

# THE NATIONAL CONGRESS OF AMERICAN INDIANS

## Testimony of Joe Garcia, First Vice President

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### Senate Indian Affairs Committee Hearing Oversight of Indian Housing Programs February 13, 2002

Good afternoon. On behalf of the Executive Committee and members of the National Congress of American Indians, I would like to thank Chairman Inouye, Vice Chairman Campbell, and other distinguished members of the Subcommittee for the opportunity to speak to you today on a subject that, although vital for Native American communities, does not often receive the spotlight among Native American issues. Particularly now, when so much attention is focused on the Bureau of Indian Affairs and its trust management issues, it is good that the Committee is taking the time to address this important issue of housing and the future of our housing program, the Native American Housing Assistance and Self-Determination Act.

I am from the San Juan Pueblo in New Mexico, a small pueblo that has its share of difficulties, but with the help of NAHASDA we have built homes for many of our people. As a member of the Executive Committee of NCAI, I speak for tribes all across the nation who support NAHASDA and want very much to see it continue.

#### **NAHASDA**

The future of Indian housing dramatically changed on October 26, 1996 when Congress enacted Public Law 104-330 titled the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). Some of the most important changes for Indian housing, as opposed to under the 1937 Housing Act, included:

- Establishing the trust responsibility with Native Americans to include affordable and healthy homes.
- Separating Indian housing from public housing within the U.S. Department of Housing and Urban Development (HUD).
- Replacing several individual housing grant programs with one block grant to tribes or their tribally designated housing entities (TDHEs).
- Allocating appropriated funds based on a single formula, eliminating the competition among housing authorities for scarce housing resources.
- Providing much greater flexibility for development of "affordable housing activities" at the community level.
- Requiring enabling regulations to be promulgated through a negotiated rulemaking process with the tribes.

On October 1, 1997 the Act went into effect, with final regulations published in March of 1998. Subsequent appropriations for FY1998 and beyond reflected a new attitude toward Native American housing with an initial block grant level of \$480 million, or a nearly 35% increase over previous funding levels. The FY2001 budget increased funding by \$30

million and was held steady at nearly \$650 million for FY 2002. The President has now proposed a small cut of \$2 million for the grant in FY 2003.

In 1998, technical amendments provided some clarification to the Act as well as amendments passed late in 2000. These later provisions included a Davis-Bacon wage rate preemption for tribes, an environmental waiver, and local cooperation agreement improvements, along with other important provisions.

### **Tribal Authority and Responsibility**

Perhaps the most fundamental change to Native American and Alaska Native housing following the advent of NAHASDA is HUD's relationship with tribes. As "beneficiary" of this federal housing program, federally recognized tribes exercise their authority throughout the NAHASDA process, seeking true self-determination that the Act emphasizes from the title all the way through the statute.

Illustrating the self-determination aspect of NAHASDA, each NAHASDA recipient is responsible for the following:

- Tribes possess the power to decide who the "recipient" of the NAHASDA program will be: either themselves or their tribally-designated housing entity (TDHE).
- Each recipient must then submit an Indian housing plan that certifies approval of each tribe involved, in the case of more than one tribe being served by the recipient.
- The essential part of the housing program is to provide affordable housing activities that can be drawn from a list of eligible activities including development, modernization, management, crime prevention, planning, and leveraging. Tribes can draw from these activities to formulate a housing program tailored to their specific needs.

### **Government-to-Government**

In so many ways NAHASDA set the stage for increased freedom for tribes and created an atmosphere where self-determination and tribal sovereignty could flourish. Unfortunately these good intentions of Congress still have not made their way into HUD's day-to-day administration of the program. For too many years HUD was the puppeteer for tribes in their housing programs, so it is understandable that there be a period of transition in adjusting to the self-determination precepts of NAHASDA. That day has come.

The best way for HUD to recognize NAHASDA and its capabilities is to implement true government-to-government consultation using negotiated rulemaking and allowing tribes the power to do with the program what it was made to do. I was part of the first negotiated rulemaking committee that produced regulations for NAHASDA. It was an arduous process, but a rewarding one. Many of us were frustrated and there was so much to learn, but we made it through. Now, the successes and challenges of NAHASDA are more important to us because we helped create it. We want the freedom to continue that process. We have a lot to offer the process because we are the ones out there building homes, seeing what works and what doesn't.

Although the NAHASDA statute clearly states that all regulations required under

NAHASDA be issued according to a negotiated rulemaking procedure, HUD has interpreted that to mean only the initial regulations. As with other laws, NAHASDA is not perfect and we did not create perfect regulations. They were good, but they need changes. I do not believe it was the intention of Congress to say that we had one chance and one chance only to affect the implementation of a law that is unprecedented in Indian housing.

I grant that HUD is currently seeking to form a Negotiated Rulemaking Committee to address issues with the NAHASDA formula. This I approve of, since the formula does need to be revisited, but why only the formula? Shouldn't other rulemaking also qualify for negotiated rulemaking? In the new HUD Consultation Policy set in place by Secretary Martinez last year, a provision was made to create a negotiated rulemaking advisory committee, made up of tribal members, to advise HUD on when negotiated rulemaking procedures ought to be used. This is certainly a step in the right direction, but it gives no guarantees since it is ultimately HUD's decision. This is not the policy we were looking for.

As many of you on the Committee surely know, this issue of consultation and negotiated rulemaking has required a lot of time and energy from both the Administration and the tribes. The reason I believe so many tribes will not give up on the issue is because we have not received the answer we need, which is that tribes will have a say in determining the course of their future and it will not be at the discretion of HUD.

One time, long ago, tribes gave up the power of self-determination to the United States government which brought us to where we are today. I make no judgement on that trust because that is not my purpose today, but the United States government has finally recognized the sovereign status of tribes and must demonstrate that it means self-determination when it says self-determination.

I know Secretary Martinez meant well when he signed that consultation policy last June, but I am sure he did it without full awareness of what his words meant to us. Many positive gestures were made in the policy that we can appreciate, but we had to reject it because it did not go far enough.

I request of this Committee today to support the tribes in insisting on true government-to-government consultation between the tribes and HUD. At the request of tribal leaders and representatives across the country I would like to suggest that the statutory language of NAHASDA be amended to spell out that negotiated rulemaking be used for all regulations and rulemaking made under NAHASDA.

### **Native American Status at HUD**

The last important point I want to cover today also has to do with respecting the government-to-government relationship between the federal government and tribes. It has to do with HUD's lead administrator of Native American housing programs.

It has come to our attention that the position of Deputy Assistant Secretary (DAS) of Native American Programs is in danger of being downgraded from a Senior Executive Service position to that of a GS-15. We believe that the change in status of the DAS position will be detrimental to the goals of the Office of Native American Programs, as well as to the

housing needs of Native Americans and Alaska Natives, because the downgrade of the DAS position will take the issue of Indian housing out of the department-wide discussion.

NCAI President Tex Hall and the Chairman of the Coalition for Indian Housing and Development, Chester Carl, recently co-signed a letter to Secretary Martinez requesting him to reconsider the reduction of the DAS position from the SES level to a GS-15, and to explore the option of elevating the position to the Assistant Secretary level.

This Deputy Assistant Secretary has responsibility for all HUD Indian housing programs, including implementation of NAHASDA. In spite of the clear significance this position holds, HUD has allowed it to remain unfilled for nearly nine months. Even more frustrating, is the reduction to a GS-15 career position, with a requirement of only one year of experience. Rather than having the Deputy Assistant Secretary be a GS-15, we believe a position of this importance should be elevated to full Assistant Secretary status at the Senior Executive Service level.

Native American programs hold a unique position in our federal system. Whomever this Administration appoints to the Office of Native American Programs must have the knowledge and experience to handle the special government-to-government relationship between the federal government and the tribes. Furthermore, the person in this position not only takes responsibility for intradepartmental coordination amongst HUD's agencies, but he or she also takes responsibility for coordination of Indian programs with other Departments. The position must carry political weight, must be linked to the other HUD cylinders, and must have enough access to the Secretary to elevate the issue of Indian housing to a level commensurate with the need of the people it serves.

We are further concerned that the decision of the Administration to lower the position from an SES to a GS-15 may be partly responsible for the delay we have seen in filling the office. So long as the position is held to a GS-15, it will be difficult for HUD to find a truly qualified candidate that is willing to take the job. It is our hope that this Committee will put pressure on HUD, not only to maintain SES status for the DAS but to elevate it to the Assistant Secretary level within a year.

With an Assistant Secretary administering the program, NAHASDA will have an even better chance at achieving its full potential.

Again, I would like to thank the Committee for holding this hearing today. Perhaps Native Americans have the reputation for not agreeing, but we can all appreciate the value of self-determination and self-governance and we agree that NAHASDA has the potential to deliver these values if allowed.

Thank you.