



NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

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  
Zionic 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 Zionic Federal Credit Union ("Zionic"). 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 Zionic.

Background

Zionic

Zionic was placed into liquidation by the NCUA on June 6, 1984. At that time BIA had \$5,186,263.47 on deposit at

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Zionic 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 Zionic 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 Zionic 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 Zionic 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

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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 Zionics 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

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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 accountholder. 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.

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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 accountholder's account is uninsured, the accountholder shall be so notified in writing and provided with a certificate of claim in the amount of the uninsured account to enable the accountholder to share in the proceeds of the liquidation of the credit union. 12 C.F.R. §745.201(b).

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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:

- (2)(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 Fi-

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nancing Act of 1974) or agency thereof having of-  
ficial custody of tribal funds and lawfully  
investing the same in a credit union insured in ac-  
cordance with this title; his account shall be in-  
sured 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 author-  
ity 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 in-  
surance were made.

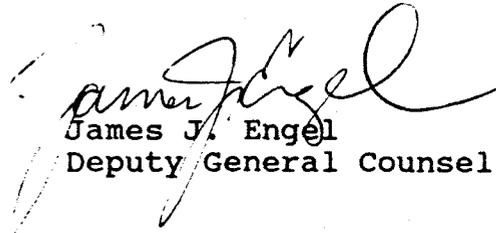
As the regulations state, if this showing is not adequately  
made, and the interests in the trust are incapable of deter-  
mination, "payment by the Board to the trustee with respect  
to all such trust interests shall not exceed the basic in-  
sured amount of \$100,000." 12 C.F.R. §745.2(d)(1-2).

Our legal position with regard to NCUSIF insurance is reason-  
able and consistent with the Federal Credit Union Act, con-  
gressional intent and NCUA Rules and Regulations.  
Furthermore, as the NCUA Board extended its denial of NCUSIF  
insurance coverage of BIA IIM accounts in Zionica to Center

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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



NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

LS/AHM:jm

3900

September 9, 1985

Frank K. Richardson  
Solicitor  
Department of the Interior  
Washington, D.C. 20240

Re: Zionic Appeal

Dear Mr. Richardson:

This is to inform you that the NCUA Board, on September 5, 1985, denied your appeal of the prior determination by the Department of Insurance that IIM Funds invested in Zionic Federal Credit Union in excess of \$100,000 were uninsured. A partial pro-rata payment of credit union assets will be accomplished shortly.

Very truly yours,

ROSEMARY BRADY  
Secretary  
National Credit Union  
Administration Board

GC/AM:JM  
3900

December 4, 1985

OFFICE OF GENERAL COUNSEL

Honorable Donald Paul Hodel  
The Secretary of the Interior  
Washington, D.C. 20240

Re: Share Insurance on BIA Deposits in Federally Insured Credit Unions

Dear Mr. Secretary:

This is in response to your letter of November 1, 1985, regarding the status of BIA deposits in several federally insured credit unions which have recently been liquidated. Chairman Jepsen has directed that I provide you with a legal memorandum informing you of the reasons why we believe that BIA investments of IIM funds in credit unions are not fully insured. We are, of course, willing to discuss any or all of these reasons with you or your staff at your convenience.

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.

Background

Zionic Federal Credit Union, chartered on June 3, 1978, was located in St. Louis, Missouri. Its field of membership served members of the Reorganized Church of Jesus Christ of Latter Day Saints. The credit union grew rapidly to approximately \$19 million, fueled largely by brokered funds. The brokered deposits

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delegated to the BIA. Section 162a authorizes the following investments:

- a. Collateralized deposits in "banks".
- b. Deposits in "banks" insured by the FDIC.
- c. Public debt obligations of the U.S.
- d. Bonds, notes or other obligations issued by a government agency unconditionally guaranteed as to principal and interest by the U.S.

Our reading of this provision leads us to conclude that Congress did not use the term "bank" in a generic sense to include all types of financial institutions. <sup>2/</sup> Investments in credit unions would not fall within any of the other investment categories noted above. Section 1730b of Title 12 U.S.C., authorizes investment of public and trust funds by the United States in institutions insured by the FSLIC but only to the extent of that insurance. We are aware of no other statutory authority for the investment of trust funds by BIA, and in particular no statute authorizing depositing such funds, either tribal or IIM, in credit unions. This is of particular import to the present controversy because, as will be noted below, share insurance only applies to lawful investments.

The BIA also has regulations concerning the investment of trust funds. (42 BIAM Supp #3.) These regulations say nothing about investing trust funds in credit unions, and refer, like the statute, only to commercial banks insured by the FDIC. In about 1976, the Division of Trust Fund Management stopped following these regulations, and, among other things, started investing in credit unions.

While inquiry was made of the FDIC as to the insurability of deposits in banks, we are not aware of any such inquiry being made of the NCUA.

The Federal Credit Union Act, amended in 1974 to provide share insurance for public units, provides as follows:

<sup>2/</sup> By letter of January 16, 1984, the Associate Solicitor, Division of Indian Affairs, informed the Director, Office of Trust Responsibilities, that 25 U.S.C §162a did not authorize investments in savings and loan institutions but only in "banks" insured by the FDIC. Despite this advice, investments in credit unions continued.

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Route Sheet No.

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	Date	Initial
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Consistently point out that BIA is incapable of identifying specific individual Indian interests in the IIM funds. For example, the IG Report noted, in April 1983, that reconciliation problems led to the overinvestment of Indian trust funds. As of September 1982 BIA had invested \$24 million more than was available for investment. This amount was in fact U.S. Treasury funds on which BIA had to pay interest. The GAO Report in September 1982 found that lax enforcement of controls and a lack of reconciliations led to large differences (\$25 million) in account balances between the automated Finance System and the subsidiary systems. The GAO study also said that BIA overinvested its IIM accounts, finding that in nine of the 24 months prior to May 1980, investments exceeded actual cash balances in IIM accounts by an average of \$2.5 million. The Price-Waterhouse Study in mid-1983 notes that IIM accounts are used as a source of banking services, and that "[m]any accounts in the IIM fund are owned by tribes. . ."

Since FDIC payment of full deposit insurance for IIM has, since at least 1976, been predicated upon full, complete and accurate recordkeeping, their position might well have been different had they been apprised of these studies. In any event, we see nothing inconsistent in the positions of our respective agencies.

We feel that our legal position with regard to Federal share insurance is reasonable and consistent with our statute and Congressional intent. Nevertheless, we are willing to discuss any or all of the foregoing with you at your convenience.

Sincerely,

15/

ROBERT M. FENNER  
 General Counsel

RMF:jrm  
 6cc: Board Members  
 Executive Director  
 E & I  
 All Regional Directors

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