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2d Session }

SENATE

{ REPORT
115-313

TO ESTABLISH A PROCEDURE FOR THE CONVEYANCE OF CERTAIN FEDERAL PROPERTY AROUND THE DICKIN- SON RESERVOIR

AUGUST 1, 2018.—Ordered to be printed

Ms. MURKOWSKI, from the Committee on Energy and Natural
Resources, submitted the following

R E P O R T

[To accompany S. 440]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 440) to establish a procedure for the conveyance of certain Federal property around the Dickinson Reservoir in the State of North Dakota, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. DEFINITIONS.

In this Act:

(1) DEPARTMENT.—The term “Department” means Dickinson Parks & Recreation in Dickinson, North Dakota.

(2) DICKINSON RESERVOIR.—The term “Dickinson Reservoir” means the Dickinson Reservoir constructed as part of the Dickinson Unit, Heart Division, Pick-Sloan Missouri Basin Program, as authorized by section 9 of the Act of December 22, 1944 (commonly known as the “Flood Control Act of 1944”) (58 Stat. 891, chapter 665).

(3) GAME AND FISH HEADQUARTERS.—The term “game and fish headquarters” means the approximately 10 acres of land depicted as “Game and Fish Headquarters” on the Map.

(4) MANAGEMENT AGREEMENT.—The term “Management Agreement” means the management agreement entitled “Management Agreement between the Bureau of Reclamation, et al., for the Development, Management, Operation, and

Maintenance of Lands and Recreation Facilities at Dickinson Reservoir”, MA No. 07AG602222, Modification No. 1 and dated March 15, 2017.

(5) MAP.—The term “Map” means the map prepared by the Bureau of Reclamation, entitled “Dickinson Reservoir”, and dated May 2018.

(6) PERMITTED CABIN LAND.—The term “permitted cabin land” means the land depicted as “Permitted Cabin Land” on the Map.

(7) PROPERTY.—The term “property” means any cabin site located on permitted cabin land for which a permit is in effect on the date of enactment of this Act.

(8) RECREATION LAND.—The term “recreation land” means the land depicted as “Recreation and Public Purpose Lands” on the Map.

(9) SECRETARY.—The term “Secretary” means the Secretary of the Interior, acting through the Commissioner of Reclamation.

(10) STATE.—The term “State” means the State of North Dakota, acting through the North Dakota Game and Fish Department.

SEC. 2. CONVEYANCES TO DICKINSON DEPARTMENT OF PARKS AND RECREATION.

(a) CONVEYANCES TO DICKINSON DEPARTMENT OF PARKS AND RECREATION.—

(1) IN GENERAL.—Subject to the management requirements of paragraph (3) and the easements and reservations under section 4, not later than 5 years after the date of enactment of this Act, the Secretary shall convey to the Department all right, title, and interest of the United States in and to—

- (A) the recreation land; and
- (B) the permitted cabin land.

(2) COSTS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the Secretary shall convey the land described in paragraph (1) at no cost.

(B) TITLE TRANSFER; LAND SURVEYS.—As a condition of the conveyances under paragraph (1), the Department shall agree to pay all survey and other administrative costs necessary for the preparation and completion of any patents for, and transfers of title to, the land described in paragraph (1).

(3) MANAGEMENT.—

(A) RECREATION LAND.—The Department shall manage the recreation land conveyed under paragraph (1)—

- (i) for recreation and public purposes consistent with the Act of June 14, 1926 (commonly known as the “Recreation and Public Purposes Act”) (44 Stat. 741, chapter 578; 43 U.S.C. 869 et seq.);
- (ii) for public access;
- (iii) for fish and wildlife habitat; or
- (iv) to preserve the natural character of the recreation land.

(B) PERMITTED CABIN LAND.—The Department shall manage the permitted cabin land conveyed under paragraph (1)—

- (i) for cabins or recreational residences in existence as of the date of enactment of this Act; or
- (ii) for any of the recreation land management purposes described in subparagraph (A).

(4) HAYING AND GRAZING.—With respect to recreation land conveyed under paragraph (1) that is used for haying or grazing authorized by the Management Agreement as of the date of enactment of this Act, the Department may continue to permit haying and grazing in a manner that is permissible under the 1 or more haying or grazing contracts in effect as of the date of enactment of this Act.

(b) REVERSION.—If a parcel of land conveyed under subparagraph (A) or (B) of subsection (a)(1) is used in a manner that is inconsistent with the requirements described in subparagraph (A) or (B), respectively, of subsection (a)(3), the parcel of land shall, at the discretion of the Secretary, revert to the United States.

(c) SALE OF PERMITTED CABIN LAND BY DEPARTMENT.—

(1) IN GENERAL.—If the Department sells any parcel of permitted cabin land conveyed under subsection (a)(1)(B), the parcel shall be sold at fair market value, as determined by a third-party appraiser in accordance with the Uniform Standards of Professional Appraisal Practice, subject to paragraph (2).

(2) IMPROVEMENTS.—For purposes of an appraisal conducted under paragraph (1), any improvements on the permitted cabin land made by the permit holder shall not be included in the appraised value of the land.

(3) PROCEEDS FROM THE SALE OF LAND BY THE DEPARTMENT.—If the Department sells a parcel of permitted cabin land conveyed under subsection (a)(1)(B), the Department shall pay to the Secretary the amount of any proceeds of the sale that exceed the costs of preparing the sale by the Department.

(d) **AVAILABILITY OF FUNDS TO THE SECRETARY.**—Any amounts paid to the Secretary for land conveyed by the Secretary under this Act shall be made available to the Secretary, without further appropriation, for activities relating to the operation of the Dickinson Dam and Reservoir.

SEC. 3. CONVEYANCE OF GAME AND FISH HEADQUARTERS TO THE STATE.

(a) **CONVEYANCE OF GAME AND FISH HEADQUARTERS.**—Not later than 5 years after the date of enactment of this Act, the Secretary shall convey to the State all right, title, and interest of the United States in and to the game and fish headquarters, on the condition that the game and fish headquarters continue to be used as a game and fish headquarters or substantially similar purposes.

(b) **REVERSION.**—If land conveyed under subsection (a) is used in a manner that is inconsistent with the requirements described in that subsection, the land shall, at the discretion of the Secretary, revert to the United States.

SEC. 4. RESERVATIONS, EASEMENTS, AND OTHER OUTSTANDING RIGHTS.

(a) **IN GENERAL.**—Each conveyance to the Department or the State pursuant to this Act shall be made subject to—

- (1) valid existing rights;
- (2) operational requirements of the Pick-Sloan Missouri River Basin Program, as authorized by section 9 of the Act of December 22, 1944 (commonly known as the “Flood Control Act of 1944”) (58 Stat. 891, chapter 665), including the Dickinson Reservoir;
- (3) any flowage easement reserved by the United States to allow full operation of Dickinson Reservoir for authorized purposes;
- (4) reservations described in the Management Agreement;
- (5) oil, gas, and other mineral rights reserved of record, as of the date of enactment of this Act, by, or in favor of, the United States or a third party;
- (6) any permit, license, lease, right-of-use, flowage easement, or right-of-way of record in, on, over, or across the applicable property or Federal land, whether owned by the United States or a third party, as of the date of enactment of this Act;
- (7) a deed restriction that prohibits building any new permanent structure on property below an elevation of 2,430.6 feet; and
- (8) the granting of applicable easements for—
 - (A) vehicular access to the property; and
 - (B) access to, and use of, all docks, boathouses, ramps, retaining walls, and other improvements for which access is provided in the permit for use of the property as of the date of enactment of this Act.

(b) **LIABILITY; TAKING.**—

(1) **LIABILITY.**—The United States shall not be liable for flood damage to a property subject to a permit, the Department, or the State, or for damages arising out of any act, omission, or occurrence relating to a permit holder, the Department, or the State, other than for damages caused by an act or omission of the United States or an employee, agent, or contractor of the United States before the date of enactment of this Act.

(2) **TAKING.**—Any temporary flooding or flood damage to the property of a permit holder, the Department, or the State, shall not be considered to be a taking by the United States.

SEC. 5. INTERIM REQUIREMENTS.

During the period beginning on the date of enactment of this Act and ending on the date of conveyance of a property or parcel of land under this Act, the provisions of the Management Agreement that are applicable to the property or land, or to leases between the State and the Secretary, and any applicable permits, shall remain in force and effect.

PURPOSE

The purpose of S. 440 is to establish a procedure for the conveyance of certain Federal property around the Dickinson Reservoir in the State of North Dakota.

BACKGROUND AND NEED

The Dickinson Dam and Reservoir, also referred to as Patterson Lake, in North Dakota is part of the Dickinson Unit of the Pick-Sloan Missouri Basin Project that is operated by the Bureau of Reclamation (BOR). The project was authorized in the Flood Con-

trol Act of 1944 (58 Stat. 891), with federal lands acquired to construct and operate the project for municipal water supply, irrigation, flood control, and recreation. The project provided municipal water to the City of Dickinson until 1991 when the city switched to water supplied by the Southwest Pipeline Project. While the reservoir is no longer used for municipal drinking water purposes, it continues to serve two water service contracts.

BOR lands surrounding Patterson Lake include recreational lands, wildlife habitat, grazing and haying lands, and 41 lots with permitted cabins. All of these federal lands are managed by the Dickinson Parks and Recreation Department (Department) under an agreement with the BOR and are not necessary to fulfill authorized project purposes. In addition, the North Dakota Game and Fish Department leases approximately 10 acres for a District Headquarters directly from the BOR.

As part of its management of the BOR lands, the Department issues permits for the 41 cabin lots. Some of the permittees now use these cabins year-round as primary residences and have made improvements to cabin lots at their own expense. In order to have certainty about the management of these lands, to secure the ability to obtain financing for home purchases and improvements, and to address increasing permit fees, permittees would like to purchase the lots they currently occupy. Additionally, North Dakota Fish and Game has expressed interest in assuming ownership of the lands they currently lease from BOR.

LEGISLATIVE HISTORY

Senators Hoeven and Heitkamp introduced S. 440 on February 17, 2017. The Subcommittee on Water and Power held a hearing on S. 440 on June 14, 2017.

The Committee on Energy and Natural Resources met in open business session on May 17, 2018, and ordered S.440 favorably reported, as amended.

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in open business session on May 17, 2018, by a majority voice vote of a quorum present recommends that the Senate pass S. 440, if amended as described herein.

COMMITTEE AMENDMENT

During its consideration of S. 440, the Committee adopted an amendment in the nature of a substitute. The amendment authorizes the Secretary to convey recreation land and permitted land to the Department, instead of providing the permittee of the property with the first option to purchase. The amendment also adds restrictions on the future uses of the property and makes numerous clarifications, technical corrections, and conforming changes. The amendment is further described in the section-by-section analysis.

SECTION-BY-SECTION ANALYSIS

Sec.1. Definitions

Section 1 contains definitions.

Sec. 2. Conveyances to Dickinson Department of Parks and Recreation

Subsection (a) directs the Secretary of the Interior (Secretary) to convey recreation land and permitted cabin land surrounding Dickinson Reservoir to the Department within five years of the Act's enactment. The conveyances by the Secretary are to be made at no cost, but the Department is required to pay for survey and administrative-related costs. The Department is directed to manage conveyed recreation land for recreation and public purposes consistent with the Recreation and Public Purposes Act (43 U.S.C. 869 et seq.); public access; fish and wildlife habitat; or to preserve the land's natural character. Additionally, if conveyed recreation land is authorized for haying and grazing by the Management Agreement as of the date of the Act's enactment, the Department may continue to permit those activities. The Department is directed to manage conveyed permitted cabin lands for any of the specified recreation land management purposes or for cabins or recreational residences in existence as of the date of the Act's enactment.

Subsection (b) provides that the conveyed lands will revert to the United States, at the discretion of the Secretary, if they are used in a manner that is inconsistent with the Act's authorized uses.

Subsection (c) requires the Department to charge fair market value for the sale of any parcel of permitted cabin land, and specifies improvements made by the permittee shall not be included in the valuation. This subsection also requires the Department to pay the Secretary the amount of any sale proceeds that exceed the costs of preparing the sale.

Subsection (d) makes any amount paid to the Secretary for conveyed land available to the Secretary, without further appropriation, for operation of the Dickinson Dam and Reservoir.

Sec. 3. Conveyance of Game and Fish Headquarters to the State

Section 3 directs the Secretary to convey all right, title, and interest in the game and fish headquarters currently leased to the North Dakota Game and Fish Department to the State of North Dakota for continued use as a headquarters or substantially similar purposes, and provides the Secretary with a reversionary interest in the event the land is used in an inconsistent manner with these requirements.

Sec. 4. Reservations, easements, and other outstanding rights

Subsection (a) specifies that conveyances made pursuant to this Act are subject to valid existing rights; operational requirements of the Pick-Sloan Missouri River Basin Program, including the Dickinson Reservoir; reserved flowage easements; Management Agreement reservations; reserved oil, gas and other mineral rights; any existing permit, license, lease, right-of-use, flowage easement, or right-of-way; deed restrictions prohibiting any permanent structures below the reservoir elevation of 2,430.6 feet; and the granting of easements for access to the property and associated facilities.

Subsection (b) shields the United States from liability for property damage, other than damages caused by an act or omission of the United States or an employee, agent, or contractor of the United States prior to the Act's enactment. This subsection further

states that any temporary flooding or flood damage to the property shall not be considered a taking by the United States.

Sec. 5. Interim requirements

Section 5 applies the Management Agreement provisions as interim requirements during the time period starting from the date of the Act's enactment and ending on the date of the land or property conveyance.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the costs of this measure has been provided by the Congressional Budget Office:

S. 440 would direct the Bureau of Reclamation (BOR) to convey certain federal land located near the Dickinson Reservoir in North Dakota to the Dickinson Parks and Recreation department. Under the bill, after the property is conveyed, the department could sell the property to certain existing cabin permit holders and the net proceeds of those transactions would be paid to the federal government. Those proceeds would be classified as offsetting receipts, which are treated as reductions in direct spending, and could subsequently be spent by BOR without further appropriation.

Enacting S. 440 would increase offsetting receipts and the associated direct spending; therefore, pay-as-you-go procedures apply. However, CBO estimates that the net effect on the budget would be negligible. Enacting S. 440 would not affect revenues.

Under S. 440, BOR would convey specified federal property to the Dickinson Parks and Recreation department within 5 years after enactment. Using information from BOR, CBO expects that 41 cabin permit holders would purchase lots from the department for about \$100,000 per lot. CBO estimates that the department would transfer the net proceeds of about \$4 million to the federal government and those offsetting receipts would be spent for annual operations costs and deferred maintenance projects at the Jamestown Dam and Reservoir in North Dakota.

CBO estimates that enacting S. 440 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 440 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Aurora Swanson. The estimate was reviewed by Leo Lex, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 440. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 440, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

S. 440, as ordered reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined in rule XLIV of the Standing Rules of the Senate.

EXECUTIVE COMMUNICATIONS

The testimony provided by the Department of the Interior at the June 14, 2017, hearing on S. 440 follows:

STATEMENT OF SCOTT CAMERON, ACTING ASSISTANT SECRETARY—WATER AND SCIENCE U.S. DEPARTMENT OF THE INTERIOR

Chairman Flake, Ranking Member King, and members of the Subcommittee, I am Scott Cameron, Acting Assistant Secretary for Water and Science at the Department of the Interior. Thank you for the opportunity to provide the views of the Department of the Interior (Department) on S. 440, a bill to establish a procedure for the conveyance of certain Federal property around the Dickinson Reservoir in the State of North Dakota. The intent of the legislation is to provide a path for current permitted cabin owners and the Dickinson Parks and Recreation Department to take ownership of certain Federal lands, allowing flexible management of the lands to meet local needs and alleviate the administrative oversight and management of the land.

Before I discuss our views on S. 440, I wanted to note the Secretary's staunch commitment against the wide-scale sale or transfer of federal lands. He firmly holds that our treasured public lands are to be maintained and preserved according to the inscription on the Yellowstone National Park Arch that reads 'for the benefit and enjoyment of the people.' The Secretary is willing to work with Congress to ensure proposals of this nature preserve access and recreation for future generations to come. Therefore, we recommend the following changes to provide additional clarity and protections. The Flood Control Act of 1944 authorized construction of Dickinson Dam and Reservoir (Project) as part of the Dickinson Unit, Heart Division, Pick-Sloan Missouri Basin Program. Federal lands were acquired for Project purposes which include municipal water supply, irrigation with flood control, and recreation benefits. The Project provided municipal water to the City of Dickinson until 1991 when the City switched its water supply to the Southwest Pipeline Project. There are currently two water service contracts associated with the Project, one with Dickinson Parks and Recreation and one with an irrigation district downstream of the Reservoir.

The current management agreement between Reclamation and Dickinson Parks and Recreation for operation and maintenance of the majority of lands around the Reservoir includes the area for 41 permitted exclusive use cabins occupied year round (approximately 25 acres) as well as additional lands dedicated to recreation, and wildlife management (approximately 2,434 acres). In addition to lands

managed by Dickinson Parks and Recreation, Reclamation leases a 10 acre parcel to the North Dakota Game and Fish Department (NDG&F) for the Southwest District Headquarters. In 2013, Reclamation's Dakotas Area Office (DKAO) requested a fair market appraisal of the rates for the exclusive use cabins be conducted pursuant to the Code of Federal Regulations related to Use of Bureau of Reclamation Land, Facilities, and Waterbodies (43 CFR 429). As required by Department policy, the appraisals were conducted by the Department of the Interior's Office of Valuation Services for all reservoirs with exclusive use under the administration of DKAO, resulting in the need to raise rates at all areas to recover fair market value. The results of the appraisal were presented to the respective managing partners in 2016.

Section 1(b) of S. 440 would provide for conveyance of land permitted to cabin owners and land managed by Dickinson Parks and Recreation. However, some Project land is not included in the Management Agreement with Dickinson Parks and Recreation (i.e., 10 acres currently under lease to NDG&F) and is not included in the legislation. This would result in fractionated ownership with continued Reclamation oversight responsibilities and costs. The Department will work with the sponsor of the bill and the Committee to revise the language to include those lands acquired for the Project with the exception of the footprint of the Dam, auxiliary spillway, and any realty interest necessary to operate and maintain the Dam.

Section 1(b) of S. 440 would also allow permittees two years following the date of enactment of this legislation to purchase a property. The Department has concerns with the timeline in the legislation as drafted given that surveys of land could take up to two years to complete. A third party appraisal, which can take a year or longer to complete, can only begin once the survey is complete. Once the appraised value is determined, additional time may be required for the permittee to seek financing or resolve any appraisal disputes if necessary. The Department recommends that permittees be allowed up to five years or "as reasonably practicable after enactment of the Act" to allow sufficient time for the pre-sale activities and to arrange financing.

Section 1(b)(2)(A) of S. 440 provides for the fair market value of a property to be determined by a local, third party appraiser, valuing the property as unimproved residential property, excluding all improvements. A third party appraisal would involve a contract between the permittee and the appraiser with the permittee responsible for direct payment to the appraiser. If Reclamation were to pay for the appraisal upfront, the contract would shift to an agreement between the United States and the appraiser, meaning it would no longer comply with the language in S. 440 as currently drafted. The Department recommends clarification of this language to ensure that permittees understand the cost requirement. The Department recommends

that Section 1(b)(2)(A) be revised so that the fair market value of a property shall be determined by an appraiser using the Office of Valuation Services' third party appraisal process, valuing the property as unimproved residential property, excluding all improvements. The Department also recommends that the bill be amended to include a requirement for review of the third party appraisal by the Office of Valuation Services as specified in section 2201.4 of title 43, Code of Federal Regulations (or successor regulations) to ensure that the third party appraisal credibly represents the fair market value of the property being conveyed. The Department further recommends that all costs paid for by the permittee shall have no effect on the appraised value and the cost for the third party appraisal shall be the responsibility of the permittee.

Section 1(b)(4) provides for the transfer of Federal land currently managed by Dickinson Parks and Recreation, without cost, subject to the requirements in Section 1(c) with no protections required to ensure lands acquired for public purpose will remain available for public use in the future. The Department recommends that the deed transferring land to Dickinson Parks and Recreation shall provide that all property transferred to Dickinson Parks and Recreation be used and maintained for public access and recreation purposes. Currently, opportunities to recreate within this area include walking trails, boating ramps, golfing, and modern and primitive camping. According to Dickinson Parks and Recreation, camping spots on the property average 2,158 rentals between mid-May and mid-September alone. Given the Secretary's firm commitment to protecting public lands, it is of critical importance that Dickinson continues to manage the parcels with recreational interests in mind. That is why the Department recommends that if the property ceases to be used or maintained for that purpose, the jurisdiction of the land would then revert back to the United States.

As drafted, S. 440 does not specifically address the land within Dickinson Parks and Recreation's Management Agreement located under the Reservoir. The Department would be happy to work with the sponsor and the Committee on language to minimize future confusion and/or oversight by the U.S. on land under the reservoir.

Section 1(c) of S. 440 provides that each conveyance pursuant to subsection (b) is made subject to two protections. The Department believes additional protections are necessary to safeguard the interests of the United States and the public to operate the dam as authorized. The Department recommends the following protections be added: the prohibition of any conveyance of subsurface or mineral rights, (2) the inclusion of language to maintain a flowage easement for flood control purposes, and the allowance for the Secretary to make necessary terms, reservations, restrictions, and conditions to safeguard the interests of the United States. The Department is willing to provide work with the Committee to amend the bill to ensure these pro-

tections are put in place. Section 1(d) of S. 440 provides that the liability and taking provisions only apply to the permittees, not any other transfer of federal land or to any future owners. In addition to technical recommendations, the Department recommends amending the definition of Permittee in Section 1(a)(3) to include future assignees of the current owners of the cabin sites.

Section 1(e)(2) of S. 440 requires that not later than 180 days after enactment, the Secretary to provide legal descriptions to Dickinson Parks and Recreation of the land to be conveyed. This will require Reclamation to contract with a registered Land Surveyor to survey the lands and develop the legal descriptions, access, utility, and flowage easements and individual lot surveys. The Department does not believe it will be reasonable to complete this work within 180 days and suggests increasing the time to no later than 2 years or “as reasonably practicable after enactment of the Act”. Section 1(e)(3)(A) of S. 440 provides the elevation above which any new improvements can be constructed is currently listed as 2,430 feet. This elevation is incorrect and ought to be changed to 2,430.6 feet to correctly locate the design maximum water surface elevation.

Section 1(f) of S. 440 provides that any revenues from a sale of Federal land pursuant to this section shall be made available to the Secretary, without further appropriation, for the costs to the Secretary of carrying out this section. Because revenues are not generated until the properties are transferred to the permittee, the United States would need to use appropriated funds to complete the surveys and appraisals and other pre-sale activities. In previous legislation to transfer cabin properties, as well as Reclamation’s process for Use Authorization requests, it is the responsibility of the permittees/requestor to pay for the required pre-sale work, including all administrative costs to convey Federal property to private individuals/beneficiaries rather than placing this burden on the United States. As written it appears the United States is responsible for the administrative costs and therefore in “net” it receives less than market value for the land.

The Department would be happy to work with the sponsor and the Committee to revise the language based on our recommendations. This concludes my written statement. I am pleased to answer questions at the appropriate time.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill as ordered reported.