

June 24, 1991

Charles Hughes
Acting Associate Solicitor
Division of Indian Affairs
Office of the Solicitor
United States Department of the Interior
Washington, DC 20240

RE: Center Place Savings Credit Union Financial Services Credit Union Zioniac Federal Credit Union (Your Letter of February 13, 1991)

Dear Mr. Hughes:

This letter serves as the response of the National Credit Union Administration ("NCUA") to your letter. In that letter you requested a reconsideration of National Credit Union Share Insurance Fund ("NCUSIF") insurability of certain investments by the Bureau of Indian Affairs ("BIA") in Center Place Savings Credit Union ("Center Place"), Financial Services Credit Union ("Financial Services") and Zioniac Federal Credit Union ("Zioniac"). It is your position that the investments BIA made in these liquidated credit unions were fully insured by the NCUSIF. It remains the position of the NCUA that the investments BIA made in these liquidated credit unions were not fully insured by the NCUSIF. The NCUA Board made this determination in 1985 with regard to Center Place, Financial Services and Zioniac.

Background

Zioniac

Zioniac was placed into liquidation by the NCUA on June 6, 1984. At that time BIA had \$5,186,263.47 on deposit at Zioniac in Individual Indian Monies ("IIM") and \$5,581,724.91 in tribal trust funds. On July 17, 1984, the NCUA Department of Insurance informed BIA that since no tribal investment exceeded \$100,000, the BIA tribal trust fund account was entirely NCUSIF insured. However, the same letter informed the BIA that the remaining IIM account, which was invested on a pool basis, did not qualify for more than \$100,000 share insurance coverage. The Solicitor of the Department of Interior, Frank K. Richardson, appealed the Department of Insurance decision on March 12, 1985. The NCUA Board denied the appeal of the Department of Interior on September 5, 1985. In deciding the appeal, the Board also expressly determined that the Zioniac decision was also applicable to IIM insurability in other instances, namely the Center Place and Financial Services liquidations. Mr. Richardson was notified of the denial by letter from Rosemary Brady, NCUA Board Secretary, dated September 9, 1985 (enclosed). The position of the NCUA regarding IIM accounts was explained in a letter to Donald Paul Hodel, Secretary of the Interior, from Robert M. Fenner, NCUA General Counsel, dated December 4, 1985 (the "December 4, 1985 letter") (enclosed), which was quoted in your above-referenced request letter.

As of February 28, 1991, \$2,047,968.57 in IIM funds have been returned to the BIA in pro rata distributions to uninsured shareholders. Another \$49,562.41 is available for distribution to uninsured shareholders, which includes parties other than BIA. The charter of Zioniac has not yet been cancelled.

Center Place

Center Place was placed into liquidation by the NCUA on July 8, 1985. At that time BIA had \$3,000,000.00 on deposit at Center Place in IIM accounts. The Director, Office of Trust Responsibilities, BIA, sent a

Western Union Mailgram to Allen Carver, Region IV Director, on July 23, 1985, to protest any disposition of Center Place assets without notice to the BIA. James J. Engel, then an NCUA Assistant General Counsel, responded to the Director, Office of Trust Responsibilities, by letter dated August 2, 1985 (enclosed), stating that the NCUA Board's decision in Zionica would apply to BIA IIM funds in Center Place. On July 25, 1985, Tim Vollman, Associate Solicitor, Division of Indian Affairs, sent a letter protesting denial of NCUSIF share insurance coverage of the BIA IIM account at Center Place to Charles W. Filson, Director, NCUA Office of Programs, and Tom Buckman, Director, NCUA Department of Insurance. This July 25, 1985, letter references the Zionica appeal letter of March 12, 1985, but does not request an appeal regarding Center Place. Mr. Engel responded to Mr. Vollman by enclosing a copy of the NCUA August 2, 1985, letter to the Director, Office of Trust Responsibilities, and informing him that the NCUA Board was considering the matter on September 5, 1985. No further correspondence was received from the BIA regarding Center Place.

NCUSIF has returned \$2,272,093.30 in IIM funds to BIA in pro rata distributions to uninsured shareholders. The Center Place charter was cancelled on August 17, 1989, and no funds remain to be distributed.

Financial Services

Financial Services was placed into liquidation by NCUA on October 31, 1984. At that time, BIA had \$1,560,000.00 in IIM funds and \$440,000.00 in tribal trust funds. As you state in your February 13, 1991 letter, on November 21, 1984, the Department of Insurance notified BIA that the BIA tribal trust fund account was entirely NCUSIF insured, but that the pooled IIM funds account did not qualify for more than \$100,000 share insurance coverage.

NCUSIF returned \$1,438,270.80 in IIM funds to BIA in pro rata distributions to uninsured shareholders. The Financial Services charter was cancelled on May 15, 1986, and no funds remain to be distributed.

Analysis

The position of the NCUA, as stated in NCUA's December 4, 1985 letter to Interior Secretary Hodel, has not changed:

[W]e believe that BIA investments of IIM funds in credit unions are not fully insured The NCUA's position is essentially threefold. First, Federal share insurance for credit union accounts applies only to accounts of members (those within the credit union's field of membership) and public units. Individual Indians are neither and therefore do not separately qualify for share insurance. Second, we question whether the BIA has the authority to invest any trust funds in credit unions. Public unit share insurance applies only to "lawfully invested" funds. Third, even if individual Indians could separately qualify for share insurance, the state of BIA's recordkeeping is such that it would be impossible to determine the amount of insurance to which each would be entitled. December 4, 1985 Letter, p.1.

NCUA continues to support the reasoning in the December 4, 1985 letter. However, for your information, each of these three points, with updated citations and discussion where needed, are expanded in this letter.

Share Insurance and Public Units

In determining insurability, the NCUSIF considers the public unit itself, not the beneficiary. The regulation applicable to BIA accounts states: "[e]ach official custodian of funds of the United States lawfully investing the same in a federally-insured credit union shall be separately insured up to \$100,000." 12 C.F.R.

~745.10(a)(1). As for tribal funds accounts, the applicable regulation reads: "Each official custodian of tribal funds of any Indian tribe (as defined in Section 3(c) of the Indian Financing Act of 1974) or agency thereof lawfully investing the same in a federally-insured credit union shall be separately insured up to \$100,000." 12 C.F.R. ~745.10(a)(5). The Appendix to Part 745 of the NCUA Rules and Regulations clarifies this position:

For insurance purposes, the official custodian of funds belonging to a public unit, rather than the public unit itself, is insured as the account holder. All funds belonging to a public unit and invested by the same custodian in an insured credit union are added together and insured to the \$100,000 maximum, regardless of the number of accounts involved and regardless of whether the funds are invested in accounts located in or outside the state. 12 C.F.R. Part 745, Appendix E, Public Unit Accounts.

A specific example pertinent to BIA accounts is included as Example 8 to Appendix E to Part 745 of the NCUA Rules and Regulations.

Question: A, the custodian of Indian tribal funds, lawfully invests \$1,000,000 in an account in an insured credit union on behalf of 15 different tribes; the records of the credit union show that no tribe's interest exceeds \$100,000. A, as official custodian, also invests \$1,000,000 in the same credit union on behalf of 100 individual Indians, who are not members; each Indian's interest is \$10,000. What is the insurance coverage? Answer: Because each tribe is considered a separate public unit, the custodian of each tribe, even though the same person, is entitled to separate insurance for each tribe (~745.10(a)(5)). Since the credit union's records indicate that no tribe has more than \$100,000 in the account, the \$1,000,000 would be fully insured as 15 separate tribal accounts. If any one tribe had more than \$100,000 interest in the funds, it would be insured only to \$100,000 and any excess would be uninsured. However, the \$1,000,000 invested on behalf of the individual Indians would not be insured since the individual Indians are neither public units nor, in the example, members of the credit union. If A is the custodian of the funds in his capacity as an official of a governmental body that qualified as a public unit, then the account would be insured for \$100,000 leaving \$900,000 uninsured. 12 C.F.R. Part 745, Appendix E, Example 8.

The NCUA recently codified its policy concerning the payment of share insurance and appeals of share insurance denials. Final Rule, 55 Fed. Reg. 5584 (February 16, 1990). As the regulation states, if the Liquidating Agent of a liquidating NCUSIF insured credit union determines that all or a portion of an account holder's account is uninsured, the account holder shall be so notified in writing and provided with a certificate of claim in the amount of the uninsured account to enable the account holder to share in the proceeds of the liquidation of the credit union. 12 C.F.R. ~745.201(b).

Furthermore, NCUA Rules and Regulations now explicitly permit an appeal for denial of insurance coverage to be filed only within 60 days after issuance of the initial determination of uninsurability. 12 C.F.R. ~745.202(a). A reasonable limitation on the filing of insurance claims was enforced by the NCUA even before the promulgation of the regulation provided for in the Financial Institutions Reform, Recovery and Enforcement Act of 1989. 12 U.S.C. ~1787(b)(6). Even though a 60 day limit was not strictly applicable in all instances (e.g., the Zionics appeal was made almost 8 months after BIA was notified of the denial of insurance coverage in 1984), certainly raising an appeal almost 6 years later in the case of Center Place and over 6 years later in the case of Financial Services, after both credit unions have been fully liquidated and their charters cancelled, is far too late under any administrative practice. In any event, as the NCUA Board denied the insurability of the BIA IIM accounts in Zionics, Center Place and Financial

Services on September 5, 1985, the issue has already been decided.

Legality of BIA Investments in Credit Unions

At the time of NCUA's original denial of these insurance claims, the authority for BIA investment of IIM funds in credit unions was not authorized pursuant to statute. Since the December 4, 1985 letter, Section 162a of Title 25 of the United States Code has not been amended to permit investment of BIA IIM funds in credit unions. 25 U.S.C. ~162a. For public unit accounts, the pertinent section of the Federal Credit Union Act reads:

(A) Notwithstanding any limitation in this Act or in any other provision of law relating to the amount of insurance available for the account of any one depositor or member, in the case of a depositor or member who is -- (i) an officer, employee, or agent of the United States having official custody of public funds and lawfully investing the same in a credit union insured in accordance with this title;

. . . (v) an officer, employee, or agent of any Indian tribe (as defined in Section 3(c) of the Indian Financing Act of 1974) or agency thereof having official custody of tribal funds and lawfully investing the same in a credit union insured in accordance with this title; his account shall be insured in an amount not to exceed \$100,000 per account. 12 U.S.C. ~1787(k)(2)(A).

It continues to be our position that BIA had no legal authority to invest pooled IIM in credit unions and, therefore, BIA did not lawfully invest such funds in the credit unions and such funds remain uninsured.

Recordkeeping

NCUA Rules and Regulations require that the account records of a credit union disclose the existence of any relationship which may provide a basis for additional insurance. 12 C.F.R. ~745.2(c)(2). Arguably, the BIA IIM accounts did disclose some relationship. However, NCUA also requires that the details of the relationship and the interest of the other parties in the account must be ascertainable either from the credit union's records or the records of a member maintained in good faith and in the regular course of business. *Id.* The BIA, which was not a member in any of the credit unions in issue, was never able to produce such documentation to the satisfaction of the NCUA, and still is not able to produce such documentation, nor has it made an attempt to supply the NCUA with such documentation. Furthermore, as stated in the December 4, 1985 letter, BIA was shown to be incapable of making such a showing at the time its claims for NCUSIF insurance were made.

As the regulations state, if this showing is not adequately made, and the interests in the trust are incapable of determination, "payment by the Board to the trustee with respect to all such trust interests shall not exceed the basic insured amount of \$100,000." 12 C.F.R. ~745.2(d)(1-2).

Our legal position with regard to NCUSIF insurance is reasonable and consistent with the Federal Credit Union Act, congressional intent and NCUA Rules and Regulations. Furthermore, as the NCUA Board extended its denial of NCUSIF insurance coverage of BIA IIM accounts in *Zionic to Center*

Place and Financial Services in 1985, there are no grounds for BIA to appeal that determination to the NCUA Board. We trust that you understand our position.

Sincerely,

James J. Engel
Deputy General Counsel

Enclosures
GC/MEC:sg
SSIC 3000
91-0223A