

A Conceptual Wreck: Salvaging the Law of Finds

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I INTRODUCTION

Two concepts of law and their overlap are treated here: the laws of salvage and finds. When courts adjudicate the overlap of these two concepts and determine rights held in shipwrecks, the policies behind and definition of the latter come into conflict with the policies behind and definition of the former, creating a conceptual conflict that federal courts failed to identify until only very recently.

Until 2006, courts had *sub silentio* permitted an overlap of the laws of salvage and finds when adjudicating the rights to shipwrecks without recognizing the conundrum. Judge Niemeyer's opinion in *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 435 F.3d 521 (4th Cir. 2006) (hereinafter referred to as the "2006 Titanic Opinion"), confronted the question. Addressing the issue head on, the court chose to impose a rule that makes remedies under the laws of salvage and finds mutually exclusive. In this article, it is argued that there is justification for permitting the conceptual conflict to stand, and that mutual exclusivity is a less desirable result.

II The Existing Legal Regime

A. The Laws of Salvage and Finds

It is first necessary to very basically explain the competing laws of salvage and finds. The law of salvage is distinctly maritime,¹ and thus jurisdic-

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¹See *Provost v. Huber*, 594 F.2d 717 (8th Cir. 1979) (denying a salvage award for recovery of a house that fell into a lake, as the doctrine requires rescuing maritime property and showing a nexus with traditional maritime activity).

tionally federal.² It is used to encourage the rescue of property in marine peril by awarding those undertaking rescue operations monetarily or *in specie* according to several factors.³ The doctrine is also used to grant exclusive salvage rights to a potential salvor who has (1) constructive possession over property in peril and (2) the present intention and capability to successfully perform the salvage operation.⁴ These rights permit a salvor to conduct salvage operations unfettered by rival salvors.⁵

The law of finds dates far back into the common law of property.⁶ The doctrine grants title to unowned property according to principle of “finders-keepers;” actual possession of property creates an interest in that property that can ripen into clear title if no better possessory interest is interposed.⁷ Thus, to acquire title to property in this fashion, a finder would have to prove the property was either (1) never owned or (2) once owned but since abandoned.⁸ Since shipwrecks were obviously once owned, it is the second option that a salvor/finder must prove in order to receive an award of title to the wreck or artifacts at issue.

Courts sever salvage petitions into two distinct proceedings, namely the grant of status as exclusive salvor-in-possession and the grant of an award

²See *Hobart v. Drogan*, 35 U.S. 108, 120 (1836) (“[C]ongress has never confided to the states any power to regulate salvage on the sea, or on tide waters; but the same belongs to the district courts, in virtue of the delegation to them of admiralty and maritime jurisdiction.”); United States Constitution, Article III, §2, Clause 1, “The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction”; 28 U.S.C.S. §1333 (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”). The “saving to suitors” language permits causes of action that lead to common law remedies to be heard by the states. For cases generally ruling that state law could not abridge or enlarge duties or responsibilities of maritime law or rights in admiralty, see e.g. *Workman v. New York City*, 179 U.S. 552 (1900), *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527 (1889), *The Lottawanna*, 88 U.S. 558 (1875), *The Hine v. Trevor*, 71 U.S. 555 (1867), and *The Moses Taylor*, 71 US 411 (1867).

³See e.g. *St. Paul Marine Trans. Corp. v. Cerro Sales Corp.*, 505 F.2d 1115 (9th Cir. 1974) (explaining the doctrine of salvage in depth).

⁴See e.g. *Hener v. United States*, 525 F.Supp. 350, 354 (S.D.N.Y. 1981).

⁵See *Rickard v. Pringle*, 293 F. Supp. 981 (E.D.N.Y. 1968) (sorting out the rights of rival salvors).

⁶See e.g. *Armory v. Delamire*, 93 Eng. Rep. 664 (K.B. 1722); Leeanna Izuel, Property Owners’ Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule, 38 UCLA L. Rev. 1659, 1702 (1991) (tracing the history of the common law doctrine of finds; this article ultimately argues for allowing land-based constructive possessions to satisfy claims under the land-based common law of finds).

⁷See generally e.g. *Adams v. Unione Mediterranea Di Sicurta*, 220 F.3d 659, 670 (5th Cir. 2000) (distinguishing the law of salvage and the law of finds based on the latter’s affording an award of title); *Fairport Int’l Exploration v. Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1084 (6th Cir. 1997) (discussing how a claimant acquires title under the law of finds).

⁸See e.g. *Yukon Recovery, L.L.C. v. Certain Abandoned Prop.*, 205 F.3d 1189 (9th Cir. 2000) (explaining the differences between the laws of salvage and finds and abandonment under the law of finds).

once property is actually possessed.⁹ The status hearings occur preliminarily as an injunctive proceeding,¹⁰ and the possessory standard that needs to be shown at that point is only *constructive*. Not all persons finally taking actual possession after recovery of a shipwreck must first be deemed exclusive salvors; an exclusive status is sought only at the behest of the salvor. As a bounty hunter, you may retrieve items from the ocean floor without wearing the badge of an exclusive salvor-in-possession. However, since the advantages of wearing that badge are intentionally made great by courts in order to encourage salvage operations, salvors naturally prefer to wear that badge.

The awards proceeding occurs lastly, and naturally there can be no award unless operations are successful, which means the possessory standard that needs to finally be met is *actual*. Though this disjunction of proceedings and distinction in possessory standards makes perfect sense chronologically, it causes a conceptual problem for a final award of title under the law of finds if exclusive salvage rights are granted preliminarily.

The policy motivating the law of finds is fair competition. The law of finds encourages people to seek out and maximize the use of property.¹¹ Historically and theoretically speaking, it is essential to an award of title under the law of finds that the property be available to all the world for discovery before it is reduced to actual possession, since application of the doctrine of finds requires that the property be abandoned.¹² If exclusive salvage rights are granted preliminarily, competition is snuffed out even though title may later be awarded under the law of finds according to *policies* then made moot by a prior grant of the badge that entitles a salvor to exclusive possession of salvage operations. Additionally, if exclusive salvage rights are granted preliminarily, the property is not available for all the world to discover; in that case, a salvor's exclusive rights themselves would *definitionally* preclude an award of title under the law of finds and the correlative concept engrained in that doctrine, abandonment. There are two ways to avoid this conceptual conflict.

One way is to deny any salvor who has been preliminarily granted exclusive salvage rights the opportunity to later petition courts for an award of

⁹See *RMST Titanic, Inc., v. Wrecked and Abandoned Vessel Believed to be the RMS Titanic*, 286 F.3d 194, 210 (4th Cir. 2002) (discussing the award that is appropriate for an exclusive salvor).

¹⁰See generally *Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel*, 895 F.2d 116 (3rd Cir. 1990) (court utilizes equitable powers to resolve dispute between competing salvors).

¹¹Patty Gerstenblith, *Ownership and Protection of Heritage: Cultural Property Rights for the 21st Century: The Public Interest in the Restitution of Cultural Objects*, 16 Conn. J. Int'l L. 197 (2001) (citing numerous policies, and citing texts that further explicate the policies behind the law of finds).

¹²See *Hener, supra*, (citing Annot., 63 A.L.R. 2d 1369 (1959)) ("A mere searcher . . . has no right to exclude others from the attempt to recover it. Any competing searcher is entitled to enter the area where the abandoned property is to seek to reduce it to possession . . .").

title under the law of finds and the abandonment standard, as the 2006 Titanic Opinion did.¹³ This scheme solves the definitional conflict, but it is problematic for the policy conflict since the law of salvage is specifically designed to encourage salvage operations and the specter of a costly recovery operation that does not end in title might deter would-be salvors from requesting exclusive salvage rights under salvage law for fear of a recovery that ends in less than title or perhaps nothing at all. In that case, would-be salvors might not seek out exclusive salvage rights because they may likely rather keep open the option of an award of title. Consequently, the policy of competitive practices would be restored, but only to the potential detriment of culturally historical property that is extremely fragile and submerged in an environment that is hostile to human life.

The better scheme would be to permit the conceptual conflict to stand and expressly justify it, with reference to the special circumstances relevant to shipwrecks. Admiralty practices would greatly benefit from permitting the conflict to stand because that scheme results in meeting both of the best policies by: (1) granting exclusive salvage rights preliminarily to discourage secretive and potentially dangerous and destructive practices; and (2) awarding title in property actually salvaged, abandoned, and possessed as the maximum incentive to conducting salvage operations, such that *safe* salvage operations *remain laden with the utmost incentive*.

The major pieces of this conceptual conflict are discussed below: (1) the different possessory standards arranged within the laws of salvage and finds, (2) the concept of abandonment as it is treated during the awards portion of proceedings, (3) the effect of overlapping preliminary exclusive salvage rights with a final award of title, (4) the case law evidencing a disregard for the conceptual conflict, and (5) a potential explanation and justification federal courts should use when confronting the conflict.

The sources most relied upon are court decisions, though there are some references to other publications relevant to the study of admiralty and property law. Major conclusionary concepts are synthesized, and case law is cited by footnote to support those syntheses. This article does not treat federal or state legislation as it supplements the common law concepts of salvage and finds either directly or indirectly, e.g. the Abandoned Shipwreck

¹³See *R.M.S. Titanic*, *supra*, 435 F.3d at 534 (“What we have concluded is that a salvor, who has accepted the role of salvor-in-possession and obtained benefits under that role for a period of ten years under the protection of the court, may not then seek to convert its role to finder in order to obtain title to the artifacts under the law of finds while remaining a salvor-in-possession as to the wreck site.”).

Act of 1987 (ASA),¹⁴ since such laws only affect how or when each concept is applied as opposed to what each concept is comprised of originally.¹⁵

B. The Different Possessory Standards Arranged Within the Laws of Salvage and Finds

Title requires possession,¹⁶ thus rights under the law of finds require possession since the law of finds purports to grant title in property.¹⁷ Exclusive salvage rights also require possession, as those rights are granted to an exclusive salvor-*in-possession*.¹⁸ The standards of possession required to make out a right to exclusive possession under the law of salvage and title under the law of finds differ.¹⁹

The possession required for an award of title under the law of finds (let us call it “actual,” for the most part) is greater than possession required for exclusive salvage rights (let us call it “constructive,” for the most part).²⁰ Actual possession is not always what it seems since the possession necessary for title has occasionally been lessened to a strong constructive posses-

¹⁴3 U.S.C. §§ 2101-2106. Interestingly, after passage of the ASA, “the salvor of a shipwreck long on the bottom of the high seas, has an interest in demonstrating abandonment, for he may seek title to the vessel under the law of finds. Under domestic waters, however, his interest is in demonstrating that there was no abandonment, for if the vessel was abandoned, title lies in the State.” Jo Desha Lucas, *Admiralty Cases and Materials*, Fifth Edition (2003 Foundation Press, New York).

¹⁵See Lawrence J. Kahn, *Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds*, 7 Tul. Envtl. L.J. 595 (1994) (treating various pieces of legislation and their effect on admiralty law and the recovery of historic shipwrecks).

¹⁶See *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450, 460-461 (4th Cir. 1992) (quoting *Hener*, *supra*, 525 F. Supp. at 356) (“[S]uccess as a finder is measured solely in terms of obtaining possession of specific property.”).

¹⁷For a review of some treatise materials covering admiralty possession and abandonment standards, see 3A Benedict on Admiralty, (7th rev. ed. 1997 Matthew Bender, New York), T. Schoenbaum, *Admiralty and Maritime Law*, (2d ed. 1994 West Publishing Co., St. Paul); Martin J. Norris, *The Law of Salvage*, (1958 Lawyers Cooperative Publishing, New York).

¹⁸See *Brady v. The Steamship African Queen*, 179 F. Supp. 323 (E.D.Va. 1960) (merely exploring the possibilities of salvage is “insufficient to entitle one to sole possession of the vessel”).

¹⁹See e.g. *Moyer v. Wrecked and Abandoned Vessel, Known as the Andrea Doria*, 836 F.Supp. 1099, 1104 (D.N.J. 1993) (stating that the standard for salvage possession is “markedly different from that applied when deciding to award title to the finder of lost or abandoned property”); *Columbus*, *supra*, 974 F.2d at 460-461; *Hener*, *supra*, 525 F. Supp. at 356 (“The law of finds requires a finder to demonstrate not only the intent to acquire the property involved, but also *possession of that property, that is, a high degree of control over it* Salvage law specifies the circumstances under which a party may be said to have acquired . . . the right to take possession of the property for the purpose of saving it from . . . loss . . . and retain it until proper compensation is paid.”) (emphasis added); see also 3A Benedict on Admiralty §158 at 11-15 to 11-16; Norris, *The Law of Salvage*, § 2 (1958); Adam P. Samansky, *The Practical Effects of Federal Legislation Altering and Amending the Substantive Admiralty Law of Salvage and Finds: The Portland Model*, 37 Suffolk U. L. Rev. 513, 525 (2004).

²⁰See e.g. *Columbus*, *supra*, 974 F.2d at 460-461; *Hener*, *supra*, 525 F. Supp. at 356.

sion.²¹ Salvage possession is generally a constructive possession based on the legal fiction that the *res* is a unified object, and recovery of any piece of it, including one or a few artifacts, is constructive possession over the whole of it.²² The possession necessary to obtain salvage rights also requires the current capability to conduct ongoing effective recovery of the *res*, which amounts to a further detailing of constructive possession.²³ Courts have considered lessening the possessory standard for exclusive salvage rights, but have found no cause to do so.²⁴

C. Two Proceedings: Salvage Rights and an Award for Recovery

Courts must engage in two distinct proceedings when (1) adjudicating exclusive salvage rights and (2) adjudicating an award for having successfully salvaged property, because the former proceeding governs only the intention of salving property while the latter proceeding governs fulfilled intentions.²⁵

²¹See *RMST Titanic, Inc., v. Haver*, 171 F.3d 943, 962 (4th Cir. 1999) (citing *Martha's Vineyard Scuba Headquarters, Inc., v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987) ("Under the law of finds, a person who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession, becomes the property's owner."); *Hener, supra*, 525 F. Supp. at 354 (citing *Eads v. Brazelton*, 22 Ark. 499, 512 (1861)) ("In *Eads*, for example, had Brazelton placed his boat over the wreck with the means to raise its valuables, and had he persisted in efforts directed at raising the [cargo], his conduct would have constituted the only effectual guard over it and thus a judicially recognizable warning that other longing occupants would be obliged to regard.") (emphasis added); *But see Eads, supra*, 22 Ark. at 505-510 (holding that, in fact, actual possession is required for title despite that constructive possession is required for salvage rights; listing many cases to support the proposition).

²²See *Haver*, 171 F.3d at 964 (citing *California v. Deep Sea Research*, 523 U.S. 491 (1998) ("Constructive possession connotes something less than physical seizure of the *res* . . . The propriety of exercising *in rem* jurisdiction over an entire shipwreck within the court's territorial jurisdiction when only part of that wreck is actually presented to a court rests upon the fiction that the *res* is not divided and that therefore *possession of some of it is constructive possession of all.*") (emphasis added)).

²³See *e.g. Moyer, supra*, 836 F. Supp. at 1106-1107; *MDM Salvage, Inc., v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 631 F. Supp. 308 (S.D.Fla. 1986) (ability to act in accordance with the standards of archeological preservation makes possible a window into an earlier era and constitutes a significant element of entitlement to be considered when exclusive salvage rights are sought); *Hener, supra*, 525 F. Supp. at 350 (court adjudicates exclusive salvage rights and determines which of several parties is best fit to conduct salvage operations based on what each party has done and what foresight predicts they will do).

²⁴See *e.g. Eads, supra*, 22 Ark. at 509 ("An impression seems to have obtained, that one who finds derelict property under water or afloat, acquires a right to it by discovery, which can be maintained by a kind of continued claim, without keeping it in possession or applying consonant exertions for its preservation and rescue. There is no foundation for such a notion. The right of a salvor results from the fact that he has held in actual possession, or has kept near what was lost or abandoned by the owner . . . with the means at command to preserve and save it, and that he is actually employing those means to that end.")

²⁵See *Columbus, supra*, 974 F.2d at 463-464 (referring with approval to parties in *Eads, supra*, 22 Ark. 499, and *Wyman v. Hurlburt*, 12 Ohio 81 (1843), as "finders/salvors" pending determination of their rights after a salvage operation); *Hener, supra*, 525 F. Supp. at 353 (The court instituted a three-step process

When performing recovery work on a shipwreck, a salvor can first petition a court for exclusive salvage rights if he demonstrates salvage-style possession (remember: constructive possession and the capability to perform).²⁶ Once this style of possession is demonstrated, the court can order an injunction effective against all the world that makes recovery of the *res*, and the chance to reduce it to actual possession, a one-man show, the stage belonging to the now *exclusive* salvor-in-possession.²⁷ But, should the present capability to continue effective recovery cease, the court may declare it “open season” for anyone electing to overtake possession of the salvage operations.²⁸

Once some artifact or part of the shipwreck has been recovered and reduced to actual possession, the awards portion of the proceedings begins in the court, whereby the value to the owner (if there is one) of what has been recovered or restored by the salvage operation is to be calculated and transferred to the salvor. A salvage award is determined based on several factors, each of which is supported by policies historically animating this aspect of the law of the sea.²⁹ Whether an award of title is granted usually turns on the ownership status of the property, which in the case of shipwrecks always comes down to whether the property has been abandoned.³⁰ It did not until recently also turn on whether exclusive salvage rights had been preliminarily granted.

whereby the right to salvage is first adjudicated and ownership of salvaged property is second adjudicated to determine whether the law of finds or salvage applies. The third step is contingent, however, as it comes between the two adjudications and is comprised of court supervision of the exclusive salvage operations.)

²⁶See *Bemis v. RMS Lusitania*, 884 F. Supp. 1042, 1050 (E.D.Va. 1995) (citing *Eads*, *supra*, 22 Ark. at 511) (“[I]f a salvor keeps a ship over the wreck and carries on a continual salvage operation, the salvor establishes possession of all the contents.”); *Brady*, *supra*, 179 F.Supp. 323 (“A salvor cannot assert a claim merely by boarding a vessel and publishing notice, unless such acts are coupled with a then present intention of conducting salvage operations, and he immediately thereafter proceeds with activity in the form of constructive steps to aid the distressed property.”).

²⁷See *Brady*, *supra*, 179 F. Supp. 323 (“[O]ne who has taken possession of a vessel, has begun the salvage service, and is successfully prosecuting it, is entitled to the sole possession of the property.”).

²⁸See *E.H. Wiggins v. 1100 Tons, More Or Less, Of Italian Marble*, 186 F.Supp. 452, 454 (E.D.Va. 1960) (one cannot continue to assert salvage possession of a vessel and remaining cargo to the exclusion of all others where plans to proceed with the salvage operation are “indefinite and uncertain”).

²⁹See e.g. *The Blackwall*, 77 U.S. 1, 13-14 (1869) (pillar case establishing the factors to consider when tallying a salvage award).

³⁰See e.g. *Moyer*, *supra*, 836 F. Supp. at 1105-1106; *Columbus*, *supra*, 974 F.2d at 461 (analyzing abandonment in depth). It would be for an entire article in itself to canvas the jurisprudential and scholarly writing on the meaning of abandonment, as it is currently rapidly developing a meaning in the admiralty context that is derived from common property law principles. For our purposes here, it will suffice to say that abandoned property belongs to no one (see Forrest Booth, *Who Owns Sunken Treasure?* The Supreme Court, the Abandoned Shipwreck Act and the Brother Jonathan, 11 U.S.F. Mar. L.J. 77, 81 (1998-99) (posing questions pertaining to how and when a state has abandoned property)).

Ordinarily, property salvaged will either be deemed ownerless (never owned or abandoned), at which time an award would be worked out either through a judicial sale for proceeds or simply made *in specie*, or it will be deemed owned, at which time the owner of the salvaged property would be ordered by the courts to pay the salvor (not a finder, since the property was owned) an award for having returned a present value to the property that was once in distress.

If during the awards proceeding the property is deemed abandoned, then the actual possessor may be granted title to that property; if the property is not abandoned, then the actual possessor can receive only a salvage award (which may in fact include an *in specie* award).³¹ All awards require actual possession in the end, since property not salvaged does not entitle one to a salvage award, and abandoned property not in hand cannot entitle one to title.³²

It must be noted that the state of admiralty law has been confused by two contextual uses of the word "abandonment," one each for the law of salvage and the law of finds.³³ However, here, we concern ourselves only with the meaning of abandonment under the law of finds during the awards portion of proceedings since that definition causes a conceptual conflict that the definition under the law of salvage does not.³⁴

Abandonment under the common law of finds carries with it the legal fiction that the whole world has equal rights to the property, a status that ends as soon as the property is reduced to actual possession, or sometimes something even less than actual possession, like a very strong constructive

³¹See *Bemis*, *supra*, 884 F.Supp. at 1049 ("The key to ownership is whether the owner has abandoned the property.").

³²See *Bemis*, *supra*, 884 F.Supp. at 1050 (quoting *Hener*, *supra*, 525 F.Supp. at 356) ("Success of a finder is measured solely in terms of obtaining possession of specific property."). In *Bemis*, the court ruled that one successful expedition, a photo expedition, in addition to a failed expedition, did not demonstrate possession sufficient to vest title to all cargo remaining submerged. The court implied that something more might create a strong constructive possession sufficient to vest title to all remaining property still submerged, perhaps something like recovering thousands of artifacts from a single wreck; *Hener*, *supra*, 525 F.Supp. at 357 (The court stated that "success is essential to obtain a salvage award . . .").

³³See John Paul Jones, Symposium: Sunken Treasure: Law, Technology, and Ethics: First Session: Background: The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan, 30 J. Mar. L. & Com. 205 (1999) (discussing United States Supreme Court admiralty case law and Eleventh Amendment implications, specifically treating various abandonment issues).

³⁴Application of the law of salvage requires abandonment only in the sense that an owner or rival salvor has given up on trying to save property from peril, not that one has given up ownership of the property. Thus, salvage references an abandonment of efforts to save property, while finds references an abandonment of ownership in property. It is the abandonment of ownership that causes the law of finds to conceptually conflict with exclusive salvage rights. See *e.g.* *St. Paul Marine*, *supra*, 505 F.2d 1115 (treating salvage abandonment); *Rickard*, *supra*, 293 F.Supp. 981 (treating salvage abandonment).

possession.³⁵ Until abandoned property is reduced to actual possession, abandoned property is fair game for the world to seek and obtain; and after abandoned property is reduced to actual possession, abandoned property belongs to its actual possessor.³⁶ Abandonment has been given full exposition by courts during the awards portion of proceedings in admiralty cases, some of which cases began with exclusive salvage rights. However, courts generally failed to visit the conceptual conflict discussed here until the 2006 Titanic Opinion, where it was finally met head on.³⁷

D. Explication of the Conceptual Conflict that Arises When Courts First Grant Exclusive Salvage Rights and Later Award Title to Property Salvaged

Since determination of abandonment happens in the second stage of proceedings, exclusive salvage rights must be sought and granted before the issue dispositive of the kind of award to be granted can be reached. And because exclusive salvage rights must be granted before abandonment can be determined, courts must be prepared to confront the conceptual problem that arises when exclusive salvage rights are granted to property that is later considered abandoned. How can exclusive salvage rights that exclude the world from seeking property coexist with a determination that the property is abandoned, i.e. without a possessor, and available for all the world to discover?

At this point the definitional and policy conflicts begin to surface. Overlapping a doctrine that requires abandonment with a doctrine that grants exclusive constructive possession is definitionally problematic since the possessory standard that leads to exclusive salvage rights is not that which leads to title under abandonment. Property that is not available to all the world during the recovery operations of an exclusive salvor-in-possession may still be considered abandoned during the awards portion of pro-

³⁵See *E.H. Wiggins, supra*, 186 F.Supp. at 456 (quoting 1 C.J.S. Abandonment §9 p. 18) (“Personalty, on being abandoned, ceases to be the property of any person, and thenceforth is no man’s property, unless and until it is reduced to possession with intent to acquire title to, or ownership of, it. It may, accordingly, be appropriated by anyone . . . and ownership of it vests, by operation of law, in the person first lawfully appropriating it and reducing it to possession . . .”); *Bemis, supra*, 884 F. Supp. at 1050 (“The first person to reduce [abandoned] property to possession, *either actual or constructive*, becomes its owner.”) (emphasis added).

³⁶See *Bemis, supra*, 884 F. Supp. at 1049 (quoting *Moyer, supra*, 836 F. Supp. at 1106, which in turn cites *Treasure Salvors, Inc., v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 572 (5th Cir. 1981)) (“Title to abandoned property is acquired by the finder who demonstrates occupancy, which is defined as taking possession of the property and *exercising dominion or control over it.*”) (emphasis added).

³⁷See e.g. *Columbus, supra*, 974 F.2d 450 (treating abandonment extensively).

ceedings.³⁸ By first granting exclusive salvage rights and second awarding title, courts potentially strip the requirement of abandonment of its policies and create a definitional conflict between the possessory standards required under each doctrine.

There are reasons for allowing the conceptual conflict to stand,³⁹ but, again, courts have generally failed to recognize them. The one court that has addressed the issue decided not to permit the conflict to stand.⁴⁰

E. Case Law Evidencing the Overlap of Preliminary Exclusive Salvor-In-Possession Status and a Final Award of Title

Case law demonstrates that courts have been willing to grant exclusive salvage rights and leave the door open to a determination of title until an award proceeding has been conducted.⁴¹ This is especially true where a large

³⁸See *Hener, supra*, 525 F. Supp. at 355 (citing *Pierson v. Post*, 3 Caines 175 (N.Y. 1805)) (“[I]f the property was in fact abandoned, no party would have the right as a finder to exclude any of the others from participating in the search . . . The mere chase of silver no more establishes its possession than the chase of wild beasts.”); But granting exclusive salvor-in-possession status does not permanently exclude the whole world since those rights can be challenged. In *Haver, supra*, 171 F.3d at 967-969, the Fourth Circuit held that exclusive salvage rights based constructive possession over a wreck lying in international waters can be challenged in any admiralty court. The court in *Haver* stated that such power to adjudicate the rights of a salvor in constructive possession is a “shared sovereignty” which gives authority to legally declare rights but not finally enforce them. Actual possession is necessary for final enforcement, at which time title may be awarded. But, in the end, the court did recognize the propriety of RMST’s exclusive salvage rights, and did agree that all the courts of the world would recognize them as well, even though not yet obliged to recognize inchoate rights based on constructive possession.; *The Port Hunter*, 6 F. Supp. 1009 (D.Ma. 1934) (holding that salvor-in-possession status does not automatically grant title in the property discovered, as abandonment must still be tested to determine if there is a true owner with rights superior to the salvor).

³⁹See *Hener, supra*, 525 F. Supp. at 354 (One reason offered is that constructive possession over submerged cargo is the only “effectual guard over it.”).

⁴⁰See *R.M.S. Titanic, supra*, 435 F.3d 535 (holding in sum that “[one] cannot claim to be a finder and, at the same time, seek to exclude the rest of the world from salvaging the wreck or reducing its artifacts to possession under finds law”).

⁴¹See *RMST Titanic, supra*, 286 F.3d 194 (The court held that RMST enjoyed exclusive salvor-in-possession status and did have a lien on property salvaged, and that title to the property would be adjudicated when enforcement of the lien was sought in the awards portion of the proceedings. The court’s ruling against adjudicating title in this case was based on the fact that RMST did not bring an awards petition; RMST was claiming title based on the order giving it exclusive salvor-in-possession status, which the court found improper. The court did not rule out an award of title, it simply saved the date for one.); *Haver, supra*, 171 F.3d at 966 (“RMST obtained the right to exclusive possession, not only of the artifacts removed from the wreck of the *Titanic*, but also of the wreck itself . . . [O]nce the property is brought in *custodia legis*, the court can execute on RMST’s lien and sell the property, or if the sale of the property would prove insufficient to compensate RMST fairly, the court can award title in the property to RMST.”) (emphasis added); *Bemis, supra*, 884 F.Supp. at 1044, 1048 (The court concluded that it had “jurisdiction to properly address [petitioner’s] claims for title, salvage, and injunctive relief” and stated that “in order to acquire title to cargo and personal effects salvaged . . . [the petitioner] must establish rights through the

part of the cargo has already been recovered and salvage operations are still ongoing, likely because strong constructive possession is proved by such conduct, and an award of title is made more possible by such proof.⁴² Courts have permitted the interposition of an *in specie* award of title to already salvaged artifacts while salvage rights are allowed to continue to run on the rest of a wreck.⁴³

At award hearings, courts have generally been open to alternative claims under the law of finds and claims under the law of salvage, the sole difference, again, being proof or non-proof of abandonment.⁴⁴

Even where exclusive salvage rights have not been preliminarily court ordered, but a salvage operation was first recognized as such at the award proceeding, the courts have allowed the salvage status to coexist with an award under the law of finds, or have at least allowed a request in the alternative for an award under either the law of finds or the law of salvage.⁴⁵ In

law of salvage or the law of finds . . ." (emphasis added). Finally, the court stated that it would deny request for a salvage award since pursuant to the law of finds the petitioner had been allowed to keep all of the property already salvaged.); *Moyer, supra*, 836 F. Supp. at 1106 (recognizing salvage rights and title to property salvaged); *Columbus, supra*, 974 F.2d 450 (The plaintiff was first granted exclusive salvor-in-possession status by the United States District Court for the Eastern District of Virginia, and was later permitted to bring an *in rem* action in the same court alleging in the alternative that it was the finder of a shipwreck under the law of finds or the salvor of the wreck under the law of salvage. The District Court found the plaintiff to be the finder under the law of finds before the case proceeded to the Fourth Circuit on appeal, where the Court of Appeals ruled that the lack of proof of abandonment foreclosed the plaintiff's right to title under the law of finds.); see also *International Aircraft Recovery, L.L.C., v. Unidentified Wreck And Abandoned Aircraft*, 373 F.3d 1147 (11th Cir. 2004) (permitting petition for (1) injunctive relief to prevent interference with salvage rights and (2) a salvage award or title under the law of finds); *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F.Supp. 1327 (E.D.Va. 1990); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Vessel*, 546 F.Supp. 919, 929 (S.D.Fla. 1981) (protecting inchoate rights to both exclusive salvage and title, even before the location of some of the property was known, since systematic and ongoing recovery operation was in effect); *Eads, supra*, 22 Ark. 499 (discussing the difference between a right to exclusive salvor-in-possession status and a right to title, according to constructive possession); *E.H. Wiggins, supra*, 186 F.Supp. at 456 ("[T]he party taking possession under salvage operations may be considered a finder under the doctrine of *animus revertendi*, i.e. the owner has no intention of returning.").

⁴²See *Bemis, supra*, 884 F. Supp. at 1050 ("[W]here courts awarded title to and an exclusive right to recover the entire cargo, the parties had recovered a large part of the cargo.").

⁴³See *Columbus, supra*, 974 F.2d at 469 (citing *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F. Supp. 186, 198 (S.D.Fla. 1981)) (Where salvage efforts had not been completed, the Fourth Circuit held that considering "the logistics in making a salvage award, we believe that in a case such as this, an award *in specie* would be proper When items salvaged are uniquely and intrinsically valuable beyond their monetary worth, an award *in specie* is more appropriate.").

⁴⁴See *Columbus, supra*, 974 F.2d at 469 (treating abandonment extensively to determine if title vests or a salvage award is due).

⁴⁵See *Brady, supra*, 179 F. Supp. at 321 (allowing salvors the right to claim title to a recovered ship where the value of services rendered exceeded the value of the property obtained); *E.H. Wiggins, supra*, 186 F.Supp. at 454 (Libellants asked the court to declare them "finders of the salvaged cargo or, in the alternative, they [sought] that the [cargo] be sold to satisfy the salvage lien.").

some cases, courts have found *both* the laws of salvage and finds to be applicable to the same cause of action during the awards portion of proceedings.⁴⁶

Thus, the admiralty case law, excepting the 2006 Titanic Opinion, by and large permits both exclusive salvor-in-possession status and an award of title under the law of finds to coexist, which renders unfounded the statement that such a coexistence would be “momentous.”⁴⁷

III THE JUSTIFICATION FOR OVERLAPPING EXCLUSIVE SALVOR-IN-POSSESSION STATUS AND AN AWARD OF TITLE IN THE SHIPWRECK CONTEXT

The safety of life and the sustainability of quality property recovery operations are the important policies backing the coexistence of exclusive salvage rights and an award of title under the law of finds

Should the courts choose the first solution suggested in the introduction of this paper and deny exclusive salvors the right to title, salvors who are encouraged not to seek exclusive salvage rights, and who hope for title to property at the bottom of the sea, would have to fight off competitors and operate in a hostile environment, as even the 2006 Titanic Opinion admits.⁴⁸ The integrity of the property and the lives of those engaged in the recovery effort would thus be put into harm’s way.⁴⁹ That is to say, if courts do not have room to grant exclusive salvage rights and an award of title, salvors may opt out of exclusive salvor status for a chance at title instead of just the chance at a salvage award, thus giving license to rival salvors to compete for recovery simultaneously and competitively. The underwater environment is not con-

⁴⁶See *Bemis*, *supra*, 884 F. Supp. at 1048 (“Two legal theories may be applied to shipwrecked vessels: the law of finds and the law of salvage . . . [T]he Court finds that both doctrines are applicable to the instant case . . .”).

⁴⁷See *R.M.S. Titanic*, *supra*, 435 F.3d 533 (“[T]o change [the petitioner’s] role from that as salvor-in-possession to that as finder would be momentous.”).

⁴⁸See *R.M.S. Titanic*, *supra*, 435 F.3d 532-533 (“A would-be finder should be expected to act acquisitively, to express a will to win by acts designed to establish the high degree of control . . . The would-be finder’s longing to acquire is exacerbated by the prospect of being found to have failed to establish title . . . Furthermore, success as a finder is measured solely in terms of obtaining possession of specific property; possession of specific property can seldom be shared . . . Indeed, a free finders-keepers policy is but a short step from active piracy and pillaging.”).

⁴⁹See *Columbus*, *supra*, 974 F.2d at 460-461 (quoting *Hener*, *supra*, 525 F. Supp. at 356) (“Would-be finders are encouraged [by the law of finds] to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or other would-be finders that could entirely deprive them of the property . . . [S]alvage rules markedly diminish the incentive for salvors to act secretly, to hide their recoveries, or to ward off competition from other would-be salvors In short, although salvage cannot alter human nature, its application enables courts to encourage open, lawful, and cooperative conduct, all in the cause of preserving property (and life).”).

ducive to a raid and plunder free-for-all because it is a dangerous environment that easily threatens survival. Furthermore, the fragility of shipwrecks must be appreciated.⁵⁰

The application of salvage law encourages more controlled conduct and conduct actually overseen by the courts, while the application of the law of finds encourages something more like a free market.⁵¹ If courts do not have the ability to apply both concepts to one operation, petitioners will be forced to choose an applicable doctrine at the outset of their project, and petitioners may choose a free market for the benefits built therein. The 2006 Titanic Opinion found otherwise in error, as it assumed the problem was in an “unfair disadvantage” rather than in a nullification of the incentive to plead salvage.⁵² Nullifying the incentive to plead salvage may encourage treasure hunters to wait on a petition to courts until property has been reduced to actual possession, whereby a more profitable claim can be made under the law of finds.⁵³ The uncertain nature of *in specie* awards granted by the law of salvage does not supply the same incentive that an award of title under the long-standing doctrine of finds does. Thus, a rational actor choosing according to the greatest incentive under the scheme established by the 2006 Titanic Opinion will incidentally encourage “violent and lawless acts of the eager or desperate finders.”⁵⁴

Adding policy on top of policy, because of their cultural value, shipwrecks should be treated more carefully than other properties subject to a member of the public’s reduction to possession.⁵⁵ Courts recognize this concern and give

⁵⁰See H.R. Rep. No. 100-514, pt. I at 1 (1988) (expressing concern for the cultural value of historic shipwrecks when discussing the ASA, and specifically recognizing that both the laws of salvage and finds are applicable to that context).

⁵¹See e.g. *Hener, supra*, 525 F. Supp. at 356 (“Admiralty favors the law of salvage over the law of finds because salvage law’s aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law.”).

⁵²See *R.M.S. Titanic, supra*, 435 F.3d 534 (The petitioner in this case argued that not permitting the coexistence of salvage status and an award under finds would present it with a Hobson’s Choice by causing it to “either file as a finder, and risk receiving no award from a potential divestiture of title on the appearance of a true owner; or file as a salvor, and risk receiving no award should the property be found abandoned and no owner existed to pay an award.” The court responded to this argument by stating that “[t]he law, however, does not suggest such an either-or risk. Under finds, [the petitioner] would be effectively receive an award in the value of what it reduced to possession, and under salvage it would also be assured an award from the value of what it reduced to possession. Indeed, if the value of property salvaged were insufficient to cover an appropriate salvage award, then the court could, after making appropriate findings, even grant an *in specie* award to the salvor.”).

⁵³Mary S. Timpany, *Ownership Rights in the Titanic*, 37 Case W. Res. 72 (1986) (discussing how a choice of the application of the law of finds to salvors of the vessel *R.M.S. Titanic* at the outset of recovery operations could be detrimental to the vessel’s integrity).

⁵⁴Norris, *The Law of Salvage*, 138 (Supp. 1974 Lawyers Cooperative Publishing, New York).

⁵⁵See *Moyer, supra*, 836 F. Supp. at 1107 (finding that capability to preserve an historic shipwreck should be considered when deciding to award salvage rights). See Patrick J. O’Keefe and James A.R. Nafziger, Report: The Draft Convention on the Underwater Cultural Heritage, 25 Ocean Dev. & Int’l L. 391, 397 (1994) (discussing underwater cultural heritage).

credit to those who observe it.⁵⁶ In fact, a new factor for computing a salvage award is the care with which archeological operations are undertaken.⁵⁷

Under common property principles, it is every finder's right to own property in clear title should the property be proved abandoned. And it is usually every person's right to hunt for title to that abandoned property. But, taking the special circumstances of shipwrecks into account, the policies of common property law should be made secondary to the policies of admiralty law.⁵⁸ Exclusive salvors-in-possession should continue to be given a chance at an award of title so that salvage law can encourage salvors to seek exclusive rights without having to give up the incentive of an award of title. This scheme would allow courts to protect the shipwreck by overseeing salvage operations, and it would at the same time protect the wreck from the behavior that applying only the law of finds incidentally encourages.⁵⁹

IV CONCLUSION

Though preliminarily granting exclusive salvor-in-possession status to those who recover property from shipwrecks and finally awarding title to property salvaged does cause a conceptual conflict, there are sound policy reasons necessary to and embedded in established admiralty law that justify allowing the conflict to stand. A strong pedigree of case law cites incentives to undertake salvage operations, the safety of those engaged, and the integrity of historical property as reasons for permitting the coexistence of exclusive salvor status and an award of title under the law of finds.

⁵⁶See Sabrina L. McLaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 Colum.-VLA J.L. & Arts 149, 190 (1995) (discussing the increase of value that recovered artifacts enjoy when wreck sites are salvaged with archaeological care).

⁵⁷See *Columbus*, *supra*, 974 F.2d at 468 (citing *MDM Salvage*, *supra*, 631 F.Supp. 308) (archeological preservation allows a window into an earlier era and constitutes a significant element of entitlement; factor added to those set out in *The Blackwall*, *supra*, 77 U.S. at 13-14).

⁵⁸See *Hener*, *supra*, 525 F. Supp. at 358 ("[B]ecause the right to salvage depends on the utility of the service offered . . . admiralty courts have more freedom to protect salvage operations . . . than common law courts have in applying the law of finds . . . Admiralty courts may be more flexible in determining whether a salvor has commenced operation worthy of protection than common law courts in deciding which searchers have taken sufficient steps to warrant deeming them finders, and therefore keepers, of the property involved.").

⁵⁹See David J. Bederman, *Building New Regimes and Institutions for the Sea: Historic Salvage and the Law of the Sea*, 30 U. Miami Inter-Am. L. Rev. 99 (1998) (discussing the law of salvage as having evolved to embrace values of historical preservation); *but see* Terence P. McQuown, *An Archeological Argument For the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks*, 26 Wm. Mitchell L. Rev. 289 (2000) (positing that the traditional law of admiralty salvage is incompetent at preserving historic shipwrecks).