INTRODUCTION

The coal measures vegetation of the Stockton and Denniston Plateaux (together called the Buller Plateau) on the South Island’s West Coast contains unique native ecosystems found nowhere else in New Zealand or the world. The Buller Plateau’s unusual geology, acidic soils and harsh climate foster highly unusual plant and animal assemblages, including some taxa that are endemic to the plateau or critically endangered. Almost all of the Buller Plateau is significant indigenous vegetation or significant habitat of indigenous fauna qualifying for protection under s 6(c) of the Resource Management Act 1991 (RMA).

The Buller Plateau also contains significant coal reserves, with an estimated net present value of $3.2 billion (although this varies widely with coal prices). Coal mining (both historic and ongoing) has impacted on the Buller Plateau ecosystems, increasing the significance of what remains.

The Ministry of Business, Innovation and Employment (MBIE) has been considering measures to facilitate regional economic development, including mining on the Buller Plateau. Options under consideration to achieve this include:

• A “single window” approach to regulatory approvals for mining development within existing legislative settings (this proposal has been carried forward into the West Coast Economic Development Action Plan released in July 2017).

• A revision of resource management entities and planning instruments (such as a unitary plan or amalgamated regional and district planning teams).

• Use of the streamlined planning process (SPP) added to the RMA by the April 2017 amendments.

• The creation of special economic zones (SEZ), and a “reweighting” of RMA decision-making criteria for developments within those zones.

An end goal of those measures is to facilitate a division of the Buller Plateau into protected and “open for mining” areas, the details of which are currently being negotiated between MBIE and the Department of Conservation (DOC), (Forest & Bird “Forest & Bird reveals secret coal mining plans for outstanding Buller plateau” (press release, 1 May 2017)).

This paper considers whether and how the new SPP might be used in that context. It also reviews tentative government plans to create SEZ, including with respect to mining on the
Buller Plateau, and considers what the implications might be for sustainable management of the plateau.

MINING AND CONSERVATION ON THE BULLER PLATEAU

At the conclusion of litigation over resource consents for the Escarpment Mine on the Denniston Plateau, it was apparent to the parties that new mining consents would not be readily forthcoming, particularly without a “whole of plateau” approach to mining and protection that recognised the environmental limits that were being approached. In addition, resource consent conditions for the Escarpment Mine required the consent holder to use its best endeavours to establish a legal mechanism to protect an area of the Denniston Plateau from open cast coal mining.

There followed an attempt by government and mining interests to negotiate an agreement with other stakeholders about how the remainder of the Denniston Plateau would be divided up between coal mining and protected areas. Negotiations did not result in agreement, largely because many of the highest values areas for conservation coincide with the highest value areas for coal mining.

However, negotiations between the Ministers of Conservation, Energy and Resources, and Economic Development continued, with draft plans for the Buller Plateau becoming public in May. These plans propose a series of open cast and underground mines across both the Denniston and Stockton Plateaux; a significant increase on what could be mined under the status quo. Areas to be mined include the Waimangaroa Valley, Deep Creek, and Whareatea West – some of the most ecologically valuable areas on the Denniston Plateau.

Most parts of the Buller Plateau are subject to mining licences, held by a range of entities. While it is largely conservation land, it is not on sch 4 of the Crown Minerals Act 1991, making applications for access arrangements possible. Whenever open cast mining for coking coal is economically feasible, the Buller Plateau will be under threat from coal mining. The demise of Solid Energy has not reduced that threat. In late 2016 a joint venture between Bathurst Resources and Talley’s Group purchased Solid Energy’s Stockton Mine. The aptly named Phoenix Coal (now BT Mining) will attempt to raise an economically feasible mining operation from the ashes of Solid Energy’s collapse. However, any further coal mining will face a difficult road on the Buller Plateau under the status quo regulatory framework.

In the headwaters of Whareatea Stream on the Denniston Plateau, gullies of forest intersect the sandstone pavement plateau.

EASING THE REGULATORY PATHWAY

MBIE has been exploring ways to facilitate regional investment in development that would otherwise face a difficult regulatory pathway due to its significant environmental footprint. Mining on the Buller Plateau is one of its case studies. Use of the new SPP or the creation of SEZ are two methods being considered.

Streamlined Planning Process

Part 5, sub-pt 5 of the RMA now provides a SPP for the preparation of a planning instrument in order to achieve “an expeditious planning process that is proportionate to the complexity and significance of the planning issues being considered”.

The scheme of pt 5 indicates that the SPP is intended to increase Ministerial influence over plan content to achieve Ministerial objectives. Government briefing papers showing that the Government is considering using the SPP to facilitate regional economic development, including Buller Plateau mining, support this view.

The SPP is initiated by a local authority making a request to the responsible Minister. It may only do so if satisfied that the application meets at least one of the criteria in s 80C(2)(a) to (f). However, the criteria are wide, including such circumstances as where the proposed planning instrument will implement a national direction, where there is urgency in preparing the planning instrument, or where the proposed planning instrument is required to meet a “significant community need”. The final catch-all criterion: that expeditious preparation of a planning instrument is “required in any circumstance comparable to, or relevant to”, those set out in paragraphs (a) to (e) is very broad,
although must as a matter of statutory interpretation be interpreted in light of the items that precede it.

If the Minister decides to direct the local authority to use the SPP, that direction then sets out the process. At a minimum, the SPP direction must provide for consultation with affected parties and public notification or limited notification of the proposed instrument (in accordance with sch 1, cl 5 or 5A, except that the timeframe for submissions could be shortened), consideration of submissions and preparation and consideration of a s 32 or s 32AA report. The SPP direction must also specify the time period within which the SPP must be completed. A hearing may be provided for, but is not required (sch 1, cl 78).

The SPP direction must also include a statement of the Minister’s expectations, which the local authority must have regard to in complying with the SPP direction (sch 1, cls 78 and 82).

Within the time specified in the SPP direction, the local authority must submit its planning instrument to the Minister for approval. The Minister has the power to decline the instrument, approve it, or send it back to the local authority with specific recommendations for changes. If the Minister approves the instrument, it becomes operative. There is no right of appeal to the Environment Court or High Court, except in relation to requirements, designations and heritage orders (sch 1, cls 90–93).

The ability for the Minister to give a statement of expectations, which the local authority must have regard to, provides an opportunity for the Minister to directly influence the substantive content of a planning instrument. This provision is a departure from the previous RMA framework in that government influence is no longer limited to long-standing and publicly notified statements of policy, but could instead relate to a particular region, industry or project and could be tailored to achieve a particular outcome sought by the Minister of the day. In addition, the effective Ministerial veto over plan content not meeting the Minister’s approval provides a powerful incentive for local authorities to ensure their instrument achieves the spirit of the Minister’s statement of intention. The removal of any appeal rights ensures that the public cannot challenge either the merits or the legality of the plan content (other than by judicial review).

There is a question mark over whether the Buller Plateau mining proposal would fall within any of the SPP criteria. The most likely to be used is probably the “significant community need” criterion. Provided that the proposal can be brought within that or one of s 80C(2)(a) to (f) criteria, the SPP provides a vehicle for the Minister to achieve particular objectives for mining on the Buller Plateau with limited public input or judicial oversight by the Environment Court.

Special economic zones

The then-Minister for Economic Development Stephen Joyce was briefed on the opportunities that SEZ might provide for regional development, including plateau coal mining, in May 2016 (MBIE Briefing: Special economic zones: Confirming next steps (3353 15-16, 31 May 2016)) (2016 Report).

The broad purpose of SEZ would be to enable faster and more certain delivery of significant regionally led investments and developments. Key features of SEZ design would see enabling legislation put in place with a broadly similar design to the Special Housing Areas Act. Councils would apply for SEZ status and, subject to approval, would be able to access “regulatory benefits”, which would be reflected in legislation or policy documents. Such benefits would focus on planning and consenting, as well as overseas investment approvals, immigration settings, access to Crown land and the Public Works Act 1981.

The sort of initiative that could qualify for SEZ status could “range from discrete initiatives (a defined industrial area, aquaculture in a specific location) to areas where certain forms of economic activity could take place (eg mining, aquaculture)” (2016 Report at 1). Mining on the Buller Plateau was a requested case study for the SEZ proposal.

A subsequent briefing paper in March 2017 to new Minister for Economic Development Simon Bridges indicates that feedback on the proposal from local government and industry groups was “cautious” (MBIE Briefing: Special economic zones: Overview and proposed next steps (2426 16-17, 24 March 2017)). Those stakeholders felt that while there are some delays and uncertainties in regulatory processes, the balance of assessment is adequate for contentious issues involving natural resources. In particular, they pointed to the social licence issues and reconsenting challenges that could follow the use of SEZ to facilitate development. Most felt that non-regulatory assistance, such as with regulatory navigation, would help as much if not more than new regulation. They also thought that RMA reforms,
including the SPP and collaborative planning process, could help provide more flexible and regionally tailored planning processes.

MBIE’s case study regarding Buller Plateau mining noted that this area exemplifies the types of trade-offs that need to be considered for sustainable development, because high-value coking coal and significant biodiversity often coincide in the same area. This makes protection of biodiversity and consenting new coal mines highly uncertain on outcomes and cost. It was felt that certainty could be provided by identifying areas for mining and giving those areas a clearer path for land access and consenting, while permanently protecting other areas from open cast coal mining.

MBIE proposed that using a SEZ to “reweight RMA decision-making criteria” could smooth the consenting process upfront (2016 Report at [16]). However, it acknowledged that this approach would be inconsistent with pt 2 of the RMA, and risk compromising environmental safeguards, and that use of a SEZ could lead to significant social licence issues.

As to which areas to protect and which to mine: “The process to agree on land use between conservation and mining interests on the Plateau has been a challenging issue to date and is not yet resolved, reflecting the difficult trade-offs” (2016 Report at [17]).

Ultimately, MBIE recommended that no further work be undertaken on a regulatory SEZ model; however, Economic Development Minister Simon Bridges has confirmed he is still weighing the option up (Radio New Zealand “Special Economic Zones still on the table” (12 July 2017) <www.radionz.co.nz/news/political/334999/special-economic-zones-still-on-the-table>).

SUSTAINABLE MANAGEMENT?

The legislative framework for the SPP is conducive to the advancement of political objectives that do not necessarily accord with the sustainable management purpose of the RMA. While in theory pt 2 still guides this process, the Ministerial statement of expectations, veto power and removal of appeal rights gives less certainty that sustainable management of the Buller Plateau will be achieved if this process is adopted.

Any move to re-weight RMA criteria in favour of open cast coal mining on the Buller Plateau using SEZ legislation could only occur at the expense of maintaining the plateau’s biodiversity, particularly the delicate sandstone pavement ecosystems that cannot be remediated once the pavement itself is removed to provide access to the coal. This is unavoidable given the coincidence of ecological and coal values on the Buller Plateau. The use of terms like “trade-offs” indicates that significant indigenous biodiversity and habitat on the Buller Plateau will not be protected by the mining/protection allocation exercise, and the proposal to allow areas to be mined despite their significant conservation value supports this. DOC’s track record in advocating for protection of habitat, particularly against powerful entities like MBIE, has not been uniformly effective.

The impacts of burning coal on climate change and New Zealand’s international obligations, while not mentioned in the MBIE documents, also counts against the sustainability of facilitating further coal mining on the Buller Plateau.

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