy to bring about some change. And I’d really love to hear the outcome of our case Natalie.

Natalie:

I’m only going to tell you if we win.

Will Stubbs:

We won and then we lost and then we won again. And I think around the coast which was ten years, really, five years court case, but ten years from when Djambawa basically said what am I meant to do with you people what you’ve done. How can I , a nonviolent alternative to defend these areas, the outcome is a dream come true but it hasn’t quite arrived yet, the objective is not to control bits of the mat, the objective is the health of the community and that’s a multifaceted thing. And it’s an ongoing job of Djambawa to do that and spreading the story and getting around and learning more is a big part of it.

Djambawa:

[inaudible]You know what, one of the very important[inaudible]lawyer was saying you have to appeal that, well we said to them, where are you going? Until the end of this world is what I said to them. So we did. We did appeal until there was seven judges there?

They won the native Title aspect of the original court case but the judge said that under the existing precedence he couldn’t give the initiative of the intertidal zone but he thought that in fact the previous decision was probably not a correct one. Then Djambawa chose to appeal to the federal court. The federal court unanimously supported the Yolngu case and gave ownership to the
intertidal zone following the argument of the interpretation of land[inaudible] water going over it. And then they appealed against that in the high court, the government appealed against that in the high court. And we were extremely nervous, finally at that stage, the lawyers were quite confident because it had been a unanimous of the federal appeal court and they said the high court would never overturn an unanimous decision. Not that I told Djambawa that, I didn’t want to give people too much optimism in case it didn’t, and then finally the high court decided by something like five judges to two, basically to confirm the federal court’s decision. But it did take a lot of time and it was very nerve wracking.

And Yolngu people came from all over Anamland came to hear the high court judgment standing in a great long line outside the high court. Their lawyers must have had a really strong idea that they were going to win, but they did, that was wonderful.

**Audience 3:**

Can I make a general comment as a non-legal person who has a deep interest in native history and so on. It seems to me that people have an interest in aboriginal peoples, of the history of Indians and so on but somewhat romantic and they don’t go very deep. And I was very struck by what you said that these people are determining law but they don’t even understand that there is a seasonality in hunter gathering people, and if you don’t even understand that then how could you possibly be making judgments. And so something has to be done I think to somehow bring people into deeper studies of these histories and the meaning of this history which is all of our history and people won’t do it.

**Natalie:**

I think there’s a really interesting point about that which is that two of our smarter lawyers at NARF, in times past, in states I will not, were judges I will not actually took the judge during a pending case, they notified opposing counsel of course they could come if they want. They took the judge to the site in question. One was a sacred sites case, where a waterfall was considered sacred because at a certain part of the day it had these very unique features and another was a subsistence case where the judge kept saying I subsist. I just subsist through money. I live through money. I don’t understand why you think your right to get fish is any different than my right to have a job. He couldn’t get it, so he was taken to a subsistence camp during a fish cut, which is a month long process. And in both of those cases, the judge only when physically present in the place that was a subject of the case finally went, now I get it. And they both ended up winning and they are these two massive cases that this occurred but there is some real impact to saying to the court, and we said during the [inaudible] case and I don’t know that the judge ever did that. He wasn’t amenable to spending time with the counsel, he hated all four of us but to say go there. Go there and look at it and this is exactly what you’re going to see, and so there is a real impact to bringing them to the place that is the location or bringing them to the issue so that they can see and meet people. There is one instance as well of the State in Alaska being asked not to appeal a decision to the US Supreme Court. And the governor was being put upon by all of these different forces some saying you must appeal get rid of the subsistence right in Alaska, and natives saying please don’t 80% of us need it to live. So what happened, was the plaintiff in that case was a 91 year old woman and she took him to her river that her family had been at for generations and generations and showed him and said you’re going to spend three days with me and you’re going to work and you’re going to engage in subsistence with me. And she had him work for three days and he decided not to appeal that case because he finally got it. So what you're saying is I think very insightful, is that a lot of times you’re not really preaching to someone, you’re not speaking the same language because they’ll understand the words that are coming out of your mouth but they do not understand the concept that you are trying to explain to them and when you’re given a finite amount of time or a framework that doesn’t allow you to explain it, it’s really hard to get your message across. And
that’s one of the primary challenges of being a lawyer is you end up being a translator not necessarily from one language to another, but from one worldview to another to explain why this is important and why it’s relevant.

Djambawa:

That is on the court now, my people are going towards into the court, second test case?

Frances Morphy:

This is the first case.

Djambawa:

Those [inaudible] tools that we were using to show to the court there a very significant important things in our heart [inaudible] we went to the high court with those not with those weapon but this is right in the man ceremonies. As you see the cross there there is a sacred [inaudible] a big [inaudible] my grandfather and [inaudible] his brother are buried and the coffin fell down. Today the sand is still remain as you can see all those lawyer, some of them this is on the court now, people stood up at the side with those weapons, [inaudible] and spears and could see the other [inaudible] standing up there we were competing each another, there’s another [inaudible] there. And you can see all the patterns and designs on their chests. And this was really very strong six clans, clan troop all came together.

Frances Morphy:

This is you see the difference from what you’re talking about in these cases there is provision for a view, things called views which aren’t evidence but they sure as hell have an impact when they’re put on like this, and so this is the men’s ceremony ground like Djambawa said. And you’ll notice… Moro, Djambawa, and the others have disappeared now will be recreating a version of this ceremony ground to open the exhibition. This is a male space where women cannot go and in the case of this view, only the male members of the court could go into that place. There were two women lawyers and I had to take them back to the main community to wait for the men to come back, so it was a case where this law was able to demonstrate its own sovereignty and its own rules and the federal court had to comply to those rules. It has an impact. There we are the women sitting there with our backs turned waiting for the men to come back and this is the men coming back from the ceremony grounds.

Djambawa:

I’m sorry I’m looking at those. Well you can see there was a nest of, there was sand culture already there and it represents a nest, a crocodile nest in the fire. You can see the people all coming out to meet these people coming from a man’s ceremonies towards this area around sand culture. You’ll see that now, I think [inaudible] you got those other film, one of the other lawyer wanted to go out from the mix, but we told him to bring him back so he can be with those people there within the sand culture there. This is yeah, people are waiting for those other people. You can see all going there and this is what’s really, the sea was really like this, really calm. When we got those boat, it was really like this. Then we went more further right in the middle, between the island, you can see the sea now just building up. We were all in the boat.

Frances Morphy:

We were soaked. You were in the big boat. I’m in that one. You were in the protected boat.
Djambawa:

But when we got more further,[inaudible] after picking us up, we were all in the boat and then all of a sudden, the sea just rised, there is particular patterns where you can see the fire inside the city, I mean it was, and the sea just rising[inaudible]nearly drowned and then the people all running around with a pen and pencil saying what are we going to do Djambawa? I couldn’t say anything. I was just sitting quiet and I didn’t tell them. Djambawa help us, can we turn the boat around. I couldn’t say anything. I just waited until everybody were really wet and also the pen and the very important note was really all wet and I said to them okay, we can turn around now. When we turned around everyone was really nervous. Well just when we turned around and maybe twenty minutes and the sea was really calm.

Frances Morphy:

I think we have to finish now. So again this was actually the court in session wasn’t it, on country? They did hold some of the court out of the courtroom on country so that people could speak about country while they’re on it. It’s obviously a different process from what you guys have to go through.

Greg Hicks:

Well thanks one and all. And it just shows the interest that everyone has stayed. And here we are in the deep of the afternoon. So thanks for coming and really encourage everyone to go to the show. Go to SAM. And I think thee is going to be a ceremonial event tomorrow evening as part of the opening of the show, so please find your way there and it will be.

Audience 4:

People who come tomorrow night have to pay a lot of money…

Greg Hicks:

So the rest of us, we [[inaudible]]

Audience:

But then the sand sculpture will be there all the time.

Greg Hicks:

Well that’s terrific, then. Thanks again, one and all, and to our guests from an ocean away and many, many degrees of latitude and longitude away thanks Djambawa, Frances, everyone, thanks for being here. The Law School is so committed to just being a place that is supporting the global common good and to be part of a project like this is very much a part of our mission. So thank you for that, for being here.