

Legal Services Office

**A HISTORICAL PERSPECTIVE
ON
2-YEAR POSTSECONDARY EDUCATION IN MONTANA:
"WHERE DO WE GO FROM HERE?"**

Prepared for the
Postsecondary Education Policy and Budget Subcommittee

by
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INTRODUCTION

This legal memorandum is in response to questions and inquiries from legislators and others concerning Montana's 2-year educational institutions. Some have expressed general confusion about the differences in governance and funding between Montana's colleges of technology and the state's three community college districts. Others, for example, are surprised to learn that the state's three community colleges are supervised and coordinated by the Board of Regents, but are governed by their own locally elected board of trustees. Many are unaware of the legal status of Montana's seven tribally controlled community colleges or how they fit into Montana's higher education scenario. Still others simply wonder in general why Montana's higher education system looks and functions the way it does.

The history, governance, and funding of vocational education or of the community colleges has been examined separately in previous reports. This memorandum is intended to: (1) bring together in one report the history, governance, and funding of all of Montana's 2-year postsecondary institutions; (2) provide legislators and others with answers to the questions cited above; and (3) provide the Subcommittee with a framework for discussing the future of 2-year postsecondary education in Montana.

Part I will provide a brief overview of the history and governance, mission, and funding of the vocational-technical education system and will detail its evolution into the colleges of technology that are now part of the Montana University System. Part II will examine the history and governance, mission, and funding of Montana's three community colleges. Part III will examine the background and legal relationship of Montana's tribally controlled community colleges and their role in Montana's higher education system. Part IV will pose some general and specific questions regarding the strategic plan for 2-year postsecondary education in Montana.

This memorandum is not intended to be an exhaustive analysis of the history of colleges of technology, community college districts, or tribal community colleges, but rather is intended to provide an overview of the history, governance, and funding of Montana's 2-year postsecondary institutions and the pertinent legal issues related to those institutions.

PART I

EVOLUTION OF VOCATIONAL-TECHNICAL EDUCATION INTO MONTANA'S COLLEGES OF TECHNOLOGY

A. History and Governance

Growth in vocational education in all states, including Montana, was triggered by passage of federal legislation beginning in the mid-1800s.¹ In 1862, the Morrill Act established land grant colleges to prepare students for the "agricultural and mechanical arts" and provided the foundation for the federal interest in vocational and technical education.² Following the Morrill Act, Congress continued to enact legislation aimed at encouraging state involvement in vocational education below the baccalaureate degree. The Smith-Hughes Vocational Education Act, enacted in 1917, provided a continuing appropriation for vocational education in agriculture, trades and industry, and homemaking and for teacher training in each of those fields.

Encouraged by acts of Congress, Montana's involvement in vocational education occurred in three major phases.³ Beginning in 1919, phase one emphasized secondary vocational education and teacher training. The Legislature established a governance system that authorized the State Board of Education to cooperate with school districts and county school boards in the establishment and maintenance in the public elementary and public high schools of courses in vocational training in agriculture, trades and industries, and home economics.⁴ Between 1919 and 1939, phase two authorized school districts to establish postsecondary vocational education offerings. The 1939 Legislature authorized the State Board of Education to designate applicant high schools as vocational training centers.⁵ Students between the ages of 16 and 21 were eligible to attend the centers on a nontuition basis, but counties without centers paid for attendance of their students at vocational training centers. This marked the beginning of postsecondary vocational education training centers in Montana.

The Board quickly designated Glasgow, Custer County, and Helena High Schools as vocational training centers, with Havre High School being designated in 1940 and Cut Bank High School receiving designation in 1942.⁶ In anticipation of federal legislation changing the criteria for selecting area vocational schools, the Board rescinded center designation for Glasgow, Custer County, Havre, and Cut Bank High Schools in 1963, leaving Helena High School as the lone vocational center.⁷ The 1967 Legislature modified the language of 1939 for vocational center designation by broadening the category of school districts and institutions that could apply for designation as an area vocational technical school.⁸

In response to Congress's passage of the Vocational Education Amendments of 1968 and increased federal support, the 1969 Legislature began phase three by focusing on two issues: (1) the size of the postsecondary vocational-technical system; and (2) how to finance it. The

debate on the number of vocational education centers proved to be a donnybrook. The State Board of Education had already designated five centers, but the Legislature had to deal with heavy lobbying from Kalispell, Glendive, Bozeman, and other smaller towns that wanted designation. Several attempts were made to limit center proliferation. In 1969, House Bill No. 481 attempted to restrict center designation to counties having a tax base of \$75 million, which would have restricted designation at that time to only three centers, with others added as needed.⁹ However, to gain support for the vocational-technical education system, the \$75 million minimum tax base was reduced to \$45 million, ensuring that all five previously designated centers would remain qualified.¹⁰

House Bill No. 481 also established the Board of Education as the sole state agency for governing vocational education, as required by federal law, and redesignated the Superintendent of Public Instruction as executive officer for vocational education for the purposes of administering state and federal laws and regulations. The bill also enabled any school district, community college, or unit of the Montana University System to establish vocational courses that would be eligible for state or federal vocational education funds upon approval of the Board of Education, provided for a legislative appropriation, federal funds, and a 1-mill countywide levy in all counties where postsecondary vocational centers were located, and allowed postsecondary vocational-technical centers to charge fees for equipment and materials, but prohibited tuition for Montana residents.

Adoption of the 1972 Constitution replaced the Board of Education with a Board of Regents and a Board of Public Education, which together comprised the State Board of Education "responsible for long-range planning, for coordinating and evaluating policies and programs for the state's educational system" and provided that "it shall submit unified budget requests". While the Constitution assigned the governance and control of the Montana University System to the Board of Regents and the general supervision of the public school system to the Board of Public Education, it left it to the Legislature to decide which of the boards would govern the community colleges and the postsecondary vocational-technical centers. The 1973 Legislature assigned the community colleges and university system vocational education programs to the Board of Regents and designated control over high school and vocational-technical center education to the Board of Education.¹¹ The 1975 Legislature attempted to resolve vocational education's "dual governance" issue by designating the State Board of Education as the State Board of Vocational Education.¹² Under the legislation, a committee within the State Board of Education would administer all vocational education and hire an executive officer. The Board of Public Education challenged the constitutionality of House Bill No. 566, and the Montana Supreme Court ruled it unconstitutional on the grounds that the State Board of Education's functions are limited to long-range planning, coordination, and evaluation and do not extend to administering vocational education.¹³

In 1977, a legislative attempt to place all levels of vocational education under the Board of Public Education failed and led to an interim study on the question of governance of all vocational education.¹⁴ The interim study recommended two options, both of which placed the governance of the vo-techs under the Board of Regents. One model created a state system, while the other created a governance structure similar to that of the community colleges.¹⁵ The 1979 Legislature, following extensive debate on both options, finally placed state administration of the

vocational-technical centers under the Superintendent of Public Instruction, with local high school districts retaining certain duties over their own vo-techs.¹⁶ The decision was influenced by the fact that the Board of Regents had voted against an interest in governing the vo-techs, while the Board of Public Education had lobbied for total control or none at all. Moreover, local districts lobbied to retain an interest in the vocational-technical centers. The system remained somewhat unchanged until 1987, when the governance of vocational-technical education was transferred to the Board of Regents.¹⁷ Vo-tech employees became employees of the Board of Regents,¹⁸ and the money generated by the vo-tech levy was placed under the control of the Board of Regents instead of the local school districts.¹⁹

In 1994, the Board of Regents began a restructuring of the Montana University System, with discussions centered on two alternative proposals: one for a "Two-University Model", favored by the Regents, which proposed moving the "Vo-Ed Centers" into the University System versus a proposal for a "Two-Year System", supported by the community colleges and vocational-technical centers, which advocated the creation of a 2-year system made up of the eight 2-year institutions currently in operation.²⁰ In a position paper submitted to the Board of Regents, supporters of the "Two-Year System" voiced concern that the "Two-University Model" would, among many concerns, result in "mission drift" or the loss of appropriate emphasis on associate-degree-level occupational and technical education and would perpetuate an attitude that, compared to the 4-year units, course work at a technical or community college was somehow "second-class".²¹ The report urged the Board of Regents to delay the inclusion of the vocational-education centers in the University System until the 1995 Legislature had an opportunity to consider the issue of a 2-year system or, in the alternative, to fold all of the current 2-year institutions, including the community colleges, into the "Two-University Model" at the same time.²²

In the end, the Board of Regents decided in 1994 to adopt the "Two-University Model", which was designed to "achieve a single, unified system of higher education with a totally integrated approach, not merely a collection of separate units".²³ The restructuring process moved the vocational-technical centers into the University System as "colleges of technology", with a purpose of enhancing 2-year educational programs and the goals of ensuring a better fit between students and programs and providing statewide access.²⁴ As a general rule, restructuring allowed the technology and 2-year program students to have access to all services previously available only to 4-year students. In Missoula, for example, restructuring provided college of technology students with access to the residence halls and family housing, expanded career assistance and placement services, student health services, and all campus facilities.

Following the restructuring by the Board of Regents, the 1995 Legislature, at the request of the Board, enacted Senate Bill No. 156, which amended state law to incorporate the five vocational-technical education institutions into the University System.²⁵ The colleges located in Billings and Great Falls were affiliated with and administered by Montana State University, and the colleges in Butte, Helena, and Missoula became affiliated with and administered by the University of Montana.²⁶

B. Mission

Prior to the restructuring of the University System in 1994-1995, the statutory purpose for colleges of technology was to provide courses that recognize the present and future needs of employers and to provide qualified graduates for positions for which there was a demand.²⁷ The colleges were market-oriented, generally training workers to do specific jobs needed in the community or state at a lower cost than that at the 4-year institutions. The colleges also provided continuing training as technology changed. Historically, the colleges of technology offered certificates or associate of applied science degrees for specific vocations, rather than associate of arts degrees designed to provide transfer credits to a 4-year college or university. After the restructuring of the University System in 1994-1995, however, the colleges of technology began to focus on offering a 2-year curriculum with credits acceptable to all units of the University System. The mission of the colleges of technology has become more closely aligned with that of the community colleges as the colleges of technology are increasingly offering general education, developmental education, transfer of credits to other units of the University System, and continuing education classes. While the colleges of technology continue to provide "workforce development" training as a major portion of their focus, they appear to be moving toward becoming more similar to the 2-year community colleges.

C. Funding

Along with the issue of how many vocational-technical centers to support came the issue of how to provide financial support. Prior to 1969, students between the ages of 16 and 21 were eligible to attend without paying tuition and were counted in the average number belonging (ANB) formula.²⁸ State aid at this time was fixed on a per-student basis. Those counties without centers were required to pay tuition for attendance of their students at the centers. However, many believed that this system of financial support for the vocational-technical system was unsatisfactory. Rural counties without vocational-technical centers felt that requiring tuition payments for their students who attended centers was a financial burden.²⁹ While some believed that postsecondary vocational education students should not be counted in the state's ANB formula, others felt that the ANB, state, and federal aid did not cover costs, especially since students over the age of 21 could not be counted in the state's ANB formula.³⁰ As a result, school districts with centers feared that the pre-1969 financing system would cause soaring increases in tuition, driving students away and further restricting postsecondary vocational-technical education opportunities.³¹

In 1969, when the vocational-technical centers were under the authority of the local school boards and the Superintendent of Public Instruction, the Legislature authorized a 1-mill levy in the identified five counties.³² In 1979, the levy was increased to 1.25 mills for that calendar year and to 1.5 mills for 1980 and thereafter.³³ In 1987, when the governance of vocational-technical education was transferred to the Board of Regents, the levy remained at 1.5 mills but was made mandatory.³⁴ After the University System was restructured in 1995 to incorporate the vocational-technical institutions into the system as colleges of technology, the five-county, 1.5-mill levy was reenacted with the provision that the funds from the mill levy were required to be deposited in the general fund and distributed for vocational-technical education on the basis of budgets approved by the Board of Regents.³⁵

Following the incorporation of the vocational-technical institutions into the University System, the legality of continuing the 1.5-mill levy was raised on several occasions in 1998 before the Joint Committee on Postsecondary Education Policy and Budget.³⁶ At its May 18, 1998, meeting, Greg Petesch, Legislative Services Division Legal Counsel, informed the Committee that while the 1.5-mill levy statute was considered constitutional until challenged, the imposition of a 1.5- mill levy on five counties to support particular institutions within the University System could be subject to challenge on the grounds that the state was violating the uniformity of taxation requirement, as applied to property taxation, within the context of equal protection of laws as required by the Montana and United States Constitutions by levying disparate numbers of mills on taxable property within a taxing jurisdiction.³⁷ However, because the Board of Regents and the University System were in the midst of a 6-mill levy campaign, which had assured voters that renewal of the levy would not constitute a property tax increase,³⁸ no changes in the current funding structure were proposed. In July 1998, the Subcommittee was provided with an alternative opinion, prepared by LeRoy Schramm, Chief Legal Counsel for the Commissioner of Higher Education, defending the constitutionality of continuing of the local 1.5-mill levy.³⁹

In the 1999 Legislative Session, legislation was introduced to eliminate the 1.5-mill levy in those counties in which a college of technology was located.⁴⁰ The bill passed the Montana House of Representatives, but was tabled in the Senate Finance and Claims Committee. Consequently, an action was filed on December 20, 1999, by two Cascade County taxpayers against the Montana Department of Revenue, the Cascade County Treasurer, and the Cascade County Commissioners, alleging that section 20-25-439, MCA, which imposes the 1.5-mill levy on taxpayers of Cascade, Lewis and Clark, Missoula, Silver Bow, and Yellowstone Counties for the support of the state's vocational-technical education program, violates the equal protection, due process, and tax equalization provisions of the 5th and 14th Amendments to the United States Constitution, Article II, sections 4, 7, and 29, of the Montana Constitution, and Article VIII, sections 1 and 3, of the Montana Constitution.⁴¹ The taxpayers asked the District Court to declare section 20-25-439, MCA, unconstitutional under both the federal and state constitutions, to order the county commissioners of the five affected counties to cease levying the 1.5 mills, to order the county treasurers, the Department of Revenue, or the Board of Regents to return to taxpayers all taxes unlawfully collected under the provisions of section 20-25-439, MCA, to award attorney fees and court costs, and to assess a pro rata share of their attorney fees and costs against either the state or the taxpayers of the counties that are benefited by the litigation.

On August 29, 2001, the District Court in Cascade County upheld the 1.5-mill levy, ruling that the colleges of technology directly benefit the local community by enhancing workplace skills of county residents and thereby making a contribution to each county's economy wholly disproportionate to the rest of Montana.⁴² On appeal, the Montana Supreme Court affirmed the District Court decision, ruling that the attendance by local residents and the course offerings served as a rational basis for putting the five counties with vo-techs in a separate class for purposes of the vo-tech levy.⁴³ The 1.5-mill levy continues to be levied in the five counties in which the colleges of technology are located.

PART II MONTANA'S COMMUNITY COLLEGES

A. History and Governance

By the mid-1970s, enrollment in 2-year public community colleges was booming with California, Texas, Illinois, and New York accounting for 50% of the enrollees. By 1977, California alone had more than 1 million students enrolled in 2-year community colleges, which accounted for 27% of the national total. Compared to other states, community college growth in Montana was slow and evolutionary.

Miles Community College was organized in 1939 as Custer County Junior College, while Dawson County Junior College opened 1 year later in 1940. Both operated as extensions of local high schools and both were governed by their local high school boards. For 20 years, growth at both colleges was slow. In 1957, for example, Custer County Junior College enrolled only 37 students for credit classes and the campus consisted of the former Milwaukee Railroad Depot Building and rented classrooms nearby.

The 1960s marked a period of institutional development for Montana's community colleges. In response to community college legislation passed by the 1965 Legislature,⁴⁴ both Miles and Dawson Colleges ceased being governed by local high school boards. The 1965 legislation authorized local voters to request the formation of a community college district by filing with the State Board of Education a petition signed by at least 20% of the qualified registered electors residing in the county or within the proposed community college district. Once a valid petition was filed, the Board was required to order an election on the proposed community college district at the next annual school election.⁴⁵ While each community college district had a locally elected board of trustees, the State Board of Education was responsible for establishing the role of 2-year colleges in Montana, for supervising community college districts formed under the 1965 Act and any junior colleges formed prior to the Act, and for adopting uniform policies, minimum entrance requirements, uniform curriculum, and accreditation standards.⁴⁶

In 1966, the name of Custer County Junior College was changed to the Miles Community College, and in 1967 the college moved to new facilities at the current campus location with funding from federal grants and local matching funds.⁴⁷ The electors of Flathead County voted in 1967 to create a community college district. Unlike Miles and Dawson, Flathead Community College was never under the jurisdiction of the local high schools. In 1970, Miles Community College established an independent community college district with an elected local board of trustees. As a result, 1970 marked the first time when all three community colleges in Montana operated as entities separate from local high school boards.⁴⁸

In 1971, Senate Bill No. 236, amended the 1965 law to require proposed community college districts to be *approved* by the Legislature upon the recommendation of the regents.⁴⁹ Prior to 1971, there was no requirement that districts be approved by the Legislature. Rather, the Superintendent of Public Instruction simply certified the election results to the State Board of Education. The 1971 amendment, however, did not specify the timing of the approval nor the "vehicle" for legislative approval. The 1971 legislation also gave the Board of Regents legal

authority for some aspects of community college governance. A year later, the 1972 Constitution authorize the Board to supervise and coordinate public educational institutions assigned by law.⁵⁰ Appointment by the Board of Regents of a Commissioner of Higher Education in 1973 lead to written policy development relating to community college governance.⁵¹

By 1975, community colleges were unique, separate institutions, separate from both K-12 and the University System programs. At the same time, the laws governing community colleges remained rooted in the laws governing K-12 education. The 1979 Legislature attempted to clarify the statutes governing community colleges by combining all the statutory guidelines concerning community colleges into Title 20, chapter 15, MCA. In 1983, Lincoln County voted to create a community college extension center of the Flathead Valley Community College to serve the residents of Lincoln County. In 1984, Flathead Valley Community College added the Glacier Institute Program in Glacier Park and a campus in Lincoln County to provide classes to Lincoln County residents.

When the Montana University System was in the process of restructuring in 1994, there was anticipation that the community colleges would become part of the Montana University System. In a letter to Commissioner of Higher Education Jeff Baker, President Dennison commented on the University of Montana's active participation in an effort to bring the three community colleges into the restructured system to ensure the achievement of goals of restructuring and the emphasis upon 2-year education, while President Malone of Montana State University, in a similar letter, commented on the likelihood that the two community colleges in the lower Yellowstone Valley would be integrated into the Montana State University.⁵² As noted in the College of Technology history and governance section, in a position paper written in 1993 on behalf of the community colleges and vocational-technical centers, 2-year academic leaders were also urging the Board of Regents to consider the establishment of a 2-year system that would include both the community colleges and the vocational-education centers.

Although the Board of Regents ultimately chose the "Two-University Model" and officially incorporated the vocational-educational centers into the Montana University System, questions concerning the merging of Montana's three community colleges into the Montana University System continued during the 1998 interim. The Subcommittee on Community Colleges, created by the Joint Committee on Postsecondary Education Policy and Budget (PEPB), considered and prepared recommendations for the full PEPB Committee concerning possible changes in community college governance and funding.⁵³ The Subcommittee requested that the PEPB Committee recommend to the 1999 Legislature that it:

- (1) levy a 2-mill statewide property tax to fund 2-year education that would replace the 1.5-mill college of technology levy, the college of technology nonlevy revenue, and the nonlevy revenue that would support the community colleges if they became part of the University System;
- (2) restrict the use of the 2-mill levy to the support of 2-year postsecondary education in the colleges of technology and community colleges;
- (3) provide a line item appropriation for an assistant deputy commissioner for 2-year postsecondary education in the Commissioner of Higher Education's Office; and
- (4) "voluntarily" merge, *with approval of the Board of Regents*, the community colleges

into the Montana University System.

The Subcommittee made no recommendations to the PEPB Committee on whether the local boards of trustees should be maintained if the community colleges were merged into the University System or how they might function and made no recommendation on whether the ownership of the community college facilities should be assumed by the state if a merger occurred. In the end, no action was taken on the Subcommittee's work.

When the 1971 Legislature enacted the community college statutes, now codified in Title 20, chapter 15, it basically "grandfathered in" the three existing community colleges. Between 1971 and 2006, the Legislature received no requests to "approve" the creation of a new community college district, and the Legislature has primarily focused its attention on the funding of Montana's three existing community colleges. As a result, the procedure requiring prior legislative approval for the creation of a new community college district has never been implemented. In 2006, however, a group of Bitterroot Valley residents proposed the establishment of a new community college district in Ravalli County. A Bitterroot Valley Community College Exploratory Committee was established in February 2006 to educate Ravalli County residents about the services, benefits, and costs of a public community college and the legal procedure that must be followed to establish a community college.⁵⁴ In the alternative, the University of Montana-Missoula proposes to construct a branch campus of the University of Montana's College of Technology in Hamilton, Montana, sized to accommodate 175 full-time equivalent (FTE) students to offer University of Montana degree programs currently available through the College of Technology as well as other colleges and schools of the University.⁵⁵

In order to establish a community college district in Montana, a county must meet three requirements:

- (1) the proposed district must coincide with preexisting, contiguous elementary school district boundaries;
- (2) the taxable value of the proposed district must be at least \$10 million; and
- (3) 700 pupils must be regularly enrolled in public and private high schools located within the proposed district.

Ravalli County, which has seven contiguous school districts, a taxable valuation of over \$62 million, and six public high schools with a combined enrollment of over 2,100 students, met the statutory requirements of section 20-15-201, MCA, and subsequently filed a petition with the Board of Regents signed by the required minimum of 20% of registered voters.⁵⁶ Pursuant to section 20-15-203, MCA, the Board of Regents, upon determining that the petition complied with state law, ordered an organizing election on May 8, 2007. On May 8, 2007, the voters in Ravalli County approved the creation of a community college district by a 52% to 48% margin and elected seven members of a local board of trustees. The election results were certified by the Board of Regents on July 11, 2007.

As stated earlier, the 1971 amendment to section 20-15-209, MCA, provide that following the election, "approval for the organization of a new community college shall be granted *at the discretion of the legislature* acting upon the recommendation of the regents". However, the statute does not indicate the *method* of legislative approval nor whether recommendation by the

Board means after an "affirmative recommendation" or simply after any type of "recommendation". In 2007, in response to a request by the Commissioner of Higher Education for an Attorney General's Opinion on the language in section 20-15-209, MCA, the Attorney General held that section 20-15-209, MCA, provides the Legislature with *final* authority to approve creation of a new community college district after a recommendation, not approval, by the Board of Regents.⁵⁷ As a result, the 2009 Legislature will have final approval on whether the proposed Bitterroot Community College District is created and whether a general fund appropriation for the new community college is provided.

B. Mission

The community college mission has historically been broader than the mission of the vocational-technical schools (now colleges of technology). In addition to offering occupational programs, community colleges have offered general education, developmental education, transfer of credits to another unit of the University System, and continuing education classes. The community colleges in Montana provide equal opportunities, without regard to race, for students to "gain college-level skills, to complete a two-year college program, to complete the first two years of a four-year college program, to gain or upgrade job skills, and to learn for personal growth and enrichment".⁵⁸ In recent years, the community colleges have received authorization to offer more vocational programs. As a result, their missions have become two-pronged--general education and vocational training.

C. Funding

Since the establishment of the first junior college in 1939, Montana's community (or junior) colleges received their funds for annual costs as if they were Montana high schools.⁵⁹ The colleges were first funded under the system of state support for Montana public education as established in 1935 and as amended in 1937 and 1939. In 1949, Montana community colleges were placed along with other public education under the State Foundation Program. Under the State Foundation Program, community colleges received their support based upon their average number belonging (ANB). The ANB was calculated by adding the total academic and occupational credits and dividing by 10 credits per quarter. With the restructuring of the laws in 1965 to change the junior college districts to community college districts, an apparent oversight changed the method of financing to include only full-time students, which eliminated support for the large number of part-time students that attended community colleges. The 1969 Legislature corrected the oversight and returned to the ANB method of calculation that had been used prior to 1969.⁶⁰

In approving the correction in 1969, the Senate Education Committee requested that the Montana Association of Community Colleges return to the 1971 Legislative Session with a method of financing the annual costs of community colleges that would remove the colleges from the State Foundation Program.⁶¹ The Committee believed that the State Foundation Program should remain exclusively for the funding of public schools through grade 12 and that community colleges should be funded separately. As outlined in the "State Master Plan for Montana Community Colleges", the current community college funding system had four major faults:

- (1) it restricted state and local foundation program support to students under 21 years of

age;

(2) current operational financing was based upon the number of students who attended the college in the prior year;

(3) the level of funding for Montana community colleges was based on the level of funding for high schools in the state; and

(4) the effect of the first three faults required community colleges to request special levy assistance for operational costs.⁶²

Based upon the recommendations of the State Master Plan for Montana Community Colleges, and after consultation with legislators, college trustees, state officials, and other interested persons, the 1971 Legislature changed the method of financing community colleges by replacing state equalization aid with direct state appropriations. Revenue for operating budgets came from three sources:

(1) state appropriations;

(2) a 3-mill levy on the community college district; and

(3) student tuition.

The state appropriation was the total budget of the colleges minus the basic district levy and student tuition. The total budget was determined by the anticipated full-time equivalent enrollment computed as 15 quarter credits per quarter multiplied by the annual revenue schedule determined by the Legislature. Anticipated enrollment was defined as the previous year's enrollment as of October 15, plus the average percentage increase of enrollment over the previous 3 years. The Board of County Commissioners of each county in which a community college was located was required to levy an annual tax of 3 mills on the dollar of the taxable value of all taxable property within the community college district. Community colleges also received funding for vocational programs from the State Board of Education based on Board policies.

In 1975, the Legislature set a 65:35 ratio of state to local funds for the operating budgets of community colleges.⁶³ Under this model, the state objective and policy goal was that state funding would support 65% of the cost of education at each community college and the remaining 35% would be funded with local mill-levy revenue and student tuition.⁶⁴ During the 1981 biennium budget deliberations, however, the Legislature expressed concern that the "65:35" formula had gotten too complex, that the statute was "inconsistent", and that each community college was applying the calculations differently. The end result was widely varying impacts on the level of state support for each college. The legislative concern about the lack of equity in state funding led to passage of House Joint Resolution No. 58 during the 1979 Legislative Session, which funded the subsequent Legislative Finance Committee interim funding study.⁶⁵ The study recommended that the new formula should be as simple or transparent as possible so that it could be understood and applied uniformly by each college. The Legislature agreed and enacted the community college funding statutes that applied averages for all schools rather than individual cost factors for each college and average costs for all courses rather than establishing technical vs. nontechnical course cost differences. The stated goal was to equalize state support based upon FTE count without regard to course content.

As a result, the three-factor or "unit-rate" formula was adopted, which involved determining the

general fund budget for each college by multiplying:

- (1) the enrollment projections aggregated for all three colleges;
- (2) the cost of education average for each FTE student; and
- (3) the state percentage support of the cost of education.⁶⁶

The total state general fund budget was then appropriated to each community college based upon the student enrollment at each.

Enrollment projections are provided by each community college, and the Legislature has the authority to either accept those projections or make an independent calculation. Over the 25 years that this formula has been in place, the enrollment projection model has varied. For some budgets, the final projections were based on a 2-year or 3-year average, while other budgets have accepted simple projections for each fiscal year of that specific biennium. For the 2007 biennium, the Legislature used actual annual enrollment projections at each college, but approved a reversion statute in the 2001 Legislative Session that required a reversion of money to the general fund when actual enrollment falls below projections.

The original "cost of education" (COE) factor was determined in the 1983 biennium by looking at and accepting the fiscal year 1979 actual expenditures for education at each community college. This number established the COE base amount, which has been adjusted in subsequent budgets. The COE has been adjusted using a variety of methods, as recommended by the Governor's Office of Budget and Program Planning with review and approval by the Legislature. The Legislature has never adjusted the formula for inflation nor has there been any recalibration of the COE based on the actual educational costs at the community colleges.

The Legislature sets public policy and determines the level at which state funding will support community college educational costs through the state percentage support factor. Section 20-15-310, MCA, requires the percentage to be stated in the general appropriations act for each biennium. The state support has ranged from a high of 53% to a low of 46% over the 25 years that the state percentage support factor has been used.

This three-factor formula looks only at and provides funding for the current unrestricted operating fund of the community college budget. Restricted funds, such as federal grants, local voted mill levy revenue, and money raised through alumni and foundation campaigns are not considered in the three-factor formula. State funding for community colleges provides the foundation of the unrestricted operating fund, and the restricted revenue is left to the sole control of the local trustees and local taxpayers. The community colleges have received a separate legislative appropriation as part of the state pay plan. The appropriation is calculated separately from the three-factor formula to provide support to the colleges over and above the cost of education.

In 2005, the Joint Education Appropriations Subcommittee expressed continued support for the three-factor formula, but had concerns that due to inconsistent biennial adjustments and other state fiscal policy decisions, the COE factor of the formula no longer reflected the cost of education at community colleges as original intended.⁶⁷ In 2007, the Legislature enacted Senate Bill No. 12,⁶⁸ which amended section 20-15-310, MCA, to reformulate the COE factor by

establishing a fixed cost of education component and a variable cost of education component. To establish the base or annual operating budgets for each of the community colleges, the Legislature begins with the cost of education figures provided by the Commissioner of Higher Education on form 201, which each college is required to complete under section 20-15-301, MCA. The Commissioner of Higher Education includes a separate accounting schedule for each community college's current unrestricted operating funds and segregates those funds from others, including restricted, auxiliary, and capital funds.

The community college funding statute, codified at section 20-15-301, MCA, does not allow state funding to support any capital construction costs at the colleges. Historically, this policy appears to have been justified by the desire to keep the costly decisions concerning capital expenditures at the local level, subject to the oversight of local trustees and local taxpayers.

PART III MONTANA'S TRIBAL COMMUNITY COLLEGES

Montana has seven tribal community colleges, which are public institutions established on each of Montana's seven reservations by the federal government under the Tribally Controlled College or University Assistance Act of 1978 (TCCA).⁶⁹ The tribal community colleges have governing boards, with members either elected or appointed by elected tribal councils. Though they are public institutions, the colleges are not governed by the Legislature, nor are they controlled by the Board of Regents.

Each college is accredited by the Northwest Commission on Colleges and Universities, the same organization that accredits the units of the Montana University System. While tribal community colleges open their doors to both Indian and non-Indian students, the TCCA requires that tribal community colleges maintain a minimum enrollment of 51% tribal members.⁷⁰

A. Mission

Tribal community colleges were established to help tribes address their manpower needs, to help tribes maintain their culture, and to provide a postsecondary education opportunity for Indian people living on reservations.⁷¹ Tribal community colleges generally offer courses of study that result in certificates and associate degrees. The Salish Kootenai College, however, offers seven baccalaureate degrees.⁷²

B. Funding

The base funding for tribal community colleges comes from the federal government under the TCCA and is based on the number of enrolled tribal members attending a tribal college as FTE students each year. Tribal community colleges receive no federal reimbursements for students who are not tribal members. Such students, whether non-Indian or Indian, who are not eligible for enrollment in any federally recognized tribe are referred to as "nonbeneficiary" students because they do not generate any TCCA support.

Prior to 1995, nonbeneficiary students received no financial assistance from the state. To keep

tuition for nonbeneficiary students comparable with tuition for Indian enrollees and to maintain their open door admissions policy, tribes partially subsidized the tuition of nonbeneficiary students, thus allowing them to continue their educations at a lower cost. The tribal community colleges requested financial assistance from the Legislature, arguing that without state support, tribal community colleges would not be able to continue serving nonbeneficiary students without increasing student fees, which could result in students dropping out of the colleges.

In response, the 1995 Legislature approved House Bill No. 544,⁷³ which appropriated \$1.4 million to the Board of Regents to offset tribal community college subsidies for nonbeneficiary students. Because Article V, section 11(5), of the Montana Constitution prevents the Legislature from appropriating funds for any educational purpose to any private association or corporation not under the control of the state, the money was appropriated to the Board of Regents, which in return distributed the financial assistance to the seven tribal community colleges for enrolled nonbeneficiary students. The distribution to any student was limited to a maximum of \$1,500 each year for each FTE student. The bill specified that the appropriation be provided in addition to any general or lump-sum appropriation provided to the University System and required any amount of the \$1.4 million that was unspent to revert to the general fund.

Receiving a share of the \$1.4 million appropriation was contingent upon each tribal community college:

- (1) being accredited or being a candidate for accreditation by the Northwest Commission on Schools and Colleges;
- (2) entering into a state-tribal cooperative agreement pursuant to Title 18, chapter 11, with the Board of Regents to provide the Board with information relating to the eligibility of nonbeneficiary students and documentation on the tribal community college's curriculum to ensure that the content and quality of courses offered by the college were consistent with the standards adopted by the Montana University System; and
- (3) filing with the Board of Regents evidence that the college's enrollment of Indian students was at least 51% as required by the TCCA.

In addition, prior to receiving any money, each tribal community college was required to:

- (1) grant fee waivers to resident nonbeneficiary students who meet the residency requirements prescribed by the Board of Regents in the same percentage that the number of Indian students who were receiving fee waivers to attend a unit of the Montana University System bears to the total enrollment in the University System; and
- (2) subtract the costs of nonbeneficiary fee waivers granted from the total amount of prorated money distributed.

As a result of House Bill No. 544, the Board of Regents entered into contracts with tribal community colleges and provided financial assistance to approximately 589 resident nonbeneficiary students.⁷⁴ In 1997, the Legislature essentially codified House Bill No. 544 by enacting Senate Bill No. 84, which required the Board of Regents, subject to the Legislature providing a line item appropriation, to provide financial assistance to tribal community colleges for enrolled resident nonbeneficiary students.⁷⁵

In 2005, the Legislature enacted House Bill No. 16,⁷⁶ which increased the maximum amount of

money provided for nonbeneficiary students from \$1,500 to \$3,024 for each FTE student, an amount comparable to that provided by the Legislature to support each community college student. House Bill No. 16 also limited financial assistance to nonbeneficiary students enrolled in courses for which credit was transferable to another Montana college or university, except for courses related to a vocational degree program or certificate program, and eliminated the requirement to subtract the amount given in Indian fee waivers prior to distribution of nonbeneficiary waivers as that provision had never been understood or implemented.

The 2005 Legislature also increased the base funding level for nonbeneficiary student assistance to \$400,000 for the 2007 biennium and added a \$500,000 one-time-only general fund appropriation. There was also an additional \$2 million one-time appropriation to the Board of Regents for the tribal community colleges to support equipment purchases and the development of tribal history materials for use in the Indian Education for All program in the K-12 schools. Each tribal community college appointed a project director to coordinate the writing and documentation of its tribal history to provide K-12 teachers with accurate and appropriate materials for classroom use in the Indian Education for All program. By 2007, the general appropriations act budget for nonbeneficiary student assistance included \$900,000 of base funding for the 2009 biennium and an additional \$1.01 million in one-time funding, for a total of \$1.91 million to support resident nonbeneficiary students attending tribal community colleges.

PART IV CONCLUSION

Montana's current 2-year "system" of higher education consists of the colleges of technology, community colleges, and tribally controlled community colleges. The colleges of technology, formerly the vocational-technical centers, were "restructured" and incorporated, at the request of the Board of Regents, into the Montana University System in 1995. As part of the University System, the colleges of technology receive the benefits of being units of the University System. Despite the merger into the University System, the 1.5 mills imposed prior to the merger in the five counties in which the old vocational-technical centers were located to support the vocational-technical centers continues to be imposed on the counties. In upholding the validity of continuing the 1.5- mill levy, the Montana Supreme Court emphasized the colleges' contributions to enhancing the workplace skills of county residents and the contributions to the local economies of the five counties. On the other hand, community college districts, commonly referred to as "community colleges", were established by the Legislature and "assigned" to the Board of Regents under Article X, section 9(2) of the Montana Constitution, for purposes of supervision and coordination. Unlike the colleges of technology, community colleges are governed by their own locally elected boards of trustees, are responsible for their own facilities, and are funded primarily by tuition and local levies. Though tribal community colleges are public institutions with open door policies, tribal community colleges are not governed by the Board of Regents nor are they subject to the control of the Legislature. Tribally controlled community colleges are funded directly by the federal government, but do receive an appropriation provided by the Legislature to the Board of Regents to support nonbeneficiary students attending the colleges.

On several occasions, both the Board of Regents and the Legislature have considered, but not

undertaken, incorporating the community colleges into the Montana University System. Despite the continuing differences in governance and funding mechanisms, the current missions of the colleges of technology appear to be expanding to be very similar to that of the community colleges. Some have suggested that the Board drop the name "college of technology" and simply refer to all of the 2-year institutions as "community colleges". While the Board has full authority to give its units any name, referring to them as "community colleges" could create confusion with those colleges statutorily established under Title 20, chapter 15.

Upon completion of the merger, Article X, section 9(2), of the Montana Constitution, vests in the Board of Regents "full power, responsibility, and authority to supervise, coordinate, manage and control" the colleges of technology. Without approval of the Board, the Legislature has no authority to act alone to remove the college of technology units from the University System. On the other hand, the community college districts were statutory created by the Legislature (see Title 20, chapter 15, MCA) and those statutes can be amended or even repealed. Without a request from the Board, the Legislature has no authority to "merge" the community colleges into the University System. Since 1971, however, the creation of new community college districts is totally within the control of the Legislature. Section 20-15-209, MCA, while not specifically indicating how legislative approval must occur, provides that "[a]pproval for the organization of a new community college district shall be granted *at the discretion of the legislature acting upon the recommendation of the regents*". In all likelihood, the 2009 Legislature will be asked to approve and fund the creation of a community college district in Ravalli County.

Questions:

(1) Given this history of change and restructuring, what is the distinct strategic role of the 2-year institutions (colleges of technology, community colleges, tribal community colleges) within the higher education mission and strategic plan of the Montana University System?

(2) Given it's limited governance authority over the Montana University System, what role can the Legislature play in the definition of a strategic plan for 2-year education in Montana?

(3) If the missions of the colleges of technology and community colleges now similarly emphasize workforce development and a "point of entrance" for transfer into 4-year institutions:

(a) is the rationale for continuing the differing governing and funding structures still valid; and

(b) is the Court's "local mission" rationale for the 1.5-mill county levy on the five counties where the colleges of technology are located still valid?

(4) Should the PEPB Subcommittee recommend to the Education and Local Government Interim Committee that it sponsor legislation to clarify the language and procedures of section 20-15-209, MCA, to state that "final" approval shall be granted by the legislature "by joint resolution" in regards to the proposed Bitterroot Valley Community College?

(5) Should the PEPB Subcommittee recommend to the Education and Local Government Interim Committee any changes to the present line item appropriation to support tuition for nonbeneficiary students attending tribally controlled community

colleges as part of a 2-year higher education strategy?

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Endnotes

1. Postsecondary Vocational-Technical Education Governance, A Report to the Forty-Sixth Legislature, Subcommittee on Education, Montana Legislative Council, November 1978.
2. Ibid. p. 9.
3. Ibid. p. 14.
4. Section 2, Ch. 192, L. 1919.
5. Section 1, Ch. 160, L. 1939.
6. Postsecondary Vocational-Technical Education Governance: A Report to the Forty-Sixth Legislature, Subcommittee on Education, Montana Legislative Council, November 1978, p. 12.
7. Ibid.
8. Ibid.
9. Postsecondary Vocational-Technical Education Governance: A Report to the Forty-Sixth Legislature, Subcommittee on Education, Montana Legislative Council, November 1978, p. 13.
10. Ibid.
11. House Bill No. 21, Ch. 344, L. 1973.
12. House Bill No. 566, Ch. 434, L. 1975.
13. Board of Public Education v. Judge, 167 Mont. 261, 538 P.2d 11 (1975).
14. House Joint Resolution No. 100, L. 1977.
15. Governance and Funding of Montana's Vo-Tech Centers: Options for Change, A Report to the 50th Legislature, Joint Interim Subcommittee on Vo-Techs/Job Training, November 1986, p. 6.
16. House Bill No. 634, Ch. 598, L. 1979.
17. House Bill No. 39, Ch. 658, L. 1987.
18. House Bill No. 39, Sec. 5, Ch. 658, L. 1987.
19. House Bill No. 39, Sec. 18, Ch. 658, L. 1987.

20. "Establishment of a Two-Year System of Community and Technical Colleges", A Position Paper Prepared on Behalf of the Community Colleges and Technical Centers For Consideration By The Commissioner's Office and Board of Regents In Restructuring of The Montana Higher Education System, December 30, 1993.
21. Ibid. pp. 4-5.
22. Ibid. p. 4.
23. Report Card Letter from Commissioner of Higher Education Jeff Baker to Presidents George Dennison and Michael Malone, Nov. 9, 1994, provided in 1995 testimony to the 1995 Legislative Session.
24. Ibid.
25. Senate Bill No. 156, Ch. 308, L. 1995.
26. Ibid and Report Card Letter from Commissioner of Higher Education Jeff Baker to Presidents George Dennison and Michael Malone, December 20, 1994, provided in 1995 testimony to the 1995 Legislative Session.
27. See Title 20, chapter 16, Montana Code Annotated (repealed by Senate Bill No. 156, Ch. 308, L. 1995).
28. Postsecondary Vocational-Technical Education Governance: A Report to the Forty-Sixth Legislature, Subcommittee on Education, Montana Legislative Council, November 1978, p. 12.
29. Ibid., p. 13.
30. Ibid.
31. Ibid.
32. House Bill No. 481, Sec. 9(2), Ch. 250, L. 1969.
33. House Bill No. 634, Sec. 4, Ch. 598, L. 1979.
34. House Bill No. 39, Sec. 18, Ch. 658, L. 1987.
35. Senate Bill No. 156, Sec. 34, Ch. 308, L. 1995.
36. "Background and Legal Analysis of Vocational-Technical Education Funding in Montana, Eddy McClure, Montana Legislative Services Division, 2000 (hereinafter Background), p. 4.
37. Background, pp. 4-5; see also, January 23, 1996, letter from Greg Petesch, Legal Counsel, Montana Legislative Services Division, to Senator Bob Brown outlining the

uniformity of taxation requirement for taxpayers on like property.

38. Background, p. 5.
39. Ibid.
40. House Bill No. 433, 1999 Legislature.
41. Kottel v. State of Montana, et al., Cause No. CDV-99-1356(a), Eighth Judicial District (2001).

The 5th Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject to the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The 14th Amendment of the United States Constitution, in part, provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life, liberty, or property, without due process of law**, nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, sections 4, 17, and 29, of the Montana Constitution, in part, provide:

Section 4. Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws.

Section 17. Due process of law. No person shall be deprived of life, liberty, or property without due process of law.

Section 29. Eminent domain. Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

Article VIII, section 3, of the Montana Constitution, provides:

Section 3. Property tax administration. The state shall appraise, assess, and equalize the valuation of all property which is to be taxed in the manner provided by law.

42. Ibid.
43. Kottel v. Montana Dept. of Revenue, et al., 2002 MT 278, 312 Mont. 387, 60 P.3d 403 (2002).
44. House Bill No. 37, Ch. 274, L. 1965.
45. House Bill No. 37, Sec. 4, Ch. 274, L. 1965.
46. House Bill No. 37, Sec. 2, Ch. 274, L. 1965.
47. Miles Community College website, Major Historical Milestones @ www.milesc.edu.
48. "Community College Governance", A Report to the Forty-Sixth Legislature, Subcommittee on Education, Montana Legislative Council, November 1978, p. 7.
49. Section 75-8112, R.C.M., 1947, now codified at 20-15-209, was actually a combination of three different bills passed by the 1971 Legislature: Senate Bill No. 1, Sec. 459, Ch. 5, L. 1971; House Bill No. 221, Sec. 1, Ch. 164, L. 1971; and Senate Bill No. 236, Sec. 2, Ch. 407, L. 1971.
50. Article X, section 9(2)(a), 1972 Montana Constitution.
51. "Community College Governance", A Report to the Forty-Sixth Legislature, Subcommittee on Education, Montana Legislative Council, November 1978, p. 7.
52. Report Card letter from President George Dennison, President of the University of Montana, to Jeff Baker, Commissioner of Higher Education, December 20, 1994, p. 9, and Report Card Letter from President Mike Malone, President of Montana State University, to Jeff Baker, Commissioner of Higher Education, December 15, 1994, p. 7.
53. See memorandum from Sandy Whitney, Senior Fiscal Analyst, Montana Legislative Fiscal Division, to the Joint Committee on Postsecondary Education Policy and Budget, August 20, 1998.
54. Fact sheet produced by The Bitterroot Valley Community College Exploratory Committee.
55. "Bitterroot Valley Community College Proposal", A briefing paper submitted by Dr. Arlene Parisot, Coordinator of Community Colleges, to the Board of Regents (September 2006).
56. Ibid.

57. 52 A.G. Op. 1 (2007).
58. "Two Year Education", A Report Prepared for the Joint Committee on Postsecondary Education Policy and Budget by Sandy Whitney, Senior Fiscal Analyst, Legislative Fiscal Division, October 10, 2007, p. 2.
59. "Financing Montana Community Colleges", A Report to the 1971 Montana State Legislature by the Montana Association of Community Colleges.
60. House Bill No. 136, Ch. 325, L. 1969.
61. "Financing Montana Community Colleges", A Report to the 1971 Montana State Legislature by the Montana Association of Community Colleges, pp. 3-4.
62. Ibid.
63. "Community College Funding Formula Study: The Cost of Education (COE) Factor", A Report Prepared for the Legislative Finance Committee by Alan Peura, Associate Fiscal Analyst, Legislative Fiscal Division (March 2006).
64. Ibid.
65. Ibid., p. 4
66. Ibid., pp. 4-5.
67. Ibid., p. 7.
68. Senate Bill No. 12, Ch. 493, L. 2007.
69. 25 U.S.C. 1801, et seq.
70. 25 U.S.C. 1804.
71. Testimony of Joe McDonald, President of Salish Kootenai College, before House Education Committee, January 10, 2005, in support of House Bill No. 16.
72. Salish Kootenai College website @ www.sk.edu/academics.html; Bachelor of Arts Degrees in Business/Entrepreneurship and Social Work; Bachelor of Science Degrees in Computer Engineering, Environmental Science, Forestry, Information Technology, and Nursing.
73. House Bill No. 544, Ch. 431, L. 1995.
74. See preamble to Senate Bill No. 84, Ch. 362, L. 1997.
75. Senate Bill No. 84, Ch. 362, L. 1997, codified at 20-25-428, MCA.

76. House Bill No. 16, Ch. 147, L. 2005.