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Re: Petition to Recognize the Goforth Creek area as a Significant Recreational Area

Dear Resource Managers,

We write on behalf of Cherokee Forest Voices, the Tennessee Chapter of the Sierra Club, WaysSouth, and The Wilderness Society, to ask that you recognize the importance of the Goforth Creek area as a recreational resource in the Cherokee National Forest. Our members enjoy this area for hiking, camping, wading, wildlife watching, and for spiritual renewal.

We are gravely concerned about the potential impacts of Corridor K to the recreational uses of Goforth Creek. Several of TDOT's design options would span a frequently visited portion of the creek and would completely block trail access to a remarkable overlook. Other design options would cross several tributaries higher in the watershed and could irrevocably destroy the creek's suitability as a trout stream. TDOT has even raised the grievous possibility of using the Goforth Creek trail as an access road for construction. In our view, TDOT cannot possibly fulfill its duties under Section 4(f) without considering the impacts to this special area. Both the Forest

Service and TWRA, as the resource managers for Goforth Creek,¹ have the authority to ensure that those impacts are not ignored.

The Goforth Creek Canyon

It is spring in the Ocoee River Gorge, and national forest users are shaking off the lethargy of winter and rediscovering the joy of recreation in the Goforth Creek canyon. In the Cherokee National Forest, there is no other place like Goforth. The Ocoee Gorge is hemmed by a steep valley, with few natural corridors into the surrounding mountains. In the interior of the gorge, only Goforth Creek allows recreational access to hiking, trout fishing, camping, wading, picnicking, wildlife watching, and broad vistas of the river gorge. Both locals and tourists enjoy the easy access to this special area.

From the parking area, a short walk on the broad creekside trail escapes the bustle and noise of the highway. Soon, the only sounds are falling water and the commerce of the forest, joined by the voices of picknicking families, warming themselves on sunny rocks after a chilly rafting adventure or splashing among the boulders, overturning creekbed rocks to spot crayfish. Just upstream of its steep, final tumble to the river, the creek broadens and fishermen quietly stalk trout in the deeper pools.

Farther upstream, the creek calms and hikers enjoy a more profound quietness and peace. The trail climbs briefly away from the water to the top of a short grade which, according to TDOT's design drawings, might one day be obliterated by a new highway. The trail then drops to rejoin the creekside, where a broad, level meadow—rare in this rugged terrain—often finds bright-colored tents pitched around stone fire rings.

Here, the trail fords the creek and quickly gains elevation on its climb to the rim of the gorge. Near the top, the trail passes through a wildlife clearing where a patient, quiet hiker will see deer and black bears browsing. At the trail's summit, hikers emerge high above the Ocoee River, where a broad vista overlooks the gorge and, farther south, the Big Frog Wilderness. It is a panorama where hikers can begin to appreciate the river's ancient work or, in the evening, simply watch the sunset beyond Sylco Mountain.

The Goforth Creek area is busy with diverse recreational uses. But there are no picnic tables. There are no bath-houses. There are no fences or railings at the overlook. And that is why we are worried that Goforth Creek has not been given due consideration by TDOT. TDOT does not understand that the Cherokee National Forest is not a city park. Its most important recreational areas find their significance not in built facilities, paved exercise trails, or swingsets, but from their ability to transport people into a natural setting.

In the Ocoee District, Goforth Creek serves unique recreational interests without sacrificing its special natural character. We therefore ask the Forest Service and TWRA, as the stewards of this

¹ The Forest Service, of course, has jurisdiction over the Cherokee National Forest. TWRA, by agreement with the Forest Service, maintains jurisdiction over hunting and fishing in the CNF, which is Tennessee's largest wildlife management area. See RLRMP at 12.

special place, to recognize that Goforth Creek is a significant recreational area for purposes of Section 4(f).

TDOT has not Acknowledged the Recreational Uses of the Goforth Creek Area

After reviewing a Section 4(f) applicability assessment by TDOT,² we have serious concerns with the depth of analysis devoted to the important recreational resources of the Cherokee National Forest, and to the Goforth Creek area in particular. Discussing Goforth, TDOT states:

Goforth Creek Parking[:] This site is a pull-off on the bluff side of Highway 64, which is used by boaters and some campers. Parking is tight, and there are no signs that identify the site.

Public Parking facilities are transportation related and support the overall function of US 64 (portion of the Ocoee Scenic Byway) which is not a Section 4(f) facility. It is recommended that this site not be advanced into the Preliminary Draft Section 4(f) Evaluation.³

This discussion shows a dismaying ignorance of the recreational resources in the Goforth Creek area. Goforth Creek, of course, is more than a “pull-off.” It is a regularly stocked trout stream, a hiking and camping area, and a place where day-users can play. Aside from Rock Creek, which has a very different geology and character, it is the only wading stream in the Ocoee Gorge.⁴ Its parking area is full to overflowing much of the year, not because drivers want to “pull off,” but because they want to hike, wade, fish, and camp. After heavy rains, the creek is even used by brave kayakers as a short but exciting paddling run.

TDOT’s cursory treatment of Goforth Creek is typical of the report we have reviewed. Kayak and raft put-ins and take-outs are also described as “transportation related,” not recreational in character.⁵ Consequently, the area’s primary recreational use—boating the Lower Ocoee—is completely neglected by TDOT’s evaluation.⁶ In addition, the Lakeview Trail Overlook is dismissed because the parking lot has “no significant features,” while the trail itself is, well, overlooked.⁷ Big Frog Wilderness is also conspicuously absent from the evaluation, despite the potential noise effects of a roadway, and we see no way that the assessment for Little Frog Wilderness can be adequate without better baseline noise monitoring. We trust that the Forest Service, with its expertise as the resource manager for these places and uses, will recognize the shortcomings of TDOT’s assessment.

² TDOT, Corridor K Section 4(f) Applicability Background Report (“Section 4(f) Report”) (July 2011). We can provide a paper or electronic copy of this Report upon request.

³ Section 4(f) Report at 23.

⁴ During recreational releases, the river itself is too powerful for wading. Streams on the south side of the river, like Big Creek, cannot be accessed without crossing the river, and other streams on the north side of the gorge do not have parking and trail access. An exception may be Rogers Branch, which has a nice trail that can be accessed from the put-in parking area, but the stream is very small and has little water during the summer.

⁵ Section 4(f) Report at 7, 18-19, 23.

⁶ TDOT recognizes that the Upper Ocoee is a recreational resource but strangely fails to assess the Lower Ocoee, despite acknowledging that the Lower Ocoee has many more release days than the Upper. See Section 4(f) Report at 24.

⁷ Section 4(f) Report at 20, 26-28.

Although not explicit, TDOT’s assessment indicates that Goforth has been overlooked as a recreational resource because it is not a designated Concentrated Recreation Zone (“CRZ”). TDOT incorrectly cites the RLRMP for the proposition that Section 4(f)-eligible trails are found *only* in CRZs.⁸ While recreational resources may, of course, be found in CRZs,⁹ the RLRMP does not say they cannot be found elsewhere. The Goforth Creek area supports many of the uses that are found in both concentrated and dispersed recreation areas: hiking trails, a stocked trout stream, maintained wildlife openings, and opportunities to interact with nature.¹⁰

The Determination of Recreational Resource Significance Belongs Solely to the Resource Managers—the Forest Service and TWRA

TDOT’s dismissive attitude toward the Cherokee National Forest’s recreational resources is problematic because TDOT asserts that it will make the final decision regarding Section 4(f) applicability, subject only to FHWA approval. TDOT, in its own words, purports to have the authority to determine whether recreational resources are significant in light of “the goals and objectives established in CNF’s Revised LRMP.”¹¹ TDOT, of course, has no special expertise to interpret the RLRMP. More importantly, TDOT has *no authority* to say that a particular resource is not significant.

The controlling statute defines eligible Section 4(f) properties as follows:

publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site)¹²

Section 4(f) envisions a simple division of labor between resource managers and departments of transportation: resource managers decide which resources are important enough to merit consideration in the 4(f) alternatives analysis, and the DOT performs that analysis to determine which alternative would cause the least harm. There are two reasons for this division of labor: DOTs aren’t familiar with local recreational resources or needs, and they have a strong incentive to ignore resources that might stand in the way of their parochial objectives.

Thus, as FHWA has acknowledged, the identification of significant resources is entrusted to the federal, state, and local resource managers.¹³ Furthermore, FHWA regulations state that FHWA can review a resource manager’s determination of *non-significance*, but not a determination of

⁸ TDOT notes that “multi-use trails” are eligible for 4(f) protection, but incorrectly interprets the RLRMP to define multi-use trails as trails found in CRZs. Section 4(f) Report at 26-27.

⁹ “[T]rails for hikers, horseback riders, [and] bicycle riders” are “examples of facilities found in [CRZs].” RLRMP at 127.

¹⁰ See RLRMP at 127-29, 131-33.

¹¹ Section 4(f) Report at 6.

¹² 49 U.S.C. § 303(c) (emphases added). See also 23 U.S.C. § 138 (identical text).

¹³ 73 Fed. Reg. 13368, 13380 (“The statute is limited by its own terms to significant properties ‘as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site.’”).

significance.¹⁴ Nevertheless, FHWA guidance, which was written to guide state departments of transportation in implementing Section 4(f), maintains that FHWA can review and overturn any determination by the resource manager.¹⁵

That position, which TDOT repeats in its 4(f) report,¹⁶ is an unlawful attempt to enlarge the FHWA's authority at the expense of federal, state, and local resource managers. Congress intended "to require the Transportation Secretary to apply the statute whenever state or local officials declare a property significant, *regardless of what Federal officials think of the site.*"¹⁷ And where Congress has "directly spoken" to an issue, "that is the end of the matter."¹⁸ Section 4(f) therefore gives resource managers the unqualified authority to determine which resources serve significant recreational purposes. In short, there is simply no authority for the proposition that FHWA can overturn a resource manager's determination of significance.¹⁹

To the extent that FHWA has *any* authority to review a resource manager's determination, such authority comes only from its ability to decline to approve the state DOT's final plans.²⁰ In other words, FHWA can require TDOT to conduct a 4(f) analysis for a resource that a local official improperly declares to be insignificant, but neither FHWA nor TDOT has any power to interfere with the resource managers' determination that a particular resource is significant.

The Goforth Creek area Functions as a Significant Recreational Resource

TDOT acknowledges that "the recreational parts of the forest including multi-use trails are considered Section 4(f) resources."²¹ According to TDOT, such a resource is significant if it "plays an important role" in meeting the recreational objectives of the resource manager.²²

¹⁴ See 23 C.F.R. §774.11(c) and (d). Paragraph (d) of the regulation is somewhat ambiguous, but it is explained by 73 Fed. Reg. at 13380, which notes that in these paragraphs, FHWA "proposed ... to retain the right to review such determinations of non-significance for reasonableness." FHWA states further that this distinction was necessary "to implement a provision of the statute itself" because the statute leaves significance determinations to resource managers.

¹⁵ See Section 4(f) Policy Paper (2005) at 12, 30 ("FHWA reviews the state determination of significance"); Proposed Section 4(f) Policy Paper (Nov. 2011) at 43.

¹⁶ Section 4(f) Report at 7 ("All determinations ... are subject to review by the FHWA.").

¹⁷ Stop H-3 Ass'n v. Coleman, 533 F.2d 434, 442 n.15 (9th Cir. 1976) (rev'd on other grounds after intervening legislation) (emphasis added).

¹⁸ Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984).

¹⁹ FHWA relies on two cases for the proposition that FHWA can "review" a resource manager's decision. Section 4(f) Policy Paper (2005) at 30. In the first, Concerned Citizens on I-190 v. Sec'y of Transp., 641 F.2d 1, 7 (1st Cir. 1981), the court held exactly the opposite. The court *rejected* the argument that FHWA should have independently reviewed the resource manager's determination of non-significance. In the second, Geer v. FHA, 975 F. Supp. 47, 64, 67 (D. Mass. 1997), the court incorrectly cited Concerned Citizens for the proposition that FHWA has a broad review power. The Geer court also cited a previous version of the regulation with overbroad language, which has now been replaced. *Id.* at 67. Compare 23 C.F.R. § 771.135(c) (1987) with 23 C.F.R. § 774.11(c) (2008); 73 Fed. Reg. at 13380.

²⁰ 114 Cong. Rec. at 24036-37 (1968) (exchange between Senator Yarborough and Senator Randolph, who chaired the conference committee) (explained further in Stop H-3, 533 F.2d at 442 n.15).

²¹ Section 4(f) Report at 27.

²² Section 4(f) Report at 7. The term "significant" is not defined in any binding law or regulation and, because significance determinations are entrusted to resource managers, the Forest Service and TWRA have the discretion to decide what it means for their own purposes. The definition used by TDOT, however, which is taken from FHWA's guidance documents, is a useful place to begin. See Section 4(f) Policy Paper (2005) at 12.

Goforth Creek is an important resource in light of the recreational objectives of both the Forest Service and TWRA.

The CNF's recreation objectives include camping, hunting, fishing, wildlife viewing and nature study, and non-motorized trail systems.²³ One particularly important objective is the availability of water-based activities, and the CNF recognizes that its scenic creeks can provide unique mountain settings for those activities.²⁴ Providing recreational trails, especially trails with easy access, is a special priority for the management prescription where Goforth Creek is located,²⁵ and existing trails are to be maintained to the extent possible.²⁶ All these objectives are uniquely met by the Goforth Creek area. Recreational users access the trail easily from the parking lot on Highway 64, only minutes from enjoying wading, fishing, camping, hiking, and wildlife viewing and nature study.

TWRA's objectives include providing increased access to trout fisheries and, at the very least, maintaining current trout fishing opportunities.²⁷ TWRA has only a limited capacity to stock trout streams, so it selects streams based accessibility and anticipated fishing pressures.²⁸ In other words, TWRA's decision to stock a stream reflects a determination that the stream is a significant resource for trout fishing. As noted above, Goforth Creek is a regularly stocked trout stream,²⁹ and it should be considered a significant recreational fishery.

The Forest Service and TWRA Should Recognize the Goforth Creek Area as Significant for Purposes of Section 4(f)

Accordingly, we request that the Forest Service and TWRA recognize the Goforth Creek area as significant for purposes of Section 4(f). The boundaries of the area should be set, naturally, to include the many recreational uses. The area should include the trail and the creek itself from the parking area to the meadow and camping area and the section of the trail leading to the Ocoee Gorge overlook. It should also include as much of the surrounding forest as necessary to shield the recreational uses from visual disturbance or noise.

Recognition of Goforth Creek's significance will be timely so long as it precedes approval at Concurrence Point 3.³⁰ Generally speaking, significance determinations may be made at any time before TDOT acquires a right of way.³¹ However, because Concurrence Point 3 seeks

²³ RLRMP at 56-57, Goal 31.

²⁴ RLRMP at 55-56, Goal 31.

²⁵ RLRMP at 115 (listing recreational trails as an "emphasis" for Prescription 7.A and listing easily accessed trails as a component of that prescription's "desired condition").

²⁶ RLRMP at 57, Goal 32.

²⁷ TWRA, Trout Management Plan for Tennessee, 2006-2016 (April 2006) at 17-18.

²⁸ *Id.* at 5.

²⁹ TWRA, Tennessee Fishing Guide (2012) at 27-28, 30.

³⁰ See FSM 7725.62 (providing for notice to FHWA when the Forest Service "identifies, for the first time, a current or proposed use of land which should be incorporated into one of the specifically stated types of areas"—i.e., the resources protected by Section 4(f)).

³¹ 23 C.F.R. § 774.13(c). Resources that would be "constructively" used by a transportation project may be designated only until the environmental documentation is approved or the right of way is acquired, whichever is earlier, 23 C.F.R. § 774.15(f)(4), but any "use" of Goforth Creek would likely be a direct, physical use.

agreement that the draft environmental document (including the 4(f) review) is adequate, it would be difficult to revisit the issue later.

Finally, it is not necessary that the area be formally delineated in a resource management plan, although that would certainly be sufficient to trigger Section 4(f) protections.³² An area is eligible under Section 4(f) if it either “function[s] for, *or* [is] designated ... as being for, significant ... recreation ... purposes.”³³ The determination of an area’s “function” belongs to the resource manager(s).³⁴ Consequently, the Forest Service and TWRA may simply recognize, in official correspondence with TDOT, that the Goforth Creek area functions for significant recreational purposes.³⁵ Of course, TWRA has already publicly designated Goforth as a stocked trout stream, and may simply inform TDOT that such a designation is tantamount to designation as a significant recreational resource.

Conclusion

Our members are grateful for the experiences we have had in the Goforth Creek canyon. We are grateful, too, that the Forest Service and TWRA have managed this area to allow high quality recreational opportunities in a natural setting. We believe that Goforth Creek meets important recreation needs in the Ocoee Gorge, and we ask that you ensure it receives due consideration under the laws designed to protect such areas.

Please contact us if we can provide any further information.

Sincerely,



Sam Evans
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D.J. Gerken
Managing Attorney

Southern Environmental Law Center
22 South Pack Square
Asheville, NC 28805

³² Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 370 (5th Cir. 1976) (requiring only that public land be “designated or administered, *formally or informally*,” for a park, recreation, or wildlife purpose) (emphasis added).

³³ 23 C.F.R. § 774.11(d) (emphasis added). FHWA’s guidance purports to require that the area be specifically described in a management plan, such as the RLRMP. Section 4(f) Policy Paper (2005) at 17 (stating that 4(f) applies “only to those portions of the lands which are ... identified in the management plans”). Such a requirement is plainly inconsistent with the controlling regulation.

³⁴ 23 C.F.R. § 774.11(d) (“The determination of which lands so function or are so designated, and the significance of those lands, shall be made by the official(s) with jurisdiction over the Section 4(f) resource.”).

³⁵ While the Forest Service Manual notes that Section 4(f) properties “include[e]” several formally-designated types of land, the list is not exhaustive. FSM 7725.62. All that is required for purposes of Section 4(f) is a determination that the area functions as a significant recreational resource. Consequently, formal publication in a management plan is not necessary for 4(f) purposes, even though such a step would be justified in light of Goforth Creek’s unique attributes.

On behalf of:

Catherine Murray, Executive Director
Cherokee Forest Voices*

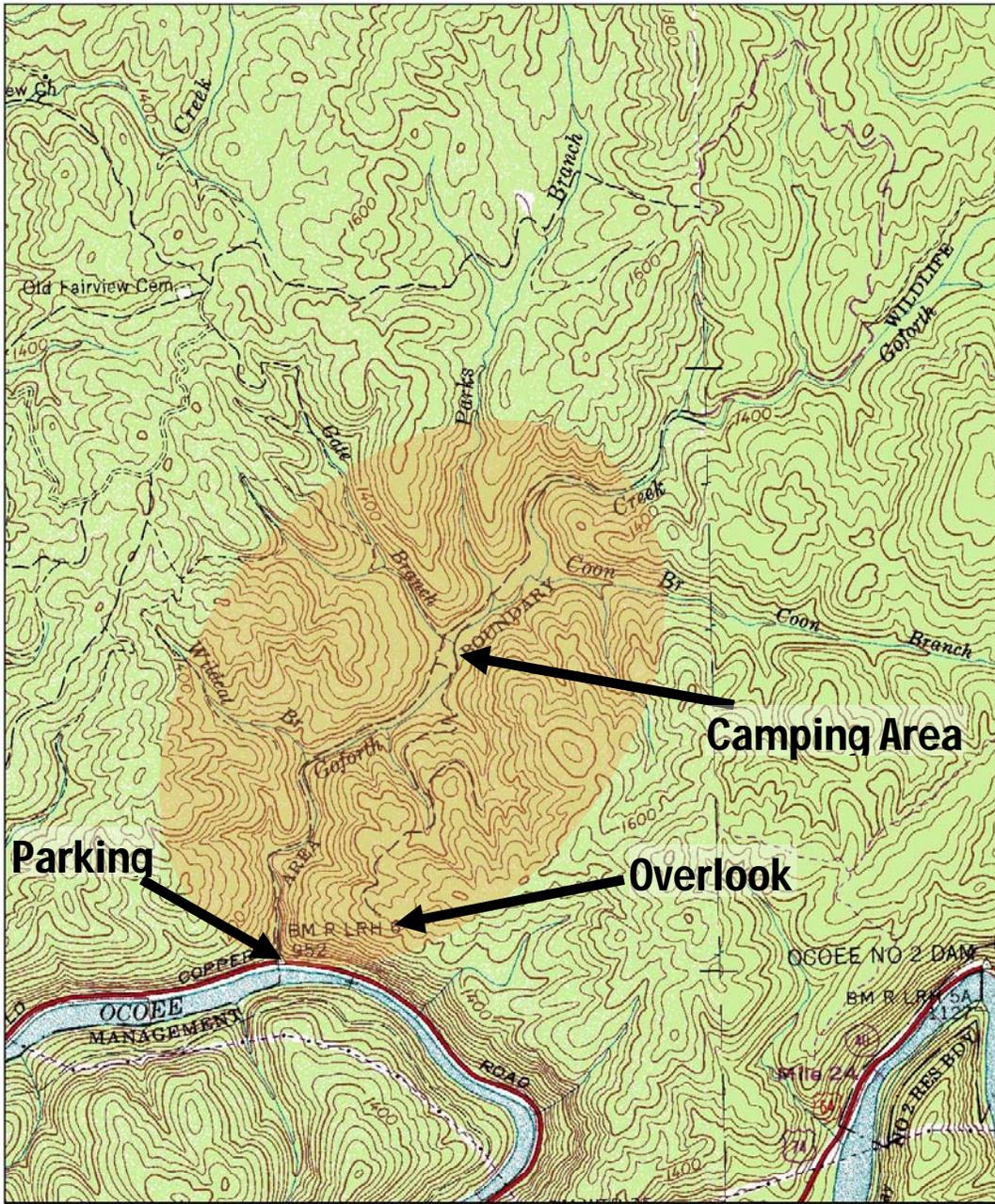
Terry Miller, Chair
WaysSouth

Axel C. Ringe, Vice Conservation Chair
Tennessee Chapter of the Sierra Club

Hugh Irwin, Landscape Conservation Planner
The Wilderness Society

* In addition to the organizations listed separately, the following organizations are members of Cherokee Forest Voices: Tennessee Citizens for Wilderness Planning, Smoky Mountains Hiking Club, Wild South, and Tennessee Audubon Council.

Attachment: Goforth Creek Area Map



0.1 miles
NAD27 CONUS Datum
Universal Transverse Mercator Zone 16

On 04/22/2012 the
magnetic declination is -4.8°
changing by -0.09° per year



True North -1.4°
Grid North
Magnetic North -6.3°