An Endangered Species?

It's great doing environmental law in no small part because it is interdisciplinary: not only do environmental lawyers and scholars have their own field, but they engage with scientists and engineers, as well as specialists in other legal areas (such as constitutional or tort law).

Still, I had never seen an environmental *trademark* controversy. Until now:

> Historic hotels and other beloved landmarks at Yosemite National Park will soon undergo a name change in a multi-million dollar tussle over who owns rights to the original names.
>
> The Ahwahnee, a luxurious stone and timber hotel with stunning views of the park's fabled granite peaks, will be called the Majestic Yosemite Hotel. Curry Village, a woodsy family-friendly lodging complex, will be recast as Half Dome Village…..
>
> The new names at Yosemite are the latest twist in the dispute with Delaware North, the company that recently lost a $2 billion bid — the National Park Services largest single contract — to run the park's hotels, restaurants and outdoor activities that draw visitors from around the world.
>
> Delaware North demands to be paid $51 million for the names and other intellectual property. The New York-based firm filed a lawsuit last year, saying

> that when it won the contract in 1993, the park service required the company to buy the former concessionaire's assets.

It's not as ridiculous as it sounds. If Delaware North actually did have to buy the former concessionaire's assets, then it stands to reason that intellectual property would be part of that.

But hang on a minute.

1) It isn't clear that names like "Wawona" or "Badger Pass" actually can be trademarked to begin with. I am no trademark expert, but at some point names enter the public domain. You can't type up "Moby Dick," and then copyright it. In the same way, people have been calling the luxury hotel in the Yosemite Valley "the Ahwanee" since it opened in the 1920's: ditto with Badger Pass. Delaware North couldn't just go ahead like some modern-day Cortes, stick a flag in the ground, and declare it their trademark. As my friend and former student Michelle Nicole Black commented, "can the State of Delaware sue Delaware North for trademark infringement?" It actually poses an intriguing legal and philosophical question about the privatization of public property, and it is far from clear that Delaware North is right on this. Trademark law is both federal and state, but if the company got the Patent and Trademark Office to sign off on this, I'd be surprised (although stranger things have happened). Since state marks don't requite registration, that means it is just a matter of common law; we don't really know whether these marks actually exist until a court says so. And no court has said so.

2) Even assuming that they can trademark these names, unless the Park Service is guilty of gross legal malpractice, it would not require Delaware North to ***buy*** the assets: it would require the company to ***lease*** them for the duration of the contract. Otherwise, the contract would be of unlimited duration, which it clearly is not.

These are pretty big issues to deal with before anyone replaces my beloved Wawona Hotel with something called the "Big Trees Inn," or whatever they want to name it. So what is going on?


Not as scenic, but probably closer to the truth

I can't help but think that this is all a big poker game. Delaware North wants $51 million for the trademarks. The new concessionaire, Aramark, has offered $2 million. So one can imagine the "conversation" between the lawyers:

Delaware North: Nice little park you've got here. Too bad if something were to ***happen*** *to it. You wouldn't want to operate a park with intellectual property you don't have the rights to, would you? That would allow someone — say,* ***us*** *— to get an injunction against you and shut the place down just as the high season is starting.*

Aramark (and the National Park Service): Oh yeah? Well, you can cease your little cranial-rectal fusion. We'll just rename the damn buildings. And by the way, in a few months no one will care what they are called, just as no one cares about Comiskey Park, or Shea Stadium, or whatever. And then your precious trademarks will be worth nothing.

It's not a surprise that spokespeople for the Park Service and the new concessionaire are making noises about this being temporary.

Lots of times property disputes like this can't get resolved because of bilateral monopolies: both sides just try to wait out the other, knowing that the other has nowhere to go. More frequently, it is because of non-monetizable values. In a property case I teach, *Estancias Development Corp. v. Schultz*, the plaintiff homeowners sued the defendant hotel company for nuisance because the hotel installed some air conditioning units that made the sound around the plaintiffs' house sound like they were in the middle of an airport runway. The defendant hotel's cost to put in a different system was many times greater than the

plaintiffs' loss of property value, so when the injunction issued, you would think that it would be a simple matter to negotiate their way around it. But no: the plaintiffs refused to deal. They just wanted to keep their quiet house. So the hotel had to do the more expensive thing.

That doesn't seem to be a problem here. This is just about money. And Delaware North's trademarks — assuming even that they own them — are a diminishing asset. I suspect, although I am obviously not sure, that they will resolve it at some point. Maybe not for this season, but at some point relatively soon. And I'll be goddamed if anyone won't let me call it the Wawona no matter what happens.