American Indian Law Review

Volume 9 | Number 2

1-1-1981

The Tribally Controlled Community College Assistance Act of 1978: The Failure of Federal Indian Higher Education Policy

Michael A. Olivas

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>

Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

Michael A. Olivas, *The Tribally Controlled Community College Assistance Act of 1978: The Failure of Federal Indian Higher Education Policy*, 9 AM. INDIAN L. REV. 219 (1981), <https://digitalcommons.law.ou.edu/ailr/vol9/iss2/2>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

THE TRIBALLY CONTROLLED COMMUNITY COLLEGE ASSISTANCE ACT OF 1978: THE FAILURE OF FEDERAL INDIAN HIGHER EDUCATION POLICY

*Michael A. Olivas**

The Tribally Controlled Community College Assistance Act of 1978 (or TCCCAA),¹ was an attempt to provide resources to Indian tribes for establishing and improving tribal colleges. However, four and one-half years after enactment, approximately half of the eligible tribal institutions have received operating grants from the Act. This inability to provide resources has been a result of several factors, including the impoverished condition of the colleges; design flaws in the Act; and bureaucratic delays in the Bureau of Indian Affairs (BIA), the Office of Management and Budget (OMB), and the U.S. Department of Education. This article examines these three concerns, and analyzes how each has prevented fuller participation by tribal colleges in the Act. Each provision of the Act is examined against these three criteria (institutional characteristics, legislative provisions, bureaucratic implementation). The legislative history and hearings are also examined to determine the extent to which the administration of the Act has fully complied with congressional intent. Finally, recommendations are made to improve the Act and its administration, for it is the complex eligibility and administrative procedures that, in the main, have caused the delay.

The historical development of higher education for Indians can be characterized as a record of majority dominance, paternalism, religious evangelism, and neglect. Although several prestigious colleges founded during colonial times (e.g., Harvard, Dartmouth, Columbia) had missions that included instructing Indians, few Indians were educated in these institutions.² Indeed, the founder of Dartmouth perhaps typified the colleges' view of educating Indians when he said of one of his students, "I have taken much Pains to purge all the Indian out of him, but after all a little of it will sometimes appear."³

* Associate Professor of Education and Law, and Director, Institute for Higher Education Law and Governance, University of Houston. The research for this article was partially supported by a grant from the Joyce Foundation. However, the conclusions of the research do not reflect the view of the Joyce Foundation, but are the author's own.

1. Pub. L. 95-471, 92 Stat. 1325, *codified* at 25 U.S.C. §§ 1801-1815.

2. A HISTORY OF COLUMBIA UNIVERSITY, 1754-1904 (1904); F. RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY, A HISTORY (1962).

3. RUDOLPH, *supra* note 2, at 104.

Sheldon Jackson College was founded for Alaskan Natives in 1878 by the United Presbyterian Church. "Indian University" was founded by the American Baptist Church in Tahlequah, Creek Nation, in February 1880; it moved in 1885 to Muskogee (now Muskogee, Oklahoma) and became known as Bacone College. In 1887, North Carolina established a school for Indian students; it became a college in the 1930s and offered its first degree in 1940. In 1969 it became Pembroke State University, which in 1978 still enrolled more than 20% Indian students. No additional efforts were undertaken to establish Indian colleges until the 1960s.

The few federal efforts aimed at assisting Indians to attend college consisted of establishing vocational schools (including Carlisle and Haskell high schools), providing boarding or reservation schools, arranging special contracts with mission schools or black institutions (e.g., Hampton Institute), and funding scholarships for the few Indian college students to attend majority institutions.⁴ In 1966, BIA officials began to plan for a federally sponsored Indian college, when studies were begun to extend Haskell Institute's high school program into a junior college, offering the first two years of a college curriculum. This effort took four years, resulting in Haskell Indian Junior College becoming accredited in 1970. Other BIA-administered colleges include the Institute for American Indian Arts, which in 1968 became the post-secondary extension of the Santa Fe, New Mexico, Indian School, and the Southwestern Polytechnic Institute, established in Albuquerque in 1973.

In addition to state-established, BIA, and church-affiliated colleges, another category of Indian colleges was established in 1968, when the Navajo Nation began Navajo Community College. This has become the most common method of establishing Indian colleges, as more than a dozen tribes have established tribal colleges with Indian community boards of trustees. Although Navajo Community College was initiated as an independent tribal institution, smaller tribes began to establish a different type of institution, affiliating themselves with larger, accredited colleges, either as branch campuses or extension centers of majority institutions. In this manner, a public institution such as Oglala Sioux Community College evolved from its original affiliated status with Black Hills State College and the University of South Dakota into

4. Chavers, *Indian Education: Failure for the Future?*, 2 AM. INDIAN L. REV. 61 (1974); Olivas, *Indian, Chicano, and Puerto Rican Colleges: Status and Issues*, 9 BILINGUAL REV. 36 (1982).

a preaccredited candidate for formal accreditation in its own capacity. Sinte Gleska College, a private institution, has also moved from its ties to Black Hills College and the University of South Dakota to similar preaccredited status. The Lummi Tribe has an arrangement with Whatcom Community College in Bellingham, Washington, to offer a degree in aquaculture (fishery management), with technical courses taught on Lummi Island and the certificate awarded by the mainland campus. Through these creative means, Indians have begun to organize and administer tribal colleges and Indian institutions.

Table 1
INDIAN COLLEGES

College [Affiliated Institution] (State)	Public/ Private 2yr/4yr	1979 Accred. Status	BIA/ Tribal Affiliation
Bacone College (OK)	Priv, 2	1	—
Blackfeet Community College (MT) [Flathead Valley CC]	Publ, 2	4	Blackfeet
Cheyenne River Community College (SD) [Northern State C]	Publ, 2	4	Cheyenne River Sioux
College of Ganado (AZ)	Priv, 2	1	Hopi
Dull Knife Memorial College (MT) [Miles C]	Publ, 2	4	Northern Cheyenne
Flaming Rainbow University (OK)	Priv, 2	4**	—
Fort Berthold College Center (ND) [Mary C]	Priv, 2	4	Mandan, Hidatsa, Arikara
Fort Peck Community College (MT)	Publ, 2	4	Assiniboine and Sioux
Haskell Indian Junior College (KS)	Publ, 2	1	BIA
Hehaka Sapa College at D-Q University (CA)	Priv, 2	1	Hoopa Valley, Soboba
Institute of American Indian Arts (NM)	Publ, 2	2	BIA
Inupiat University (AK)	Priv, 4	2	Inupiaq Eskimo
Little Bighorn Community College (MT) [Miles C]	Publ, 2	4	Crow
Little Hoop Community College (ND) [Lake Region JC]	Publ, 2	4	Devil's Lake Sioux
Lummi School of Aquaculture (WA) [Whatcom CC]	Publ, 2	3	Lummi
Native American Educational Services (IL)	Priv, 4	2	—
Navajo Community College (AZ)	Publ, 2	1	Navajo
Navajo Community College Branch (NM) [Navajo CC]	Publ, 2	3	

College [Affiliated Institution] (State)	Public/ Private	1979 Accred. Status	BIA/ Tribal Affiliation
Nebraska Indian Community College (NE) [Northeast Technical C]	Publ, 2	4	Santee Sioux, Omaha, Winnebago
Nebraska Indian Satellite Community College (NE) [Nebraska Indian CC]	Publ, 2	3	
Oglala Sioux Community College (SD)	Publ, 2	4**	Oglala Sioux
*Pembroke State University (NC)	Publ, 4	1	—
Salish-Kootenai Community College (MT) [Flathead Valley CC]	Publ, 2	4	Salish, Kootenai
Sheldon Jackson College (AK)	Priv, 4	1	—
Sinte Gleska College (SD)	Priv, 4	2	Rosebud Sioux
Sisseton-Wahpeton Community College (SD)	Publ, 4	4	Sisseton- Wahpeton Sioux
Southwestern Indian Polytechnic Institute (NM)	Publ, 2	1	BIA
Standing Rock Community College (ND)	Priv, 2	2	Standing Rock Sioux
Turtle Mountain Community College (ND) [North Dakota State U at Bottineau]	Publ, 2	2	Turtle Mountain Chippewa

* Formerly Pembroke State College for Indians.

** Not listed in *Accredited Postsecondary Institutions* (September 1, 1979), but listed as having preaccredited status in *Education Directory* (May, 1980).

Accreditation Key: 1) Accredited
2) Preaccredited
3) Branch or extension campus ~
4) Unaccredited

Drawing from several sources, a list of Indian institutions such as those in Table 1 would necessitate as many footnotes as entries: Pembroke State University, founded for Indians, today enrolls approximately 20% Indians; in this regard, Pembroke resembles three formerly black, now predominantly white, colleges—Bluefield State College, Lincoln State University, and West Virginia State—that are considered “traditionally black,” with an asterisk.⁵ Sadly, the status of many of these institutions is uncertain and the list is fluid; in particular the rural isolation, the lack of property tax bases, and benign neglect by government have stunted the growth of Indian colleges.⁶

5. W. TURNER & J. MICHAEL, *TRADITIONALLY BLACK INSTITUTIONS OF HIGHER EDUCATION* 2 (1978).

6. Table 1 could have included several more institutions, but adequate information was not available: Tanana Land Claims College, United Tribes Educational Technical Center, Gila River Community College.

Legislative History

Vine Deloria has noted that congressional hearings and legislation on Indian issues often must wend their way through a protracted process, and even when legislation is enacted, it frequently does not remedy the problem.⁷ The extent of poverty and illiteracy is so extraordinary that only comprehensive economic and education legislation can begin to reorganize or refocus federal and state programs to serve Indian communities.⁸ It was in recognition of the severe problems facing Indians in higher education that Congress began to draft legislation for Indian colleges in 1975, when S. 2634 was introduced in the first session of the Ninety-fourth Congress. The legislative history encompasses several versions of the bill, which was signed into law on October 19, 1978, nearly three years after it had first been introduced.⁹

One recognition of the special nature of these colleges was congressional intent to make grants for general operating expenses.¹⁰ This type of grant, with its unrestricted nature, is unusual, for most federal higher education institutional grants are of the categorical or restricted nature, tied to narrow, specific program purposes. The only major postsecondary institutional grants program is Title III of the Higher Education Act, the Strengthening Developing Institutions program,¹¹ a program that targets development resources implicitly at minority institutions, particularly black colleges. Because Indian colleges are heavily reliant upon majority institutions, and because the Title III staff have repeatedly shown themselves to be insensitive to Indian concerns, Indian colleges receive a disproportionately small share of Title III funds.¹² In the 1979 program, only seven of the twenty-five awards to "Indian Programs" went to the Indian colleges listed

7. Deloria, *Legislation and Litigation Concerning American Indians*, 436 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 86 (1978).

8. Oversight Hearing on Tribally Controlled Community College Assistance Act: *Hearing Before the Subcomm. on Postsecondary Education of the Comm. on Education & Labor*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *House Hearing*, 1981]; H.R. REP. No. 736, 97th Cong., 2d Sess. (1982) [hereinafter cited as H. REP. No. 736].

9. See Appendix A, which details the legislative history of the Tribally Controlled Community College Assistance Act.

10. Pub. L. 95-471, 92 Stat. 1325, § 102.

11. Apart from "indirect cost" allowances, which are individually negotiated between institutions and agencies and can be spent for general operating purposes. 20 U.S.C. §§ 1051-1056 (1976) (amended 1980).

12. Middleton, *Indian Tribal Colleges Accuse U.S. Bureaucrats of Delaying \$85 Million Congress Authorized*, CHRONICLE OF HIGHER EDUC., Feb. 11, 1980, at 1; Olivas, *supra* note 4.

in Table 1; four of the majority institutions that received money are affiliated with the Indian colleges in Table 1, and these arrangements had Indian participation. As Indian testimony in the Title III reauthorization noted, however, the bulk of this money designed to strengthen Indian colleges is being administered by majority institutions.¹³ Thus, Congress had the Title III Indian experience in mind in making provisions for general grants, but with additional safeguards to ensure Indian control.

Public Law 95-471

These safeguards took the form of specific definitions and requirements for Indian control, provisions that were more narrowly targeted than any existing Indian education legislation. For example, recently published rules and regulations for the Indian Education Act defined an "Indian institution" as a "[postsecondary school] that—(1) Is established for the education of Indians; (2) Is controlled by a governing board, the majority of which is Indian; and (3) If located on an Indian reservation, operates with the sanction or by charter of the governing body of that reservation."¹⁴ Under the terms of the Tribally Controlled Community College Assistance Act, stricter definitions were drawn as only one sector of Indian colleges was targeted: tribally controlled community colleges, except Navajo Community College, which has its own federal legislation.¹⁵ Any eligible college is required to be "formally controlled, or . . . formally sanctioned, or chartered, by the governing body of an Indian tribe or tribes, except that no more than one such institution shall be recognized with respect to any such tribe." Further, it "must be one which—(1) is governed by a board of directors or board of trustees a majority of which are Indians; (2) demonstrates adherence to stated goals, a philosophy, or a plan of operation which is directed to meet the needs of Indians; and (3) if in operation for more than a year, has students a majority of whom are Indians."¹⁶

13. Reauthorization of the Higher Education Act and Related Measures Part 1: *Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education & Labor*, 96th Cong., 1st Sess. 348 (1979) (testimony of Richard Nichols, American Indian Higher Education Consortium).

14. Pub. L. No. 92-318, 86 Stat. 334 (*as amended*); the regulations will be recodified under 34 C.F.R., replacing the 45 C.F.R. regulations. See 45 Fed. Reg. 34,153 (1980).

15. Navajo Community College Assistance Act of 1978, 25 U.S.C. § 640(a) (Supp. IV 1980); H.R. REP. No. 1337, 96th Cong., 2d Sess. (1980) [hereinafter cited as H. REP. No. 1337].

16. 25 U.S.C. § 1801(103) (Supp. IV 1980).

This requirement has had ironic consequences, for several colleges have altered their governance structure and have become tribal colleges, eligible for support under TCCCAA provisions. One such college was the College of Ganado, in Ganado, Arizona, on the Navajo Reservation. Previously a private college affiliated with the United Presbyterian Church, the college has become a tribally controlled community college of the Hopi Tribe, which resides within the reservation boundaries of Navajo Nation.¹⁷ D-Q University, established as an Indian-Chicano college in Davis, California, is now chartered by the Hoopa Valley and Soboba tribes. In both instances, institutions with predominantly Indian student enrollments reconstituted themselves and secured tribal charters. Also in both instances, the rural isolation and the colleges' characteristics made such transformations possible and economical. This has been an unanticipated consequence of the Act, and tribal educators have feared privately that several other Indian or non-Indian colleges will alter their character to become eligible for Act funds.

Congress should monitor this development closely to ensure that no "tribe shopping" occurs and that such reorganizations are genuine tribal initiatives in the best interests of the institutions and tribes. It should be recalled that many white institutions have taken "Indian program" initiatives to be eligible for Developing Institutions resources without altering their basic governance structures, which rarely include Indians. Indeed, a 1976 survey of all two-year college trustees noted that fewer than .2 of 1% were Indian.¹⁸

Another definition that has proved to have unanticipated consequences has been the definition, seemingly self-obvious, of "institution of higher education." The Act requires that eligible colleges be "institutions of higher education," in the commonly understood and statutory meaning of the terms.¹⁹ However, as with other provisions of law, when applied to special populations—in this case, Indian colleges—the definition becomes less obvious and may preclude the target population from being effectively served. Public Law 95-471 breaks down at this threshold point, for few tribally controlled community colleges can meet the definitional tests of "institutions," notably in the requirements for

17. P. Locke, *A SURVEY OF COLLEGE AND UNIVERSITY PROGRAMS FOR AMERICAN INDIANS* 24 (1978).

18. G. Grafe, *THE TRUSTEE PROFILE OF 1976*, 4 (1976).

19. 25 U.S.C. § 1801 (Supp. V 1981); 20 U.S.C. § 1141 (1976) (amended 1980).

accreditation status.²⁰ In this case, Indian colleges find themselves in a classic Catch-22 situation: they are not eligible for Act money because they are not accredited, but they cannot secure accreditation without the development money and technical assistance promised in the Act.

Indian colleges, including tribal colleges, have found it difficult to negotiate the accreditation test of the "institution" definition, or to avail themselves of the statutory exceptions to the requirement. The first exception allows the Secretary of Education to waive the requirement if there is "satisfactory assurance" that the college is making progress toward accreditation. The second provision allows a college to secure three letters from accredited colleges indicating their willingness to accept the unaccredited college's credits for transfer.²¹ However, no regulations have been promulgated by the Department to guide the Secretary in this regard, and in the face of larger political battles over accreditation, the Department has not chosen to interpret the colleges' status generously.²² Nor have the unaccredited colleges employed the "three-letter" rule to trigger the other exemption provision. All that would be required is to enlist three accredited institutions in order to have credits accepted for transfer, but such waiver has not been widely utilized by the tribal colleges. It may be that senior institutions are reluctant to jeopardize their own status and risk accepting the credits.

One provision of the "institution" language that was successfully tailored to meet tribal needs is a specific TCCCAA exemption for clause (2) of the requirement that "institutions" be "legally authorized within such State."²³ This is explicit recognition that tribes are independent governmental bodies, not subject to state licensing or government authority. In sum, the definitions employed by Congress have had an uneven history of success in distinguishing Indian conditions from general postsecondary cri-

20. See Table 1.

21. Higher Education Act of 1965, Pub. L. No. 89-329, § 1201(a)(5); 20 U.S.C. § 1141 (1976) (amended 1980). Anticipating that the unaccredited status of most Indian colleges would cause eligibility problems, the drafters of the original Tribally Controlled Community College Act bill (which had been proposed as an amendment to the Indian Self-Determination Act) had incorporated the two exceptions into the bill. The legislation that emerged, however, simply incorporated the definition language, eliminating the redundant exemption references.

22. Finkin, *Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate*, 2 J. LAW AND EDUC. 339 (1973).

23. 25 U.S.C. § 1801 (Supp. V 1981).

teria, and in this important area of accreditation, the ostensibly simple "institution" definition has proved to be a major design flaw.

Technical Assistance Contracts and Feasibility Studies

Congress, unwilling to give money so easily to eligible tribal colleges, required that the Secretary of the Interior (to whom the Bureau of Indian Affairs reports) conduct "feasibility studies" to "determine whether there is justification to start and maintain a tribally controlled community college."²⁴ The formats of these studies were designed by BIA staff and the Office for Management and Budget, and require completion of a feasibility study form that is 73 pages long, not including its required appendices. The "institution" definition has been strictly interpreted by OMB and the BIA to require accreditation or candidacy as a measure of feasibility; the BIA has added to the circularity of this requirement by noting that this criterion could be waived by the three-letter rule—the accreditation waiver. Thus, the accreditation requirement has an added requirement of "feasibility," although accreditation standards are employed in determining feasibility. Indian educators have argued unsuccessfully that these dual requirements are redundant and that a recognized accreditation status should be *prima facie* evidence of the college's feasibility.²⁵ BIA officials have conceded the difficulty in this dual proof, but have not devised a reduction in the paperwork required of the colleges.²⁶

24. Pub. L. 95-471 § 105 (a) & (b). The Senate bill had no such requirement. S. REP. No. 582, 95th Cong., 1st Sess., § 105 (b) & (d) (1977).

25. *Implementation of the Tribally Controlled Community College Assistance Act: Hearing on Pub. L. 95-471. Before the Senate Select Comm. on Indian Affairs*, 96th Cong., 2d Sess. 9-17 (1980) (testimony of Leroy Clifford, Exec. Dir., American Indian Higher Education Consortium) [hereinafter cited as *Senate Hearing*, 1980].

26. 25 C.F.R. § 41 (1982). See 44 Fed. Reg. 67,040-67,048 (1979). See also *Senate Hearing*, 1980, *supra* note 25, at 6-7 (testimony of Earl Barlow, BIA).

TABLE 2

PROCESS FOR FEASIBILITY STUDIES AND GRANT APPLICATIONS

School	(6-79/4-80) Feasibility Study Request	(3-2/) Feasibility Study	(3-2/ Review of Study	Determination (4/1-
Ojibwa C.C.	7/15/80	8/26/80	9/18/80	N 9/18/80
Nebraska Indian C.C.	12/4/79	3/9-15	4/9/80	P 5/1/80
Blackfeet C.C.	6/18/79	3/16-22	4/7/80	P 4/8/80
College of Ganado	9/27/79	3/2-8	3/27/80	P 4/8/80
Cheyenne River C.C.	9/11/79	4/14-16	5/6/80	N 5/9/80
Dull Knife Memorial C.C.	12/7/79	3/9-15	4/3/80	P 4/9/80
Fort Berthold C.C.	3/ /80	4/28-30	6/23/80	N 6/25/80
Gila River C.C.	12/14/79	4/23-25	5/16/80	N 5/20/80
Hehaka Sapa C. at DQU	12/19/79	3/9/15	4/7-6/12/80	P 6/12/80
Inupiat University of the Arctic	4/21/80	5/19-21	6/20/80	P 6/26/80
Little Hoop C.C.	2/18/80	4/14-16	5/6/80	P 5/9/80
Lummi School	1/24/80	3/23-25	4/9/80	N 4/16/80
Salish Kootenai C.C.	1/10/80	3/16-22	5/1/80	P 5/1/80
Sinte Gleska College	9/17/79	3/2-8	4/4/80	P 4/9/80
Sisseton-Wahpeton College Center	12/6/79	4/28-30	5/22/80	N 6/4/80
Standing Rock C.C.	1/3/80	3/16-22	4/9/80	P 4/16/80
Turtle Mountain C.C.	8/24/79	3/2-8	3/27/80	P 4/1/80
Oglala Sioux C.C.	7/31/79	3/9-15	4/4/80	P 4/9/80
Little Big Horn C.C.	3/3/80	4/28-30	6/5/80	N 6/23/80
Fort Peck C.C.	5/13/80	6/19-21	6/30/80	N 7/7/80

2nd Feasibility Cycle								
	Neg. Det. 30 days	Appeal Date	Hearing Date	Deter- mina- tion	Feasibility Study Request	Feasibility Study	Review of Study	Deter- mina- tion
Lummi School of Aquat. and Fishing	4/28/80	6/05/80	7/15/80	N	9/17/80	1/81	1/23/81	P 2/2/81
Cheyenne River C.C.	5/19/80	6/26/80			10/10/80	Withdrew		
Gila River C.C.	6/20/80	7/27/80						
Sisseton- Wahpeton College Center	6/14/80	7/21/80			9/20/90	10/6/80	10/10-9/12	P 11/19/80
Little Big Horn C.C.	6/30/80	8/07/80	8/28/80	N				
Fort Berthold C.C.	6/30/80	8/07/80			8/6/80	9/25/80	10/14/80	P 10/16/80
Fort Peck	8/20/80	9/20/80	10/21/80			6/25/80	1/19/81	P 2/4/81

TABLE 2

PROCESS FOR FEASIBILITY STUDIES AND GRANT APPLICATIONS

FY 1980			FY 1981			
Grant Application	Grant Determination (w/in OIEP)	Grant Awards	Grant Application	Review of Application	Grant Determination	Grant Award
5/29/80	6/16/80	6/24/80	8/1/80	9(8-12)80	10/24/80	11/7/80
3/28/80	4/30/80	5/20/80	7/3/80	9(15-20)80	10/24/80	10/31/80
5/15/80			7/24/80	10(15-20)80	10/16/80	10/27/80
	5/19/80	6/12/80	8/7/80	9(15-20)80	10/24/80	11/7/80
5/01/80	6/12/80	6/19/80	8/6/80	9(15-20)80	12/11/80	12/18/80
5/25/80	6/12/80	6/27/80	8/5/80	9(15-20)80	9/16/80	11/7/80
	5/19/80	6/10/80	7/29/80	9(15-20)80		11/28/80
3/18/80	4/30/80	5/23/80	8/1/80	9(8-12)80	10/29/80	10/30/80
3/28/80	4/30/80	5/20/80	8/7/80	9(8-12)80	10/16/80	11/7/80
4/22/80	5/01/80	5/20/80	8/9/80	9(8-12)80	10/16/80	11/7/80
4/02/80	5/19/80	6/10/80	8/8/80	9(8-12)80	10/16/80	10/30/80

N = Negative determination

P = Positive determination

Source: BIA Staff

As can be seen in Table 2, twenty tribal colleges have initiated feasibility studies, most of which have been conducted by Indian consultants under contract to the American Indian Higher Education Consortium, a Denver-based Indian technical assistance organization. Section 104 of the Act has an Indian preference provision: "In the awarding of contracts for technical assistance, preference shall be given to an organization designated by the tribally controlled community college to be assisted." This arrangement, though unusual, is appropriate for colleges as unique and specialized as are Indian colleges. Therefore, regarding the feasibility studies, Congress and the administrators have been inconsistent: requiring extraordinarily high standards of eligibility and feasibility for Indian colleges, but allowing the colleges to approve their own technical assistance contractors. This curious ambivalence is seen throughout the Act—giving with one hand and taking with the other.

The process that OMB and BIA have developed for feasibility studies is elaborate, requiring a request for the study; negotiation of a study team; conducting a several-day site visit; report preparation; BIA review of the study; positive or negative feasibility determination by BIA; and eligibility for a grant application if the college is judged feasible. On the first attempt, seven colleges failed to win feasible status, and all filed appeals and requested additional review. The entire process, even with a positive initial review, can be time-consuming, as Blackfeet Community College discovered. Filing a feasibility study request in June 1979, it did not receive a determination until April 1980; it was not until June 6, 1980 that it received a grant award.²⁷

This lag time, a chronic problem with many federal grants and contracts, is a particularly acute problem for Indian colleges. First, these colleges have practically no financial reserves, no endowment funds, no ability to cultivate property tax bases or state resources, and no economies of scale to tide them over during the waiting periods. Second, this lack of financial reserve is exacerbated by the expenses of maintaining small institutions located in rural, isolated areas, where essential materials and supplies are not routinely available. For instance, a 1974 study undertaken by Navajo Community College found that building costs in Tsaile, Arizona, were 30% higher than in Albuquerque, New Mexico.²⁸

27. *Senate Hearing*, 1980, *supra* note 25, at 3 (testimony of E. Barlow).

28. Indian Postsecondary Educational Assistance Act: *Hearing on S. 2634 Before the Subcomm. on Indian Affairs of the Comm. on Interior & Insular Affairs*, 94th Cong., 2d Sess. 229-31 (1976).

Alaskan costs would also be disproportionately higher for similar reasons of isolation and distance from suppliers. Finally, the schools have such small enrollments that the amount per full time equivalent (FTE) student, while seemingly high, is insufficient to enable the colleges that eventually do receive the money to establish programs and stabilize their operations, particularly capital plant needs. The Senate bill proposed a flat grant of \$125,000 and \$5,850 per FTE student, but the final House version eliminated the grant provision and lowered the FTE award to \$4,000.²⁹

The amount arrived at by the House committee exemplifies the curious way in which Indian legislation is drafted and the assumptions that usually prevail. The House report indicates that the per-FTE student amount was determined in order to approximate Haskell Indian Junior College FTE costs, judged to be \$4,310 in 1977.³⁰ This approximation was inappropriate for obvious reasons, including Haskell's already completed plant, mature curriculum, large size, and federal investments since 1968 in the establishment of the college. Newer institutions, reliant upon scarce tribal resources rather than federal start-up support, require more resources than Haskell did as its well-established high school was expanded into a junior college. Moreover, the Haskell approximation was itself adjusted downward from its actual \$5,050 FTE appropriation to take into account the less comprehensive nature of the tribal colleges,³¹ so the colleges actually would receive \$1,000 less per FTE student than did the well-established Haskell. Finally, 1977 indices, unadjusted for 1981 appropriations, have struck these colleges particularly hard for cost reasons already noted.

Another provision under this section is the authorization for the Secretary of Interior to pay for the feasibility studies. The Secretary can finance them through general departmental administrative funds or through dipping into a setaside of 10% of the TCCCAA grant funds. This provision would allow the feasibility studies to be financed by the funds intended to go to the institutions determined to be eligible. This provision is unusual, not only because such administrative studies appear to be envisioned as required "technical assistance" under section 104 and have a sepa-

29. Compare S. REP. No. 582, 95th Cong., 1st Sess. 3-10 (1977) [hereinafter cited as S. REP. No. 582] to H.R. REP. No. 1558, 95th Cong., 2d Sess. 10-16 (1978) [hereinafter cited as H. REP. No. 1558]. See also 25 U.S.C. § 1808 (Supp. V 1981).

30. H. REP. No. 1558, *supra* note 29, at 10.

31. *Id.* at 9-10. Although the Report refers to "more conclusive" services, the context suggests "more comprehensive" was intended.

rate authorization (under section 109[a]2), but also because the Bureau has a larger administrative trust responsibility to provide technical assistance to Indian tribes under the Indian Self-Determination and Education Assistance Act programs. The administrative costs and contract provisions of this Act spell out in considerable detail the Bureau's responsibility for providing technical assistance, and there is no indication in this legislation or its regulations that funds for such activities are to come from Indian program funds.³² Although the delays in screening and certifying eligible institutions meant that drawing from the program funds did not pose a threat in the first year (1979-80), the decline in appropriations and increase in program outlays have continued to threaten institutional entitlements.

Effect Upon Other Programs

In order to preclude federal agencies from playing a shell game with Indian funds by substituting TCCCAA money for other funds for which tribal colleges were eligible, Congress enacted section 108, a prohibition on such a practice ("eligibility for assistance under this title shall not, by itself, preclude the eligibility of any tribally controlled college to receive Federal financial assistance" from other federal programs). This section was added to ensure that the TCCCAA entitlement funds would supplement and not supplant resources received by the colleges.³³ Congress had reason to fear that agencies would attempt to supplant funds, both formally and informally. BIA, for example, had supplanted tribal funds in vocational programs to colleges receiving TCCCAA money.

Indian educators had also noted the decline in Title III funds to Indian programs³⁴ and were concerned that the Title III staff would view TCCCAA funds as an opportunity to reduce Indian resources even further. Congressional hearings and testimony from Title III administrators gave additional evidence that such a trade off might occur, for the officials testified against the bill and urged instead that the resources be added to the Title III program for its categorical awards to developing institutions.³⁵ Con-

32. 25 U.S.C. § 450f (1976); 25 C.F.R. § 271 (1980).

33. S. REP. No. 582, *supra* note 29, at 10; H. REP. No. 1558, *supra* note 29, at 16.

34. Nichols, *supra* note 13. See also BUREAU OF HIGHER AND CONTINUING EDUCATION, FACTBOOK OF BHCE PROGRAMS, 1978, 88-90 (1978).

35. Tribally Controlled Community College Act: *Hearings on H.R. 9158 Before the Subcomm. on Postsecondary Education of the Comm. on Education & Labor*, 95th Cong., 2d Sess. 144-50 (1978).

gress was justifiably skeptical of the program's claim that more money given to it would meet the long-term stabilization needs of Indian colleges, when only seven tribal colleges received such competitive awards for the 1979 fiscal year.³⁶

A more formal shell game is evident in the BIA's method of "band analysis," a fiscal mechanism for funding tribal social programs. This mechanism, itself an antiquated and inefficient appropriations device, has been employed by the BIA to supplant tribal higher education funds in anticipation that tribes will receive TCCCAA funds—a practice that appears to be prohibited both by section 108's provisions and by congressional intent. The band-analysis method is a budget process in which a tribe submits a budget request and the BIA approves certain tribal expenditures. Each categorical entry (housing, health, elementary education, higher education) approved is a "band," or percentage, of the final annual BIA appropriation to the tribe. Because tribal administrators are subject to BIA internal budget politics (including antagonism toward non-BIA Indian institutions) and delays, the tribes themselves cannot plan in advance and have no flexibility to rearrange budget expenditures among the "bands." Thus, tribal colleges that do seek to stabilize their BIA funding must trade off among other categories; in fact, Navajo Community College sought and received legislative exemption³⁷ to remove its appropriations from the band-analysis method. The Senate Report noted: "It can be stated fairly certainly that the funding provided by the Bureau to these colleges is inadequate and unstable due to the nature of the band analysis process itself."³⁸

Although Congress specifically directed that band funds not be diminished in anticipation of TCCCAA, this is exactly what has happened. In the case of Navajo Community College, as noted, separate legislation was enacted to negotiate the situation, but not until several years of such BIA trade offs had elapsed, seriously jeopardizing the development of the first tribal college.³⁹ For other tribal colleges using band analysis, the situation has been

36. Olivas, *supra* note 4.

37. Indian Education: *Hearing on H.R. 9158 Before the Subcomm. on Post-secondary Education of the Comm. on Education & Labor*, 95th Cong., 1st Sess. (1977); H.R. REP. No. 1251, 96th Cong., 2d Sess. (1980).

38. S. REP. No. 582, *supra* note 29, at 6.

39. H.R. REP. No. 1337, 96th Cong., 2d Sess. 205-06 (1980). H. REP. No. 1558, *supra* note 29, at 17; *Senate Hearing*, 1980, *supra* note 25, at 60; S. REP. No. 582, *supra* note 29, at 7.

equally serious, with no individual institutional legislative relief. For example, band money for Sinte Gleska, Oglala Sioux, and Turtle Mountain community colleges was removed when the three colleges were found to be feasible for TCCCAA eligibility. Only in May 1980, the end of the 1979-80 school year, did BIA rescind its action; not until 1981-82 did BIA supplement the TCCCAA fund request and comply with the no-penalty provisions of the law.⁴⁰

Other Fiscal Considerations

Sections 109 and 110 include authorization language for appropriations, including a separate provision, noted earlier, for technical assistance. Anticipating that no schools would be found feasible or eligible, Congress did not authorize any funds to be appropriated until fiscal year 1979.⁴¹ Congress also constructed an elaborate scheme for pro-rata increases or decreases in the FTE formula, contingent upon appropriation levels. However, there are internal inconsistencies and conflicting directions within these provisions and other TCCCAA sections.

The grant adjustments, for instance, appear to allow more than the \$4,000 per FTE allotment: "*Sums appropriated in excess of the amount necessary to pay in full such total eligible amounts shall be allocated by ratably increasing such total eligible amounts.*"⁴² Yet section 110(b) takes a different tack, stipulating "no grant recipient shall receive, as a result of such reallocation, more than the amount provided for under section 106(a) of this title." The regulations promulgated by BIA for the administration of these disbursements do not entirely clarify the rollback provisions:

If with respect to any academic year the amounts of financial assistance hereunder have been ratably reduced as provided in paragraph (d)(3) of this section and additional funds have not been appropriated to pay the full amount of such reductions on or before June 1st. of such year, the Director of Education shall notify each Community College of such fact in writing, and each Community College shall report in writing to the Director of Education on or before July 1st. of such year the

40. *Senate Hearing*, 1980, *supra* note 25, at 18-31 (testimony of Elgin Badwound, President, Oglala Sioux Community College). This testimony also includes a letter from the Department of Interior clarifying the Department's error (at 32).

41. 1 October 1979. See Table 3.

42. Pub. L. 95-471, 92 Stat. 1325, § 110(a) (emphasis added).

amount of unused portion of received funds. The total of such reported unused portions of received funds shall be reallocated by the Director of Education in proportion to the amount of financial assistance to which each Community College is entitled under paragraph (d) but which has not been provided due to the ratable reductions provided for therein, (except that no Community College shall receive more than the total annual cost of the education programs provided by such College) and payments shall be made reflecting such reallocations on or before August 1st. of such academic year.⁴³

As with the band analysis, it will be difficult for tribes to plan budgets and commit themselves to expenditures when complex and contradictory regulations prevail. Although the TCCCAA was enacted to provide a stable flow of resources to these colleges, the band analysis, rollback provisions, and pro-rata negotiation terms do not allow such stability. In the first year of funding, the colleges received \$3,421 per FTE student, almost \$600 less per FTE than the law mandates. As noted in Table 3, the BIA only requested \$6,157,000 for fiscal year 1982—\$3,444 per FTE. Therefore, in the first year, the colleges received less than their full share, and the BIA budget request for the second year asked for less than full share.⁴⁴ Moreover, the special legislation secured by Navajo Community College guaranteed the full \$4,000 for each of its FTE students, restricting the amount of money available to the other tribal colleges. The BIA has acknowledged that such a budgeting procedure is unfair to the remaining colleges, but it has not requested separate appropriations that would enable them to budget separately, even though the law appears to require such separate line items.⁴⁵

43. 25 C.F.R. § 41.8f (1982).

44. And, as indicated in the text at note 30 *supra*, these figures were based upon low, rough estimates of Haskell's costs.

45. See BIA Testimony, *Senate Hearing*, 1980, *supra* note 25, at 1-9. Additionally, no indirect costs are allowed in this formula, which makes it difficult for tribes to establish an indirect cost rate for conducting business with other government agencies. See note 25, *supra*, at 18.

TABLE 3
TCCCAA APPROPRIATIONS

College	FY 1980		Estimate FY 1981		Estimate FY 1982	
	FTE	Grant	FTE	Grant	FTE	Grant
Standing Rock	111	\$354,078	85	\$290,985	120	\$413,221
Blackfeet	83	264,761	199	689,779	199	685,259
Sinte Gleska	73	551,851	173	591,833	187	643,937
Turtle Mountain	107	341,318	107	366,047	128	440,769
Salish-Kootenai	90	287,079	125	427,625	125	430,439
*Ganado	131	156,287	82	280,522	82	282,368
Little Hoop	35	111,646	42	143,682	46	158,402
Sisseton-Wahpeton	—	—	66	225,786	66	227,272
D.Q. University	76	242,431	82	280,522	82	282,368
Ft. Berthold	—	—	38	129,998	38	130,853
Dull Knife	93	296,709	93	318,153	93	320,247
Oglala Sioux	282	833,703	214	732,094	214	736,911
Nebraska	109	329,453	106	362,974	118	406,335
Lummi Sch. Aqua. ¹					70	241,046
Little Big Horn ¹					110	378,786
Ft. Peck ¹					50	172,176
Cheyenne River ¹					60	206,611
	1,290	\$3,769,356				
Subtotal		+ 231,000*				
Title I		4,000,356	1,412	4,831,000	1,788	6,157,000
Navajo Community College ²	1,600	6,405,000	793	3,172,000	793	3,172,000
Sinte Gleska ³		358,300		136,500		136,500
Oglala Sioux ³		117,180		133,000		133,000
Turtle Mountain ³		93,700		80,500		80,500
Ganado ³		506,000				
Subtotal-Title II and Snyder Act		7,480,180		3,522,000		3,522,000
Feasibility Studies		400,000		50,000		
Technical Assistance		600,000		600,000		600,000
Total Estimate	2,890	12,249,536*	2,205	\$9,003,000	2,581	\$10,279,000

1. Represents colleges which are expected to be declared feasible in FY 1982.

2. Funds provided under Title II of P.L. 95-471.

3. Supplemental funds under the Snyder Act in addition to funds made available under Title I above.

* Ganado received an emergency grant of \$231,000 in 1980 which is not included in the budget figures.

Sources: 1981 and 1982 figures are from BIA actual requests.

1980 awards are from BIA Office of Indian Education.

1980 FTE is taken from Higher Education Daily, Apr. 29, 1980, p. 5.

Additionally, the small size of the colleges and high Indian student attrition combine to make it difficult to plan and stabilize college programs under the TCCCAA formulae. The FTE determination has been spelled out in the regulations and employs a formula designed to account for attrition during the year.⁴⁶ While attrition at large colleges is a major problem for all institutional planners,⁴⁷ the tribal college enrollments are so small that even small attrition rates make a significant difference in their TCCCAA entitlement. The sixth-week determination for the first-term formula poses planning problems, as resources to be used for retaining students (counseling, financial aid administration, academic advising) have been delayed. In this sense, the delays in the funding have directly contributed to the attrition, which in turn has led to reduced FTE funding.⁴⁸

Reporting Requirements

The TCCCAA mandated four reports or studies, as well as the required rules and regulations. As with other provisions of this law, BIA has a poor record in meeting these requirements. The reports on facilities mandated under sections 111 and 112 were not completed by the deadline dates (January 17, 1979 and November 1, 1979), but were made available in late summer, 1980.

Section 106(e) requires the Secretary of Interior to report annually to Congress on the status and needs of the tribal colleges; in the four years since the law was enacted, no report has been made. Of course, the delays in administering feasibility studies made such a report difficult, and any candid report would have surely reflected badly upon BIA and OMB. However, an important component of the mandate was the Secretary's "recommendations for needed action," which could have touched upon design flaws and acknowledged difficulties such as BIA officials were conceding elsewhere in congressional testimony.

46. 25 C.F.R. §§ 41.3g & 41.8(d)(1) (1982):

$$\$4000 \times \frac{\text{FTE}_{\text{Term 1}} + \text{FTE}_{\text{Term 2}} + \dots + \text{FTE}_{\text{Term N}}}{N}$$

(Indian FTE = FT + PTCR/12)

where FT = fulltime Indian students carrying 12 or more credit hours at the end of the sixth week of the academic term,

PTCR = number of credit hours for which part-time Indian students are registered at the end of the sixth week of an academic term.

47. Blanc, DeBuhr & Martin, *Breaking the Attrition Cycle: The Effects of Supplemental Instruction on Undergraduate Performance and Attrition*, 54 J. HIGHER EDUC. 80 (1983).

48. *Senate Hearing*, 1980, *supra* note 25, at 9-17 (testimony of L. Clifford).

Finally, under section 107(c)2, the Secretary is to collaborate with the National Center for Education Statistics in order to establish a fiscal data collection system. This system has not been established, even though the feasibility studies have been available to provide baseline data. Although BIA estimates indicate that the \$4,000 allocations may be too *low*, they requested less than that amount for 1982, without the required fiscal data system.⁴⁹ In sum, reporting requirements have not been met, even in fundamental data categories crucial for planning activities and appropriations.

Miscellaneous Provisions

Section 113 precludes participation by Navajo Community College in the TCCCAA because of the prior legislation enacted for NCC, reconstituted as Title II of the TCCCAA, the Navajo Community College Assistance Act of 1978.⁵⁰ Additional provisions include specific antidiscrimination language, prohibiting recipient colleges from denying admission to nontribal Indians, and general provisions for repayment of funds by institutions violating this policy. Although the legislative history and hearing record do not suggest why such a provision was deemed necessary, discussion with congressional staff noted that some acrimony had been evident between AIHEC institutional members and other Indian educators, and that this provision was in response to such disagreements.⁵¹ The provisions for promulgating rules and regulations were not unusual and ordered the requisite posting of proposed rule-making and final rules within ten months. The Department was only slightly behind schedule in this process, with final regulations published in the November 21, 1979 *Federal Register*.⁵² Department officials were also required to meet with national Indian organizations, a requirement met by BIA's convening of a task force of Indian educators.⁵³

Proposed Amendments to Public Law 95-471 (1980)

An amendment to the Act (S. 1855) was passed by the Senate

49. *Id.* at 1-9 (testimony of BIA).

50. 25 U.S.C. § 640a (Supp. V 1981).

51. Of course, majority institutions are never required to abide by such prohibitions. For an example of the type of acrimony Congress may have had in mind, see the letter from the College of Ganado in *Senate Hearing*, 1980, *supra* note 25, at 70.

52. 44 Fed. Reg. 67,040-67,048 (1979).

53. *Senate Hearing*, 1980, *supra* note 25, at 3-4.

on January 25, 1980 and referred to the House Committee on Education and Labor on January 29. It was then referred to the Subcommittee on Postsecondary Education, where it remained until the Congress adjourned for the year.⁵⁴ The amendment clarified the Indian eligibility requirement but, curiously, it further complicated the accreditation issue, for it restored portions of the redundant accreditation waiver provisions incorporated in the statutory definition of "institution of higher education," and gave the Secretary of the Interior (not the Secretary of Education) the authority to determine reasonableness of the colleges' efforts toward accreditation. This provision, if it were to be adopted, would further complicate the accreditation provisions, for a memorandum of agreement would have to be drafted between Interior and Education to utilize the eligibility staff of the Department of Education, adding yet another layer of administration. A more reasonable legislative approach would have employed the Act's present language and adopted accreditation or its waivers as evidence of feasibility for existing colleges.⁵⁵ The amendment also increased authorization levels for technical assistance, and clarified an ambiguity in the law that could have been construed to allow only accredited colleges to be eligible for the assistance.⁵⁶ This clarification remains necessary, but BIA's corollary mandates to provide such services could be employed without altering the legislation.

The Subcommittee on Postsecondary Education, to which the Senate amendments were sent, never scheduled hearings or took action on S. 1855. Almost two years later, when the Ninety-sixth Congress ended, the amendments died. Discussions with congressional staff indicated that the inattention was due to pressing work on the legislation establishing the Department of Education and reauthorizing the Higher Education Act. Indian educators, understandably more cynical, accused the Congress of continued insensitivity toward Indian education.⁵⁷

Proposed Amendments to Public Law 95-741 (1982)

It may have been a blessing in disguise that the House failed to

54. U.S. Senate *Calendar*, Sept. 24, 1980, at 199.

55. Congressional staffers have suggested that this reassignment was in anticipation of Higher Education Act reauthorization changes in § 1201. These changes were not made in the final version of § 1201.

56. Pub. L. 95-471, § 104.

57. *House Hearing*, 1981, *supra* note 8.

act upon the Senate's amendments, for the changes failed to remedy the major design flaws in the TCCCAA, and such minor fine-tuning might have dissuaded Congress from taking any further comprehensive action to make the Act more responsive to the colleges' difficulties. The delays over the Act's early years have meant that the institutions have lost valuable time in stabilizing their programs, and most of the colleges are financially even more precarious than they were at the time Congress was moved to legislative action. In one respect, the status of the colleges recently declared feasible may render moot many of the eligibility concerns; however, the uncertainty of the ineligible colleges' status, and the inadequacy of the financial provisions reveal major design problems that still remain. Moreover, major provisions of the TCCCAA remain unfulfilled, and interagency cooperation remains an elusive goal. In each case of delay, reasonable administrative provisions could have been employed to resolve the problem. Unfortunately, the TCCCAA is, in many respects, an all-too-typical example of the Indian law administered against the best interests of its intended recipients.

The legislation was reconsidered in 1982, at House hearings on May 4 and in Senate hearings on June 15. The Omnibus Budget Reconciliation Act had extended the TCCCAA's authorizations from 1982 through fiscal year 1984, leading several members of the House to file a minority report objecting to the reconsideration of the legislation. They also objected to endowment provisions of the newly reported bill (H.R. 6485) "not only on budgetary concerns but also on the extent to which the Federal Government should become involved in a practice that has heretofore been solely the responsibility of the private sector."⁵⁸ Senate legislation (S. 2623) became the vehicle for the reauthorization (see Appendix A), and differences between the House and Senate versions were reconciled in conference in December 1982.⁵⁹ On January 4, 1983, President Reagan vetoed the reauthorization, objecting to legislative language that stressed the federal government's trust responsibility.⁶⁰ The legislation would have resolved many of the problems encountered during the first four years of the TCCCAA,

58. H. REP. NO. 736, *supra* note 8, at 27. Title III of the Higher Education Act had been amended in 1980 to award endowment support to developing institutions. Olivas, *supra* note 4.

59. H.R. REP. NO. 979, 97th Cong., 2d Sess. (1982) [hereinafter cited as H.R. REP. NO. 979]; S. REP. NO. 688, 97th Cong., 2d Sess. (1982).

60. Higher Educ. Daily, Jan. 6, 1983, at 1.

and it actually introduced several new dimensions of program support to tribal colleges. Because the chair of the House Post-secondary Education Subcommittee has indicated his intention to reintroduce the conference version, the major provisions are summarized in this section. Congressional counsel has indicated that if the conference version were vetoed a second time, Congress would likely resubmit the legislation and attempt to override the presidential veto.⁶¹

The definition of "Indian" was widened to remove the TCCCAA's more restrictive eligibility, that of the BIA's blood quanta criteria.⁶² The veto was premised upon what President Reagan believed to be an expansion of federal trust responsibility,⁶³ but the conference committee viewed this language as reaffirmation of an existing policy: "the inclusion of this language is for clarification only, to recognize a state of affairs which the conferees agree already exists . . . and does not create, alter, extend or amend the current rights and responsibilities of either the schools or the administering entity."⁶⁴ Revisions to sections 101 and 102 would seem to increase the number of areas in which tribal colleges could spend TCCCAA funds, although the original language ("general operating funds of the institution to defray the expense of activities related to education programs")⁶⁵ is sufficient to allow most administrative expenditures. The revisions struck technical assistance contract provisions and substituted "planning grants,"⁶⁶ which may be problematic: only five such grants may be made, and the Secretary of the Interior is charged to establish regulations for the program.⁶⁷

Given the problems with the various secretaries' administration of the TCCCAA, Congress could have been more prescriptive in setting out its intent, particularly since the technical assistance contracts are, arguably, already mandated under separate trust authority provisions.⁶⁸ Feasibility studies have been abolished in

61. *Id.* The author also discussed this policy with subcommittee staff.

62. 25 U.S.C. § 1801 (Supp. V 1981); § 2(a)(2) in H.R. REP. No. 979, *supra* note 59.

63. Higher Educ. Daily, Jan. 6, 1983, at 1.

64. H.R. REP. No. 979, *supra* note 59, at 12.

65. 25 U.S.C. § 1803 (Supp. V 1981).

66. *Id.*; § 104 in H.R. REP. 979, *supra* note 59.

67. § 104 (b), (c) in H.R. REP. 979, *supra* note 59.

68. For example, the Indian Self-Determination Act, 25 U.S.C. § 450f (1976). See Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Note, *Trusts: Toward an Effective Indian Remedy for Breach of Trust*, 8 AM. INDIAN L. REV. 429 (1980). The Bureau testified against increased technical

the reauthorization, although the "planning grants" may retain these features of the TCCCAA legislation for previously unfunded tribal colleges. Congress was being ironic in labeling this change in section 105 as "technical amendments," inasmuch as this provision has been a major problem for the colleges. Congress was forthright in its "supplement, not supplant" provisions,⁶⁹ including specific reference to Snyder Act appropriations.⁷⁰ Several technical amendments⁷¹ provide "forward funding" so as to improve tribal college cash flow. The reporting requirement for facilities is clarified by the reauthorization,⁷² and a section⁷³ has been added on construction of new facilities. An endowment program was added, modeled in part upon the Developing Institutions reauthorization;⁷⁴ it was this initiative that drew the sharp dissent by House Subcommittee members.⁷⁵ If fully funded, this program would enable TCCCAA colleges to build sorely needed reserves and to make modest investments.

Conclusions, Recommendations

The delays have been caused, in large part, by interagency disagreements and a lack of coordination among the three lead offices: BIA, OMB, and the Department of Education. For example, OMB has been inflexible in its review of feasibility criteria and has been unwilling to consider these colleges' characteristics as deserving special attention. Many Indian educators have blamed BIA for its lukewarm support of the TCCCAA, while others blame the new Department of Education for its foot-dragging.⁷⁶ Both criticisms are accurate, for the BIA was not required to use accreditation as a feasibility criterion, and the Department of Education could have been more flexible in interpreting the colleges'

assistance to tribal colleges. That the Act could provide too much money for technical assistance to these fledgling colleges seems a ludicrous claim, given the history of delays and neglect. See S. REP. NO. 538, 96th Cong., 1st Sess. 5 (1979) (testimony of Forrest J. Gerard).

69. § 109(b)(1) & (2) & § 113(c)(1) in H.R. REP. 979, *supra* note 59.

70. Snyder Act, 42 Stat. 208, 25 U.S.C. § 13 (1976). See H.R. REP. 979, *supra* note 59, at 13.

71. H.R. REP. 979, *supra* note 59; 25 U.S.C. §§ 110, 111.

72. *Id.* § 112.

73. *Id.* § 113.

74. 20 U.S.C. § 1051 (1976) (amended 1980).

75. H. REP. NO. 736, *supra* note 8, at 27-29.

76. Middleton, *supra* note 12; Higher Educ. Daily, June 12, 1980, at 5-6.

progress toward accreditation. Indeed, the Department, in the absence of regulations governing accreditation, could have employed the discretion accorded it in Title III, where accreditation requirements for developing institutions' eligibility can be waived in special circumstances where Indian and Spanish-speaking students will be served.⁷⁷ In either case, the bureaucratic delays have frustrated the legislative attempts to create and enhance these Indian colleges.

The colleges, pressed for their survival, have not been able to convince Congress or the agencies that changes are necessary. AIHEC's recommendations have included clarification of definitions ("Indian," "institution," and "FTE"), acceptance of accreditation status as evidence of feasibility, restoration of tribal college band-analysis funds reallocated by BIA, incorporation of forward-funding provisions, and stabilization of funding patterns.⁷⁸ While these recommendations would surely improve the law and regulations, several problem areas remain. It is essential that BIA and NCES develop their required fiscal data-gathering system so that exact costs and an inflation index can be determined; once the costs are determined, more stable funding provisions will be possible. Congress surely cannot have intended for the funds to be as irregular and imprecise as they have been, the rollback provisions notwithstanding. Congress will also need to clarify the technical assistance provisions and to determine whether program funds should be used for technical assistance when corollary Indian legislation (e.g., the Indian Self-Determination Act) already requires BIA assistance to tribes.⁷⁹ At the least, Congress should fully fund the program so that the dollars per FTE are available. In addition, BIA should request full funding rather than ask for less money than is required to serve the eligible students. BIA should also seek the money necessary to build the facilities acknowledged to be necessary for the colleges.

There has been no coordination of administrative efforts to improve the situation for the tribal colleges, and the BIA, the lead agency, has not been effective in pressing OMB and the Department of Education for streamlining procedures. Although some of the colleges have negotiated the complex TCCCAA pro-

77. The Education Amendments of 1980 widened the waivers to include rural students, low-income individuals, and black students. H. REP. NO. 1337, *supra* note 15, at 160.

78. *Senate Hearing*, 1980, *supra* note 25, at 9-17, (testimony of L. Clifford).

79. See Gerard testimony, note 68 *supra*.

cedures, several have not been declared feasible. The BIA and the Department of Education should concentrate upon these colleges and upon the new institutions established by tribes. Moreover, the Department of Interior should take seriously its required annual report. It is unclear why Congress has not pressed for this mandated study, when design flaws and bureaucratic delays have been so obvious, especially in BIA's supplanting of band funds. If Congress is serious about developing tribal colleges and Indian self-determination, it would consider the provisions of TCCCAA that have proven troublesome and would fully fund the program. If Interior and BIA took their trust responsibilities more seriously, they would not have administered the Act as slowly and as poorly as they have. After nearly five years, it is not clear to observers whether tribal colleges will survive the legislation enacted and administered on their behalf.

Appendix A

LEGISLATIVE HISTORY OF TRIBALLY CONTROLLED COMMUNITY COLLEGE ASSISTANCE ACT OF 1978

- 6 November 1975: S. 2634 introduced by Senators Abourezk and McGovern.
- 15 March 1975: Hearing before the Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs (*Senate Hearing*, 1976).
- 29 September 1976: S. 2634 redrafted, submitted as S. 3850.
- 21 February 1977: S. 3850 redrafted, submitted as S. 1215 by Senators Abourezk, Burdick, Gravel, DeConcini, Jackson.
- 28 July 1977: Hearing before the Senate Select Committee on Indian Affairs (*Senate Hearing*, 1977).
- 16 September 1977: H.R. 9158 introduced by Representatives Blouin and Quie.
- 13 October 1977: Hearing before the House Subcommittee on Postsecondary Education of the Committee on Education and Labor (*House Hearing*, 1977).
- 1 November 1977: Senate Report on S. 1215 (*Senate Report*, 1977).
- 4 November 1977: Senate considers and passes S. 1215.
- 18 May, 14 June 1978: Hearings before the House Subcommittee on Postsecondary Education of the Committee on Education and Labor (*House Hearings*, 1978).
- 11 September 1978: House Report on H.R. 9158 (*House Report*, 1978).

- 26 September 1978: House considers and passes H.R. 9158. Passage is vacated while amended S. 1215 is passed in lieu.
- 3 October 1978. Senate concurs in House amendment.
- 17 October 1978. P.L. 95-471 signed by President Carter (*Comp. Pres. Doc.*, 14, No. 41).
- 15 December 1979: S. 1855, amending TCCCAA, reported by Senator Melcher (*Senate Report*, 1979).
- 25 January 1980: S. 1855 passed by Senate; referred to House Committee on Education and Labor.
- June 1980. First tribal colleges receive TCCCAA operating funds.
- 10 June 1980. Hearing before Senate Select Committee on Indian Affairs (*Senate Hearing*, 1980).
- 23 July 1981: Hearing before House Subcommittee on Post-secondary Education.
- 4 May 1982: Hearing before House Subcommittee on Post-secondary Education.
- 25 May 1982: H.R. 6485 introduced by Representative Simon.
- 8 June 1982: S. 2623 introduced by Senator Cohen.
- 15 June 1982: Hearing before Senate Select Committee on Indian Affairs.
- 21 June 1982: H.R. 6485 reported by Subcommittee to House Committee on Education and Labor.
- 27 July 1982: H.R. 6485 reported by House Committee on Education and Labor (*House Report*, 1982).
- 29 September 1982: Senate Committee approves S. 2623.
- 13 December 1982: Senate Committee on Indian Affairs reports S. 2623 (*Senate Report*, 1982).
- 16 December 1982: Senate passes S. 2623; Senate disagrees with House amendments to S. 2623; Conference appointed.
- 17 December 1982: House passes substitute for S. 2623.
- 19 December 1982: Conferees report S. 2623. (*Conference Report*, 1982); Senate adopts S. 2623.
- 20 December 1982. House adopts S. 2623.
- 4 January 1983. President Reagan vetoes S. 2623.

Appendix B

PUBLIC LAW 95-471—Oct. 17, 1978

AN ACT

To provide for grants to tribally controlled community colleges,
and for other purposes.

Be it enacted by the Senate and House of Representatives of

the United States of America in Congress assembled, That this Act may be cited as the "Tribally Controlled Community College Assistance Act of 1978".

DEFINITIONS

(1) "Indian" means a person who is a member of an Indian tribe and is eligible to receive services from the Secretary of the Interior;

(2) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaskan Native village or regional or village corporation as defined in or established pursuant to the Alaskan Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(3) "Secretary", unless otherwise designated, means the Secretary of the Interior;

(4) "tribally controlled community college" means an institution of higher education which is formally controlled, or has been formally sanctioned, or chartered, by the governing body of an Indian tribe or tribes, except that no more than one such institution shall be recognized with respect to any such tribe;

(5) "institution of higher education" means an institution of higher education as defined by section 1201(a) of the Higher Education Act of 1965, except that clause (2) of such section shall not be applicable;

(6) "national Indian organization" means an organization which the Secretary finds is nationally based, represents a substantial Indian constituency, and has expertise in the field of Indian education; and

(7) "full-time equivalent Indian student" means the number of Indians enrolled full-time, and the full-time equivalent of the number of Indians enrolled part-time (determined on the basis of the quotient of the sum of the credit hours of all part-time students divided by twelve) in each tribally controlled community college, calculated on the basis of registrations as in effect at the conclusion of the sixth week of an academic term.

TITLE I—TRIBALLY CONTROLLED COMMUNITY COLLEGES

PURPOSE

Sec. 101. It is the purpose of this title to provide grants for the

operation and improvement of tribally controlled community colleges to insure continued and expanded educational opportunities for Indian students.

GRANTS AUTHORIZED

Sec. 102. (a) The Secretary is authorized to make grants pursuant to this title to tribally controlled community colleges to aid in the post-secondary education of Indian students.

(b) Grants made pursuant to this title shall go into the general operating funds of the institution to defray the expense of activities related to education programs for Indian students. Funds provided pursuant to this title shall not be used in connection with religious worship or sectarian instruction.

ELIGIBLE GRANT RECIPIENTS

Sec. 103. To be eligible for assistance under this title, a tribally controlled community college must be one which—

(1) is governed by a board of directors or board of trustees a majority of which are Indians;

(2) demonstrates adherence to stated goals, a philosophy, or a plan of operation which is directed to meet the needs of Indians; and

(3) if in operation for more than one year, has students a majority of whom are Indians.

TECHNICAL ASSISTANCE CONTRACTS

Sec. 104. The Secretary shall provide, upon request, technical assistance to tribally controlled community colleges either directly or through contract. In the awarding of contracts for technical assistance, preference shall be given to an organization designated by the tribally controlled community college to be assisted. No authority to enter into contracts provided by this section shall be effective except to the extent authorized in advance by appropriations Acts.

FEASIBILITY STUDIES

Sec. 105. (a) The Secretary is authorized to enter into an agreement with the Assistant Secretary of Education of the Department of Health, Education, and Welfare to assist the Bureau of Indian Affairs in developing plans, procedures, and criteria for conducting the feasibility studies required by this section. Such agreement shall provide for continuing technical assistance in the conduct of such studies.

(b) The Secretary, within thirty days after a request by any Indian tribe, shall initiate a feasibility study to determine whether there is justification to encourage and maintain a tribally controlled community college, and, upon a positive determination, shall aid in the preparation of grant applications and related budgets which will insure successful operation of such an institution.

(c) Funds to carry out the purposes of this section for any fiscal year may be drawn from either—

(1) general administrative appropriations to the Secretary made after the date of enactment of this Act for such fiscal year; or

(2) not more than 10 per centum of the funds appropriated to carry out section 106 for such fiscal year.

GRANTS TO TRIBALLY CONTROLLED COMMUNITY COLLEGES

Sec. 106. (a) Grants shall be made under this title only in response to applications by tribally controlled community colleges. Such applications shall be submitted at such time, in such manner, and will contain or be accompanied by such information as the Secretary may reasonably require pursuant to regulations. The Secretary shall not consider any grant application unless a feasibility study has been conducted under section 105 and it has been found that the applying community college will service a reasonable student population.

(b) The Secretary shall consult with the Assistant Secretary of Education of the Department of Health, Education, and Welfare to determine the reasonable number of students required to support a tribally controlled community college. Consideration shall be given to such factors as tribal and cultural differences, isolation, the presence of alternate education sources, and proposed curriculum.

(c) Priority in grants shall be given to institutions which are operating on the date of enactment of this Act and which have a history of service to the Indian people. In the first year for which funds are appropriated to carry out this section, the number of grants shall be limited to not less than eight nor more than fifteen.

(d) In making grants pursuant to this section, the Secretary shall, to the extent practicable, consult with national Indian organizations and with tribal governments chartering the institutions being considered.

(e) The Secretary shall report to Congress on January 15 of each year the current status of tribally controlled community colleges and his recommendations for needed action.

AMOUNT OF GRANTS

Sec. 107. (a) Except as provided in section 110, the Secretary shall, for each academic year, grant to each tribally controlled community college having an application approved by him, an amount equal to \$4,000 for each full-time equivalent Indian student in attendance at such college during such academic year, as determined by the Secretary in accordance with such regulations as he may prescribe, except that no grant shall exceed the total annual cost of the education program provided by such college.

(b) The Secretary shall make payments, pursuant to grants under this title, in advance installments of not less than 40 per centum of the funds available for allotment, based on anticipated or actual numbers of full-time equivalent Indian students or such other factors as determined by the Secretary. Adjustments for overpayments and underpayments shall be applied to the remainder of such funds and such remainder shall be delivered no later than July 1 of each year.

(c)(1) Each institution receiving payments under this title shall annually provide to the Secretary an accurate and detailed accounting of its operating and maintenance expenses and such other information concerning costs as the Secretary may request.

(2) The Secretary shall, in consultation with the National Center for Education Statistics, establish a data collection system for the purpose of obtaining accurate information with respect to the needs and costs of operation and maintenance of tribally controlled community colleges. The Secretary shall report annually to the Congress on such needs.

EFFECT ON OTHER PROGRAMS

Sec. 108. Except as specifically provided in this title, eligibility for assistance under this title shall not, by itself, preclude the eligibility of any tribally controlled college to receive Federal financial assistance under any program authorized under the Higher Education Act of 1965 or any other applicable program for the benefit of institutions of higher education, community colleges, or postsecondary educational institutions.

APPROPRIATIONS AUTHORIZED

Sec. 109. (a)(1) There are authorized to be appropriated, for carrying out section 106, \$25,000,000 for each of the fiscal years beginning October 1, 1979, and October 1, 1980, and \$30,000,000 for the fiscal year beginning October 1, 1981.

(2) There are authorized to be appropriated \$3,200,000 for

each of such three fiscal years, for the provision of technical assistance pursuant to section 104.

(b) Unless otherwise provided in appropriations Acts, funds appropriated pursuant to this section shall remain available until expended.

(c) Nothing in this title shall be deemed to authorize appropriations for the fiscal year beginning October 1, 1978.

GRANT ADJUSTMENTS

Sec. 110. (a) If the sums appropriated for any fiscal year for grants under this title are not sufficient to pay in full the total amounts which approved grant applicants are eligible to receive under this title for that fiscal year, the amounts which such applicants are eligible to receive under this title for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for the same fiscal year, such reduced amounts shall be increased on the same basis as they were reduced. Sums appropriated in excess of the amount necessary to pay in full such total eligible amounts shall be allocated by ratably increasing such total eligible amounts.

(b) In any fiscal year in which the amounts for which grant recipients are eligible to receive have been reduced under the first sentence of subsection (a) of this section, and in which additional funds have not been made available to pay in full the total of such amounts under the second sentence of such subsection, each grantee shall report to the Secretary any unused portion of received funds ninety days prior to the grant expiration date. The amounts so reported by any grant recipient shall be made available for reallocation to eligible grantees on a basis proportionate to the amount which is unfunded as a result of the ratable reduction, but no grant recipient shall receive, as a result of such reallocation, more than the amount provided for under section 106(a) of this title.

REPORT ON CURRENT FACILITIES

Sec. 111. The Secretary shall, not later than ninety days after the date of enactment of this Act, prepare and submit a report to the Congress containing a survey of existing and planned physical facilities of tribally controlled community colleges, including in his report a survey of Bureau of Indian Affairs existing and planned facilities which may be used for tribally controlled community colleges without disruption of current Bureau programs.

STUDY OF FACILITIES NEEDS

Sec. 112. The Secretary shall conduct a detailed survey and study of the academic facilities needs of tribally controlled community colleges and shall report to the Congress not later than November 1, 1979, the results of such survey and study. Such report shall include any recommendations or views submitted by the governing body of any such college and by the governing body of the tribe, and shall include detailed recommendations by the Secretary as to the number, type, and cost of academic facilities which are required, ranking each such required facility by relative need.

MISCELLANEOUS PROVISIONS

Sec. 113. (a) The Navajo Tribe shall not be eligible to participate under the provisions of this title.

(b)(1) The Secretary shall not provide any funds to any institution which denies admission to any Indian student because such individual is not a member of a specific Indian tribe, or which denies admission to any Indian student because such individual is a member of a specific tribe.

(2) The Secretary shall take steps to recover any unexpended and unobligated funds provided under this title held by an institution determined to be in violation of paragraph (1).

RULES AND REGULATIONS

Sec. 114. (a) Within four months from the date of enactment of this Act, the Secretary shall, to the extent practicable, consult with national Indian organizations to consider and formulate appropriate rules and regulations for the conduct of the grant program established by this title.

(b) Within six months from the date of enactment of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(c) Within ten months from the date of enactment of this Act, the Secretary shall promulgate rules and regulations for the conduct of the grant program established by this title.

(d) Funds to carry out the purposes of this section may be drawn from general administrative appropriations to the Secretary made after the date of enactment of this Act.