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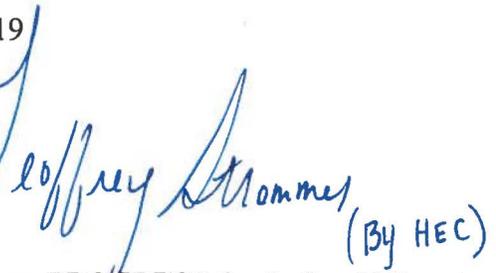
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MEMORANDUM

December 6, 2019

TO: TRIBAL CLIENTS

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP



(By HEC)

RE: ***House Natural Resources Committee Passes PROGRESS for Indian Tribes Act, Clearing it for House Floor Consideration***

Yesterday, December 5, 2019, the House Natural Resources Committee, by a largely partisan vote of 22 to 10, passed S. 209, the PROGRESS for Indian Tribes Act, clearing it for a vote on the House Floor. The Committee, on a strictly partisan vote of 13 to 19, rejected an amendment offered by Rep. McClintock (R-CA) which would have resulted in the bill going back to the Senate for consideration, effectively ending any chances of its enactment this first session of the 116th Congress. We describe the Amendment and the concerns raised by some Committee Republicans below and attach the text. We understand that the Democratic leadership of the House Natural Resources Committee intends to push for S. 209 to be voted on the floor the House of Representatives as soon as possible.

Background. S. 209 is a bipartisan bill that would amend Title IV of the Indian Self-Determination and Education Assistance Act (ISDEAA) by conforming it to Title V, the self-governance statute for the Department of Health and Human Services. It has been a 15-year effort to move this legislation forward, and enactment this year is within striking distance. S. 209 is sponsored by Senate Committee on Indian Affairs Chairman Hoeven (R-ND). It passed the Senate by Voice Vote on June 27, 2019. Representative Haaland (D-NM) introduced the companion bill in the House as H.R. 2031 but is moving the Senate-passed S. 209 forward to expedite the legislative process.

Hearing. At the hearing today, Rep. Haaland opened the consideration of S. 209 by describing the ISDEAA as one of the most important legislative acts affecting Indian Country in the last 40+ years. She emphasized that promoting tribal self-governance and sovereignty has always been a bipartisan effort and that this bipartisan support continues today: She sponsors the House version, Senator Hoeven sponsors the Senate version, and the Administration has gone on record supporting the bill. She explained that any amendment, no matter how small, would result in the bill being sent back to the Senate and would thus derail the chances of being enacted this first session of the 116th Congress.

Rep. McClintock expressed concern that the bill would “add ambiguities” to the ISDEAA which would “ignite a firestorm of expensive, time-consuming, and wasteful litigation.” He explained that his particular concern is with provisions relating to the Bureau of Reclamation (BOR) which would “create wide-ranging implications to water projects throughout the western United States” and that his amendment would exclude the BOR from these provisions. He expressed concern that the bill, as currently written, would allow more tribes to take over the management and control of those reclamation works not deemed to be performing an inherent federal function. He expressed his view that the term “inherent federal function” is so vaguely defined that this provision would greatly expand the number of facilities currently serving the general public that could be transferred to tribal control. He said that problem would be amplified by the provision providing that “any ambiguity in a compact or funding agreement shall be resolved in favor of the Indian tribe”—which could result in a potential broadening of which facilities or programs are eligible to be transferred and could provide the legal protection for tribes to take over projects and programs that should be an inherent federal function. He described this idea as “especially alarming” in light of the “controversial history of the Hoopa Tribe’s attempts on the Trinity River.”

Rep. Haaland described the McClintock Amendment as a “red herring” and said the concerns behind the amendment are unfounded. She explained that the problem that the amendment seeks to fix does not exist. She emphasized that S. 209 does not change any of these authorities and in fact, Section 101 of the bill contains a lengthy disclaimer stating that it does not affect in any way the ability of tribes to take over programs or projects of Interior agencies other than the Bureau of Indian Affairs. She further explained that if a tribe does propose to assume a BOR project under the constrained authority continued by S. 209, the Department of Interior continues to have full discretion to decline it. Rep. Haaland concluded that S. 209 is critical to the furtherance of self-governance and improvements in tribal communities.

House Natural Resources Committee Ranking Member Bishop (R-UT) said that S. 209 is “problematic” and noted that the legislation has been discussed for a long time. He complained about the bill’s lack of debate and speedy passage in the Senate this Congress. He said that unfortunately, the bill still has the same problematic language that has stopped its enactment in years past. He said that western states with regard to water and state wildlife jurisdiction have expressed concern with the language that “provides some ambiguity within the management authority on certain federal lands” and also expressed concern about language that he contends could create ambiguities on priorities. He offered to work with Senator Hoeven on this to “work something out that would easily solve these issues” and which could be taken up expeditiously in the Senate. Ranking Member Bishop asked that letters from the State of Utah and the Association of Fish and Wildlife Agencies (AFWA) explaining their concerns about the “ambiguous” provisions in the bill be made part of the record. We will share those letters with you as soon as they become available.

Before adjourning the hearing, House Natural Resources Committee Chairman Grijalva (D-AZ) stated that all Members have two days to file supplemental or dissenting views.

The page for the hearing is here: https://naturalresources.house.gov/hearings/full-committee-markup_december-5-2019. The discussion on S. 209 occurs between the 1:43 and 1:53 minute marks, and the vote on S. 209 occurs between the 2:42 and 2:45 minute marks. The vote counts for the McClintock Amendment and on the final passage of the bill are attached.

If you have any questions about this legislation or this memorandum, please do not hesitate to contact Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745) or Steve Osborne (sosborne@hobbsstrauss.com or 503-242-1745).