

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Governor Mark R. Warner by substitution for Governor)
James S. Gilmore, III, Lt. Governor and President of the)
Senate John H. Hager, Acting Attorney General Randolph)
A. Beales, Speaker of the House of Delegates S. Vance)
Wilkins, Jr., Senate Majority Leader Walter A. Stosch,) **RECORD NO. 021003**
House Majority Leader H. Morgan Griffith, Senator Kevin)
G. Miller, Delegate John H. Rust, Jr., Delegate S. Chris)
Jones, State Board of Elections Secretary Cameron P.)
Quinn, all in their official capacities,)

*Defendants and also Appellants except for Gov. Mark R. Warner,
former Lt. Gov. John H. Hager, and former Acting Atty. Gen. Beales.*

v.

Douglas MacArthur West, Albert Simpson, Nanalou)
Sauder, Ruby Tucker, Shirley N. Tyler, Shanta Reid,)
John Mumford, Sam Werbel, Collins Howlett, Ira J.)
Coleman, Maryann Coleman, Carl Waterford, Regina)
Harris, Herman L. Carter, Jr., Grindly Johnson, Rosa Byrd,)
Harold A. Brooks, Elijah Sharp, III, Herbert Coulton,)
Delores L. McQuinn, Richard Railey, Jr., Vincent)
Carpenter, Leslie Byrne, L. Louise Lucas, Yvonne Miller,)
Henry Marsh, Henry Maxwell, Mary Margaret Whipple,)
Bill Barlow, Bob Brink, C. Richard Cranwell, Viola)
Baskerville, Flora Crittenden, Mary T. Christian, L. Karen)
Darner, Jay W. DeBoer, R. Creigh Deeds, Franklin P. Hall,)
Robert D. Hull, Thomas M. Jackson, Jr., Jerrauld C. Jones,)
Kenneth R. Melvin, William P. Robinson, Jr., Marian Van)
Landingham, Mitchell Van Yahres, Clifton A. Woodrum,)

Plaintiffs/Appellees.

ON APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF SALEM

**REPLY BRIEF OF AMICUS CURIAE
SENATOR D. NICK RERRAS IN SUPPORT OF APPELLANTS**

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ASSIGNMENTS OF ERROR

Amicus hereby adopts the Assignments of Error set forth in the Opening Brief of Appellants.

QUESTIONS PRESENTED

Amicus hereby adopts the Questions Presented set forth in the Opening Brief of Appellants.

STATEMENT OF THE CASE

Amicus hereby adopts the Statement of the Case set forth in the Opening Brief of Appellants.

STATEMENT OF FACTS

Amicus hereby adopts the Statement of Facts set forth in the Opening Brief of Appellants.

SUMMARY OF ARGUMENT

Neither the plaintiffs' nor the amicus briefs refute the key points made in the Initial Brief of amicus Sen. Nick Rerras:

1. None of the districts contained in the 2001 redistricting plan are less compact and contiguous than Senate District 18 in the 1991 redistricting plan, which was upheld by this Court in *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992).

2. None of the districts contained in the 2001 redistricting plan are less compact and contiguous than their 1991 predecessors.

3. The 2001 redistricting plan did not use water contiguity as often or as aggressively as did the 1991 redistricting plan. Unlike the 1991 plan, all contiguity across water was by line of sight from opposite bank to opposite bank. Connections running downstream or up-river were not used in the 2001 redistricting plan.

Apparently, the Governor recognizes that if Senate District 18 and/or the 1991 legislative redistricting plan is the benchmark for measuring compactness and contiguity under the Constitution of Virginia, then the circuit court applied the wrong legal standard and must be reversed based upon the substantial improvement in the compactness and contiguity from the 1991 to the 2001 redistricting plan. The Governor attempts to avoid this problem by suggesting that the *Jamerson* Court never considered contiguity as an issue, and therefore this Court should address the contiguity aspect of the compactness and contiguity requirement separately and *de novo*.

This is contrary to this Court's opinion in *Jamerson*. This Court specifically noted that "the words 'contiguous and compact' as joint modifiers of the word 'territory' in Article II, § 6, clearly limits their meaning as definitions of spatial restrictions in the composition of electoral districts." *Jamerson*, 244 Va. at 514, 423 S.E.2d at 184. Moreover, it fails to recognize that one of the key issues in *Jamerson* was the ability to travel throughout the district, which was limited by the passage of the district through the Great Dismal Swamp. As to the question of whether contiguity by water is implicated in

the 1991 version of Senate District 18 depends upon how deep one needs the water to be before you call it water contiguity.

ARGUMENT

The Governor apparently recognizes the weakness of his suggestion that contiguity was not implicated in this Court's *Jamerson* decision. As a result, he openly calls for this Court to re-examine its *Jamerson* precedent and adopt a new rule which will invalidate the 2001 redistricting plan. Contrary to the Governor's suggestion, no event has occurred which should cause this Court to re-examine its precedent. Contrary to the suggestion of the Governor that this Court's earlier decision would have found a violation of the Constitution of Virginia but for the existence of the Voting Rights Act, this Court chose to base its decision upon the discretion given to the General Assembly in reconciling sometimes conflicting redistricting criteria. Just as in 1991, the General Assembly must still comply with "one person, one-vote," §§ 2 and 5 of the Voting Rights Act, and the compactness and contiguity provision of the Constitution of Virginia, while accommodating numerous other policy and political concerns. The 2001 General Assembly should be entitled to the same level of discretion which it was able to exercise in 1991. The only question that should be asked is: Did the General Assembly act reasonably in reconciling these competing concerns?

In order to bolster his argument that this Court should re-examine its precedent in *Jamerson*, the Governor makes a claim which is factually incorrect. He asserts that the 2001 redistricting plan uses water contiguity in a new and "aggressive" way and that the plaintiffs' alternative plans proved that more compact and contiguous districts could have

been drawn. In fact, plaintiffs' proposed alternative plans in the General Assembly actually used water contiguity more aggressively than did the 2001 redistricting plan (twelve districts in plaintiffs' alternative plans as opposed to four districts in the 2001 redistricting plan). In fact, many of the exact same configurations which the circuit court attacked *sua sponte* were contained in plaintiffs' alternative plans as well. Furthermore, many of these water contiguity issues were continuations of the 1991 redistricting plan. We have provided maps of those districts in plaintiffs' alternative plans, the Miller-Whipple plan in the Senate and the Robinson plan in the House, which are contiguous by water but fail to provide transportation access to all parts of the district. These districts are described below.

Senate District 1 in plaintiffs' alternative plan (please *see* Appendix Maps 1 and 1A) is essentially a repeat of Senate District 1 in the 1991 redistricting plan (Initial Brief of Sen. Nick Rerras [hereinafter "Initial Brief"] Map B). As in the 1991 map, Senate District 1 in plaintiffs' alternative plan is contiguous by water in two places that lack a road connection. The first is along the waterfront in Hampton. This issue was eliminated in the 2001 plan (please *see* Initial Brief, Map N). However, all three versions of Senate District 1 connect across the Southwest branch of the Back River through Langley Air Force Base. As described in our initial brief, the circuit court found this connection lacked contiguity.

Plaintiffs' proposed Senate District 2 (please *see* Appendix Map 2) does exactly what plaintiffs and the Governor raise as an argument *ad horrendum* against water

contiguity – engaging in water contiguity down a river. Unlike the 2001 plan for Senate District 2 (Initial Brief, Map O) which the circuit court invalidated, plaintiffs' proposed alternative does not have a road connection between the two portions of the district which are separated by water. Clearly, Senate District 2 is less compact and contiguous by the circuit court's stated standard than Senate District 2 in the 2001 plan. Senate District 2, as contained in the 2001 plan, is the only majority minority district proposed in any plan that meets the circuit court's stated standard for road travel throughout the entire district.

Plaintiffs' proposed Senate District 3 (please *see* Appendix Map 3) is the equivalent of Senate District 6 in the 2001 redistricting plan. This district crosses Chesapeake Bay without the benefit of a bridge, as did the districts in all the proposed plans which include the Eastern Shore. However, plaintiffs' Eastern Shore district does one thing which the 2001 plan's Eastern Shore district does not do; plaintiffs' proposed district combines territories around James City and Williamsburg which do not border the Chesapeake Bay. While it is recognized that the Eastern Shore does not have enough population to constitute an entire senate district by itself, it should at least be combined with communities that share similar interests regarding the economic and environmental aspects of the Chesapeake Bay.

Plaintiffs' proposed Senate District 4 is contiguous over the York River solely by water. (Please *see* Appendix Map 4.) There is no road travel within the district between the arm that extends out to the west through New Kent and the bulk of the district on the eastern side of the York River.

Plaintiffs' proposed Senate District 5 has three portions that are only contiguous by water. (Please see Appendix Map 5.) The three portions are separated by the Elizabeth River and there are no road connections within the district between the three separated portions.

In Plaintiffs' proposed Senate District 7, a northern portion of the district is contiguous solely by water. (Please see Appendix Map 6.) This northern portion of the district is separated from the rest of the district by Thurston Branch and there is no road connection within the district.

The Eastern and Western portions of Senate District 14 in plaintiffs' proposed plan are separated by almost ten miles of the Great Dismal Swamp. (Please see Appendix Map 7.) There is no road through this portion of the Swamp; no party before this Court asserted that travel through the swamp is logically feasible. Indeed, travel by boat across the open water of a river or bay would be far more practical than attempting to traverse the Swamp without the benefit of a roadway. From a practical standpoint, this district, and for that matter Senate District 18 from the *Jamerson* case, poses far more difficulty in travel through the district than does a district that crosses a river without the benefit of a bridge.

Senate District 16 in plaintiffs' proposed plan is contiguous solely by water over the Appomattox River. (Please see Appendix Map 8.) This is a continuation of the same

contiguity by water used in Senate District 16 in the 1991 redistricting plan. (Please *see* Initial Brief, Appendix Map E.) As in 1991, there was no road connection between the north and south banks of the river. This is an example of a majority-minority district where the 2001 General Assembly was able to avoid retrogression while actually improving the compactness and contiguity of the district.

Plaintiffs' proposed House of Delegates District 72 is contiguous only across the James River west of Richmond. (Please *see* Appendix Map 9.) There is no bridge from the north side to the south side of the James River, which divides the district approximately in half. District 72 is divided in this manner because of plaintiffs' radical reconfiguration of the Richmond metropolitan area. This reconfiguration seems to have had as one of its principal purposes the unnecessary retrogression of a majority minority district that is currently represented by a white Democrat incumbent.

House District 90 in plaintiffs' proposed plan is contiguous solely by the Elizabeth River and across Lake Whitehurst. (Please *see* Appendix Maps 10 and 10A.) This configuration is a continuation of the 1991 plan that was contiguous solely by water in exactly the same manner. (Please *see* Initial Brief, Appendix Map K.)

Plaintiffs' proposed House District 91 is contiguous solely by water in two places, across the Poquoson River and across the Back River. (Please *see* Appendix Map 11.) The 2001 redistricting plan is contiguous across the exact same two rivers. The connection across the Poquoson River is exactly the same in plaintiffs' proposed map and

the 2001 redistricting map. The connection across the Back River is slightly different. The 2001 redistricting plan includes Langley Air Force Base in House District 91, which does allow for bridge across the Back River. However, plaintiffs' proposed map places Langley Air Force Base in House District 96 so that there is no bridge across any portion of the Back River linking the north and south banks. District 91 was one of the districts found by the circuit court to violate its new rule regarding water contiguity without road travel throughout the district. Examination of the 1991 plans and plaintiffs' proposed House District 91 clearly shows that the 2001 district approved by the General Assembly was the least aggressive in terms of water contiguity of all of the proposed or prior districts.

Plaintiffs proposed House District 100 crosses Chesapeake Bay from the Eastern Shore to Mathews and Gloucester Counties. (Please *see* Appendix Map 12.) This district is a continuation of the 1991 district described in our initial brief. (Please *see* Initial Brief, Appendix Map T.) As noted in our initial brief the 2001 redistricting plan allows the Eastern Shore to continue to have viable representation and is superior in terms of travel through the district by motor vehicle to the 1991 district or plaintiffs' proposal for 2001.

Clearly, the General Assembly in the 2001 redistricting plan used water contiguity **less** aggressively than did the legislature in 1991 or the plaintiffs in their proposed redistricting plans for 2001. Instead of asserting a new, aggressive water contiguity

standard, the 2001 General Assembly actually reduced the number of districts linked by water contiguity and limited its use to more restricted and particularized situations.

In asking this Court to reexamine its *Jamerson* precedent, one of the cases the Governor cites is *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996) (three-judge panel). What should be noted about this argument is that many of the districts ultimately approved by the *Smith* court contained many of the features which the Governor has asked this court to invalidate. Included are maps of nine districts in the plans from *Smith* that are contiguous solely by water without road transportation throughout the district. These districts are described below.

Map 13 in the Appendix shows two majority-minority state House of Representatives districts. District 109 crosses the Cooper River to the east in order to reach what was then the incumbent representative's residence. District 111 reached across the Ashley River to the west in order to reach additional African-American population on the west side of the river. Neither district crosses either river at a location that includes a bridge across that river.

Map 14 in the Appendix depicts House District 119, which runs from the city of Charleston along the edge of a majority minority district to reach the resort communities of Seabrook and Kiawah Islands, which contains four different portions of the district which are contiguous solely by water. Map 15 in the Appendix shows majority minority House District 122, which reaches across the Broad River without the benefit of a bridge

within the district to the largely non-voting population of the Parris Island Marine Corps Base.

Map 16 in the Appendix depicts the majority minority District 121 that encompasses large concentrations of minority population on both sides of the Combahee River. Map 17 in the Appendix shows majority minority Senate District 45 and majority white Senate District 46. Majority minority District 45 crosses the Coosaw River at a location where there is no bridge. This connection allows District 45 to incorporate the African-American concentration on St. Helena's Island on the south side of the river with the African-American population on the mainland. Likewise district 46 combines the resort communities of Fripp Island, Hilton Head Island, Beaufort and Port Royal. The three principal portions of Senate District 46 are contiguous solely by the water over Port Royal sound.

Map 18 in the Appendix shows Senate District 42, which is a majority-minority district. This district crosses the Ashley River without the benefit of a bridge in a manner similar to that shown earlier for House District 111. Finally, Map 19 in the Appendix depicts majority white Senate District 41. This district begins north of the city of Charleston, proceeds through the West Ashley portion of the city, across James Island, and then proceeds down the coast to include the resort communities of Folly Beach and Kiawah and Seabrook Islands. There are no road connections over the water between James Island, Folly Beach, and Kiawah Island.

Obviously, the 2001 redistricting plans produced by the Virginia General Assembly were at least as compact and contiguous as those ultimately approved in the *Beasley* litigation. Clearly, a re-examination of the *Jamerson* precedent in light of the Beasley districts should not result in the invalidation of the 2001 redistricting plans for the Commonwealth of Virginia. As the *Smith* districts show, the districts in the 2001 redistricting plan for the Commonwealth of Virginia are comparable with districts which have survived racial gerrymandering challenges or have been corrected because of those challenges. If this Court re-examines the *Jamerson* precedent at this point and revises that precedent in a way which invalidates the 2001 redistricting plan of the Commonwealth of Virginia, it will be instituting a requirement which is beyond that required by federal racial gerrymandering precedent.

Finally, the Governor suggests that Virginia courts could find that a district was not sufficiently compact and contiguous solely because the reapportionment plan combined or divided compatible and incompatible communities of interest. As a federal district court in Kansas recently noted, questions of the division and combination of communities of interest are the least appropriate of all redistricting criteria to be reviewed by the courts. *Graham v. Thornburgh*, ___ F. Supp. 2d ___ (D. Kan. 2002) (reported at 2002 WL 1453796) (three-judge panel) (*per curiam*).

CONCLUSION

When this Court reviews the decision made by the legislature in 2001 to select the current redistricting plan, it should note that the General Assembly selected the plan which among those before it was:

1. Least aggressive in its use of water contiguity.
2. Least retrogressive.
3. More compact than its predecessor plan.
4. At least as compact as 1991 Senate District 18 which was upheld in *Jamerson*; and
5. Insured the greatest equality of population.

In short, the legislature selected the best plan for all of the criteria of those before it. The legislature attempted to select the plan which best met ALL of the criteria. Plaintiffs' proposals clearly were less appropriate under many of the criteria they now advance. This Court should abide by its *Jamerson* precedent, and using that decision as its benchmark, the 2000 redistricting plan of Commonwealth should be sustained and the decision of the circuit court reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:30(c) of the Rules of Supreme Court of Virginia, I hereby certify that Rule 5:26(d) has been complied with, that twenty copies of this amicus brief were sent by certified mail, postage prepaid, this _____ day of August, 2002 to the Office of the Clerk of the Supreme Court of Virginia for filing, and that three copies of this amicus brief were mailed by first-class mail, postage prepaid, this _____ day of August, 2002 to the following opposing counsel and counsel *amicus curiae*:

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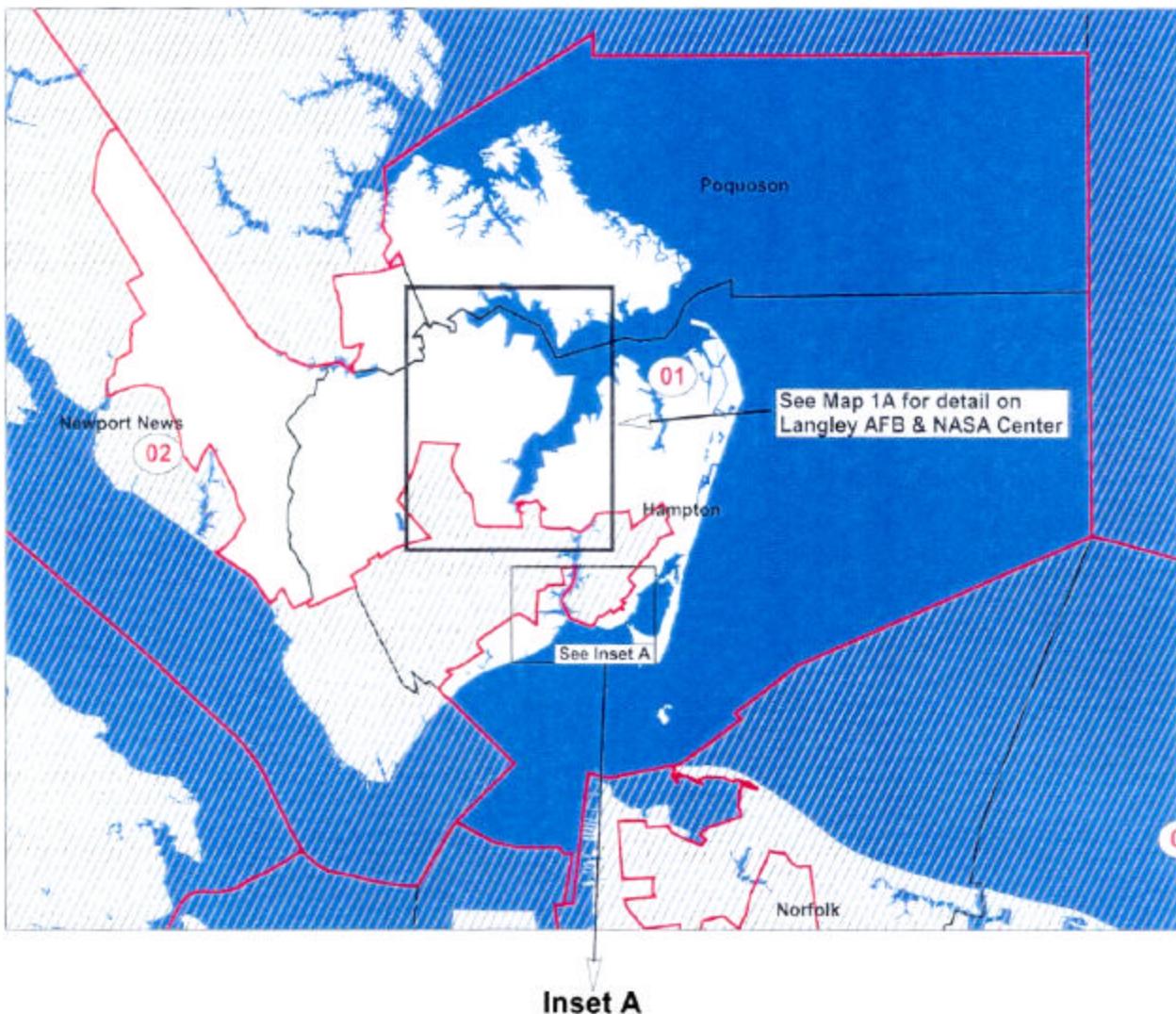
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MAP 1

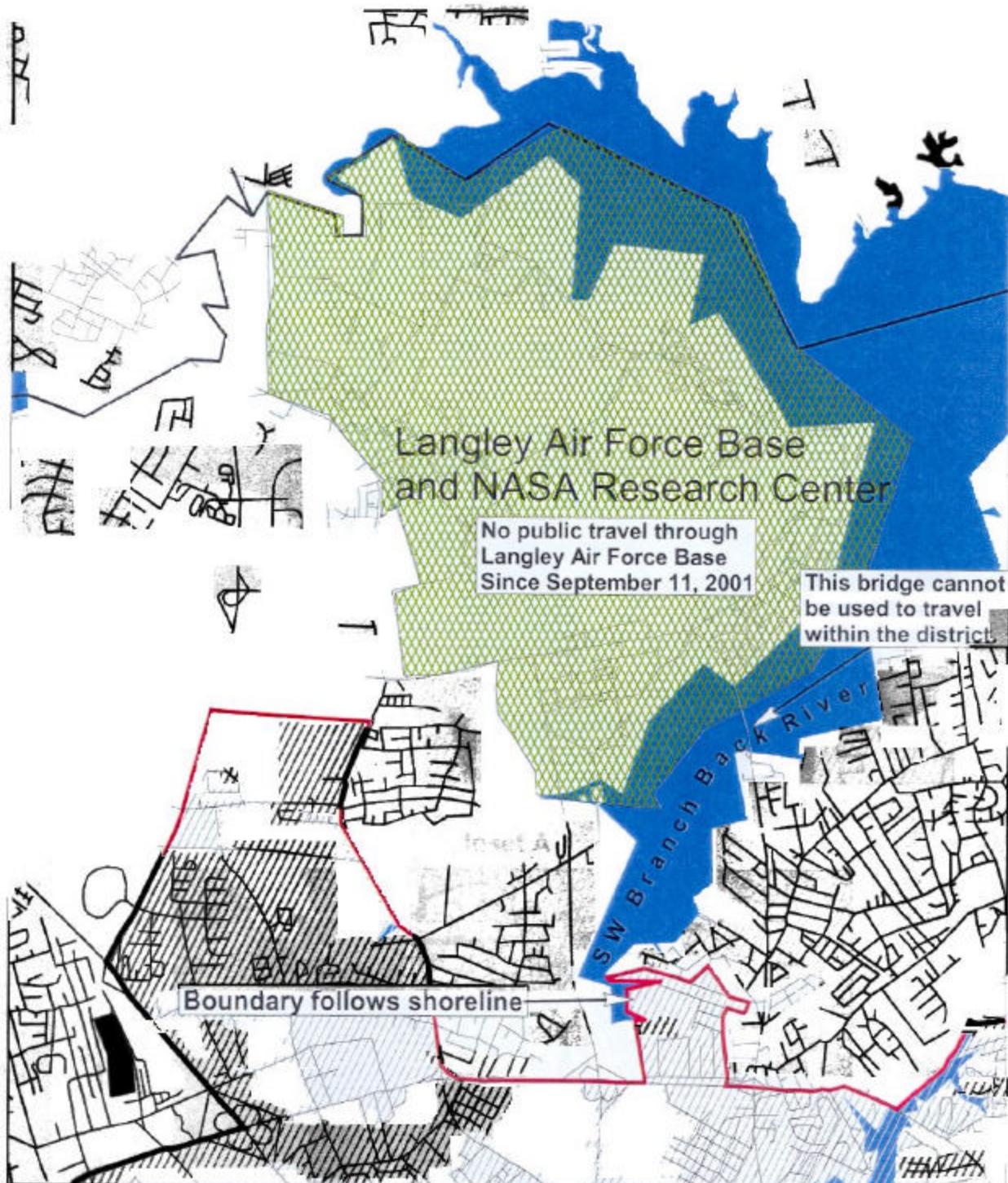
PROPOSED MILLER PLAN -- SENATE DISTRICT 1

Showing Lack of Road Travel over Water and Through Langley AFB

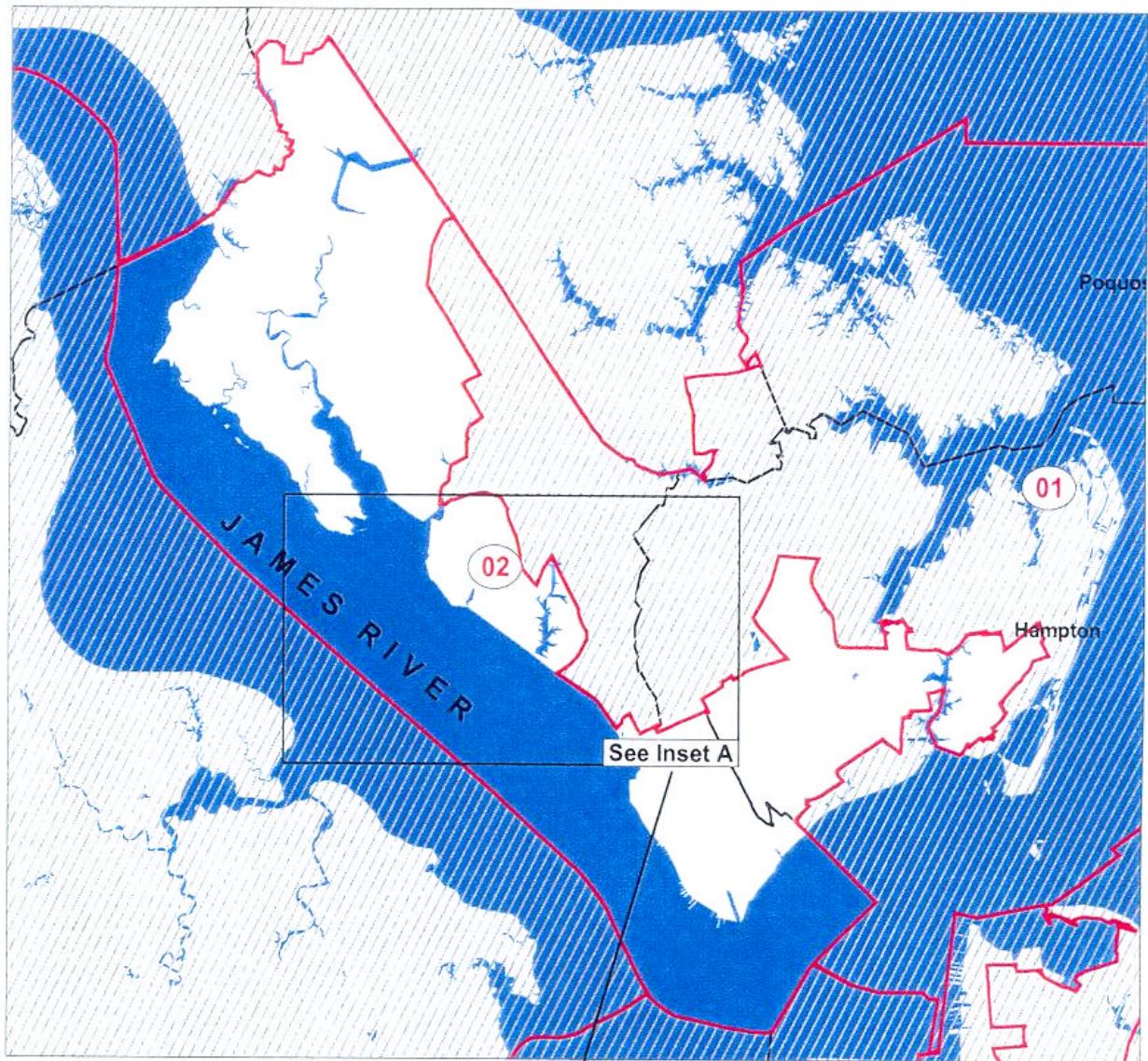


MAP 1A PROPOSED MILLER PLAN -- SENATE DISTRICT 1

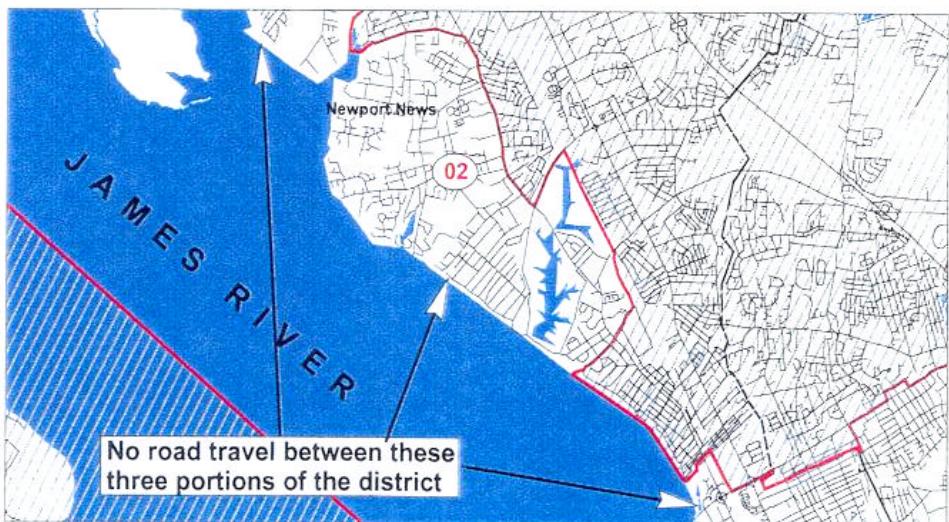
Showing Lack of Road Travel over Water and Through Langley AFB



MAP 2
PROPOSED MILLER PLAN -- SENATE DISTRICT 2
Showing Lack of Road Travel over Water



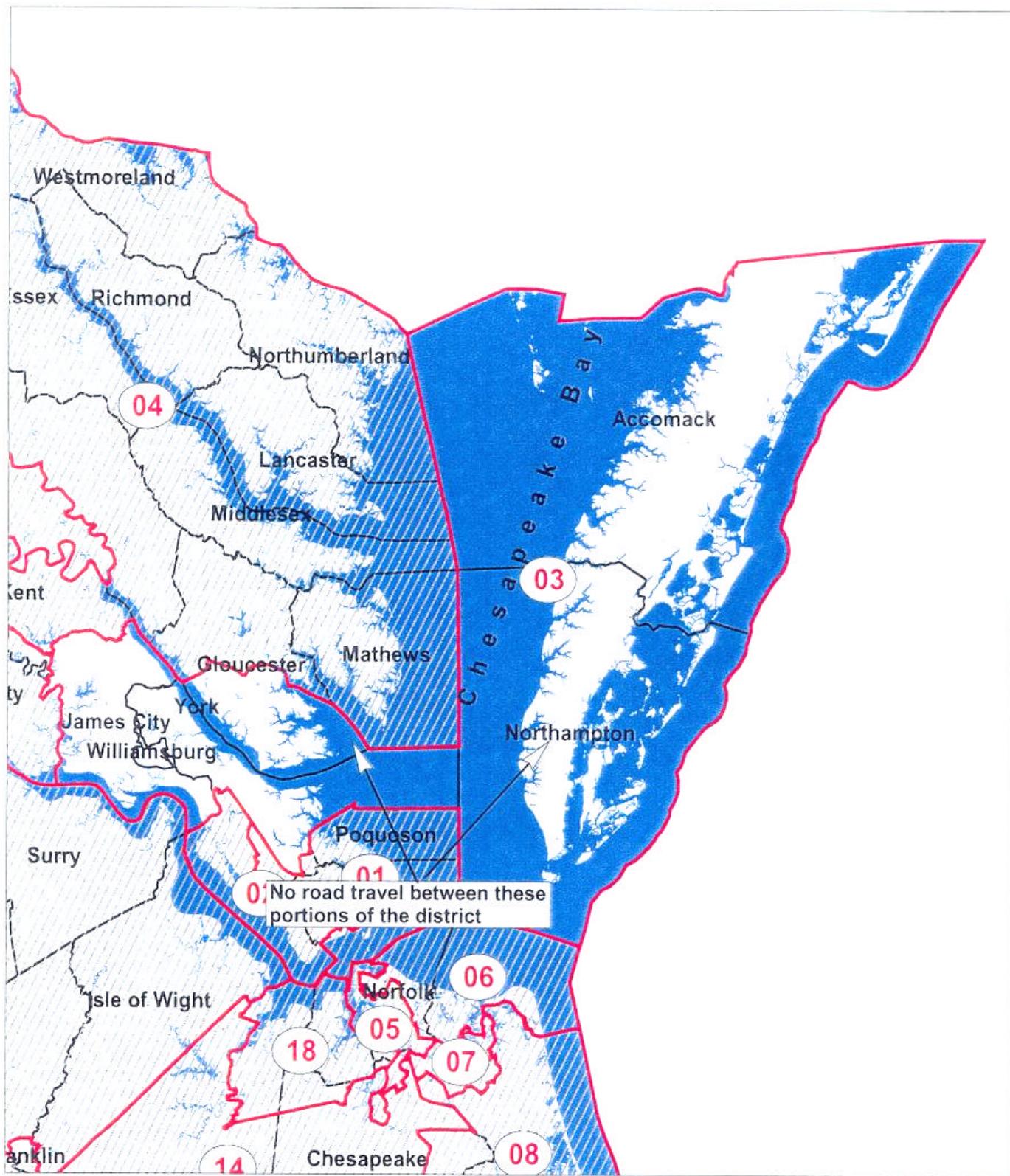
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MAP 3

PROPOSED MILLER PLAN -- SENATE DISTRICT 3

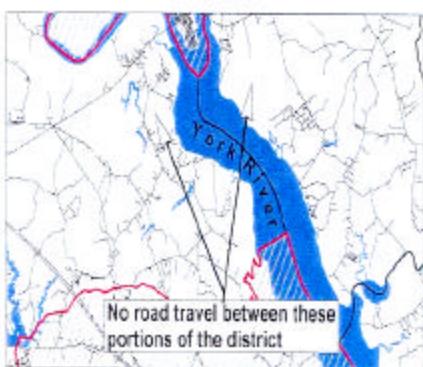
Showing Lack of Road Travel over Water



MAP 4
PROPOSED MILLER PLAN -- SENATE DISTRICT 4
Showing Lack of Road Travel over Water



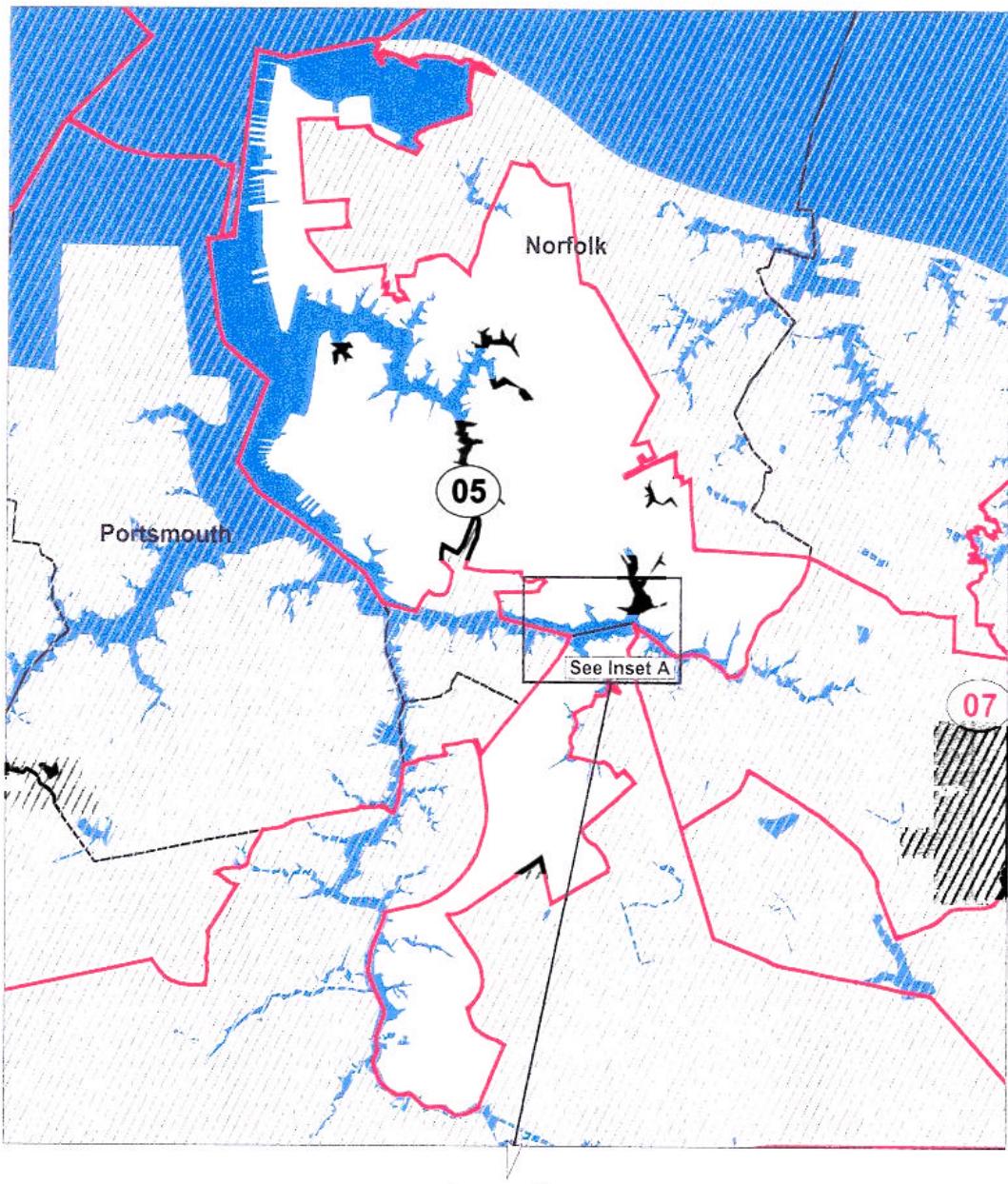
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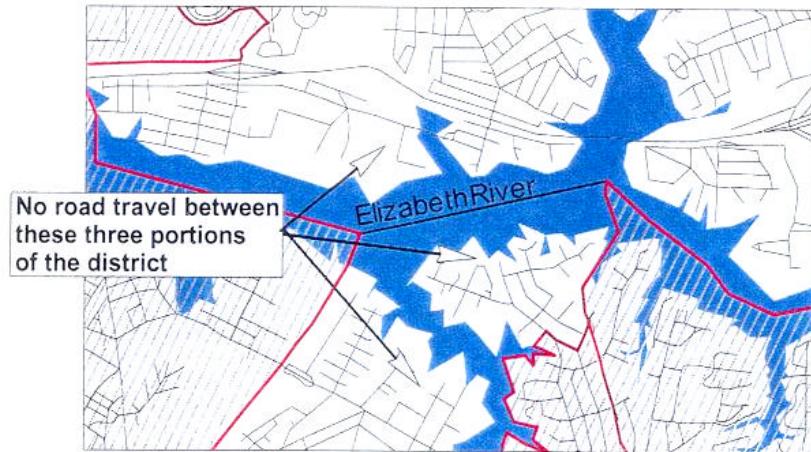
MAP 5

PROPOSED MILLER PLAN -- SENATE DISTRICT 5

Showing Lack of Road Travel over Water

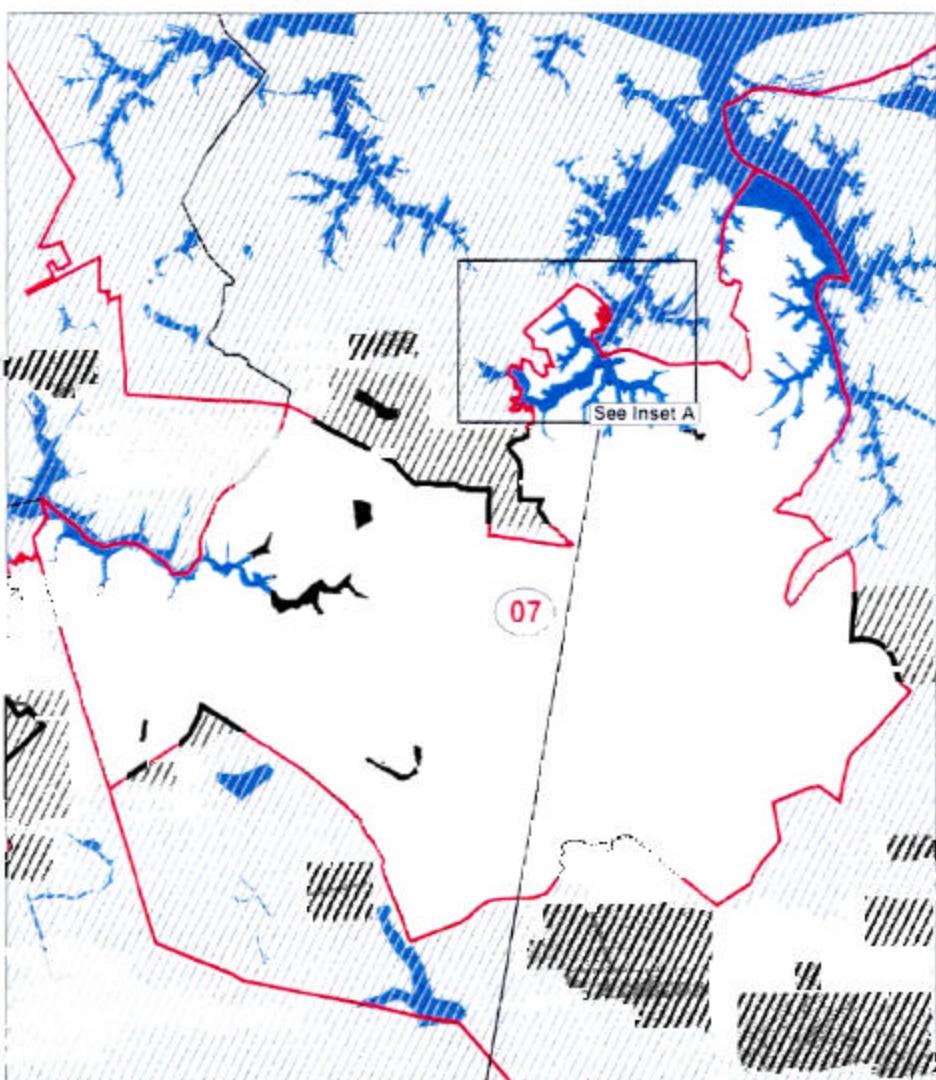


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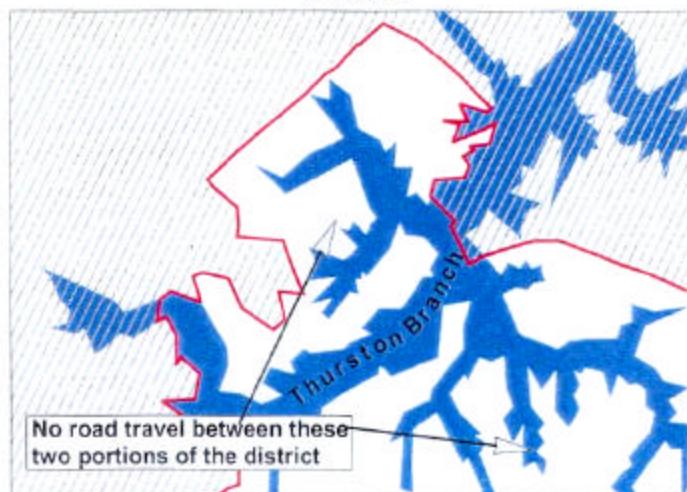


MAP 6
PROPOSED MILLER PLAN -- SENATE DISTRICT 7

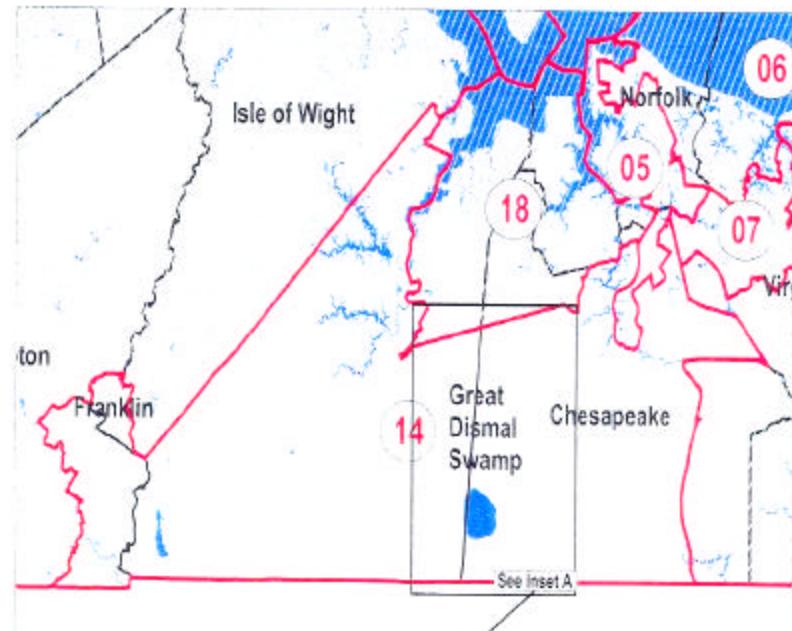
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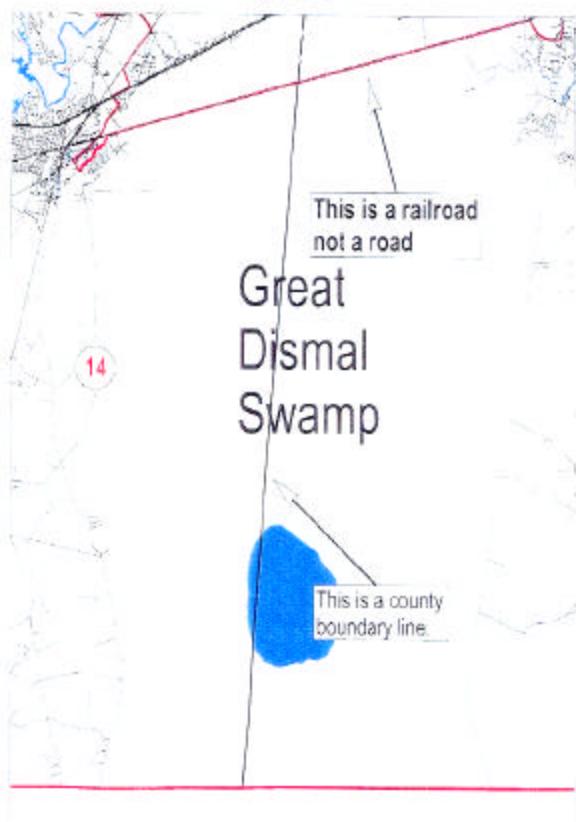
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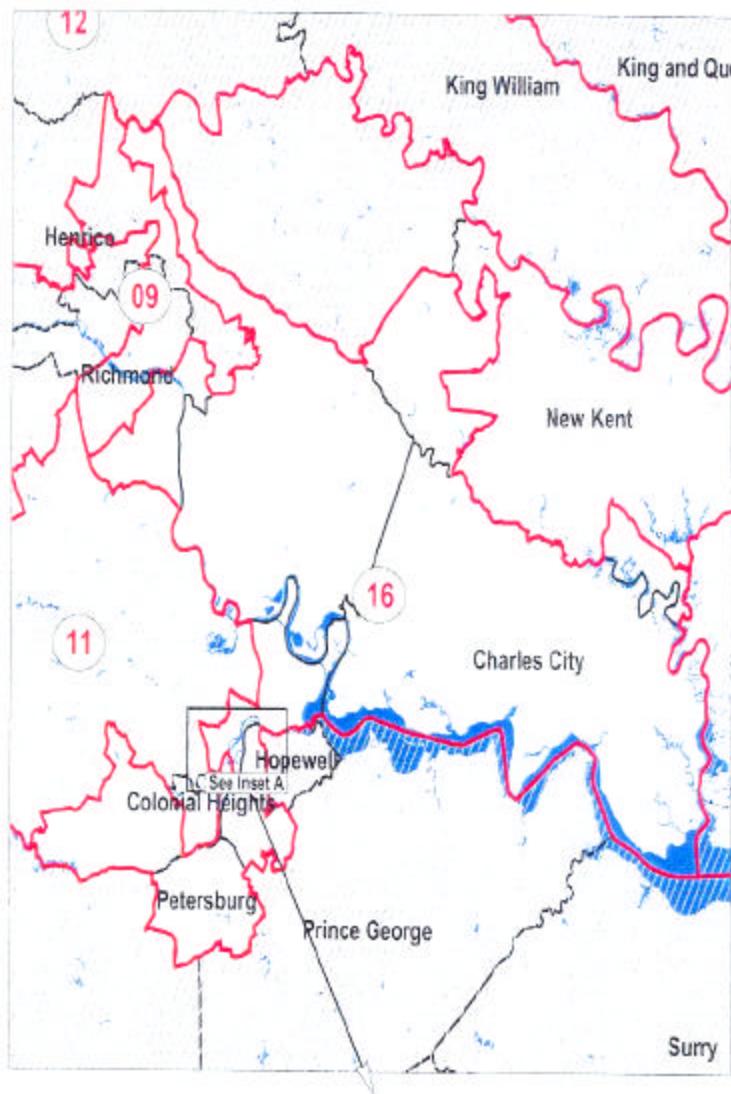
MAP 7
PROPOSED MILLER PLAN -- SENATE DISTRICT 14
Showing Lack of Road Travel over Water



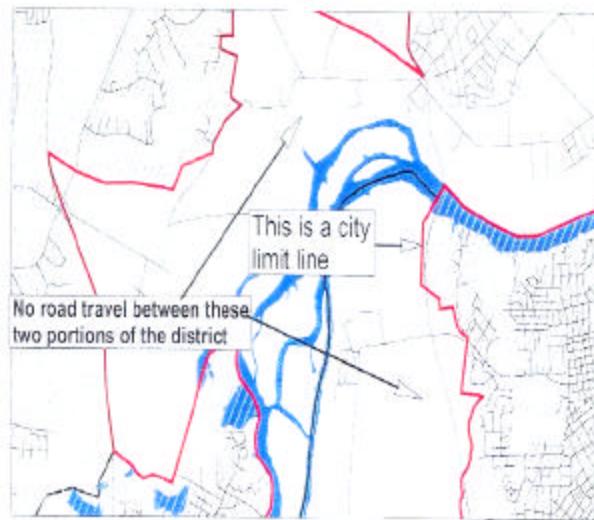
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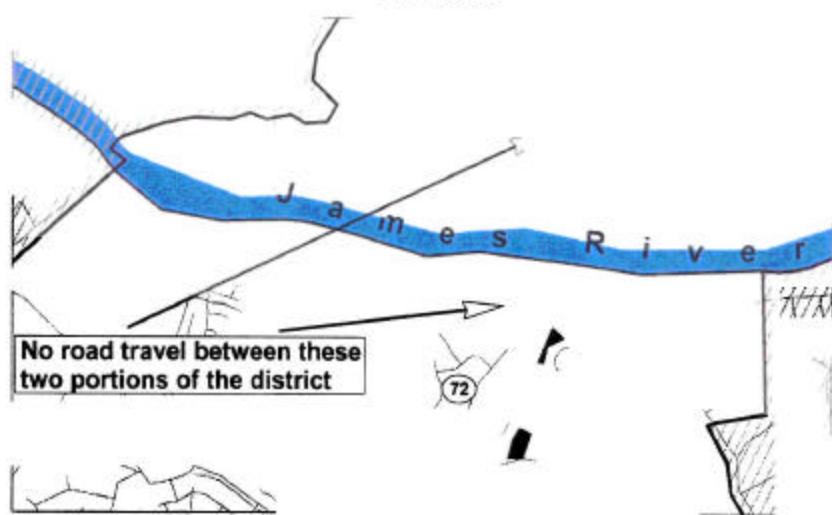
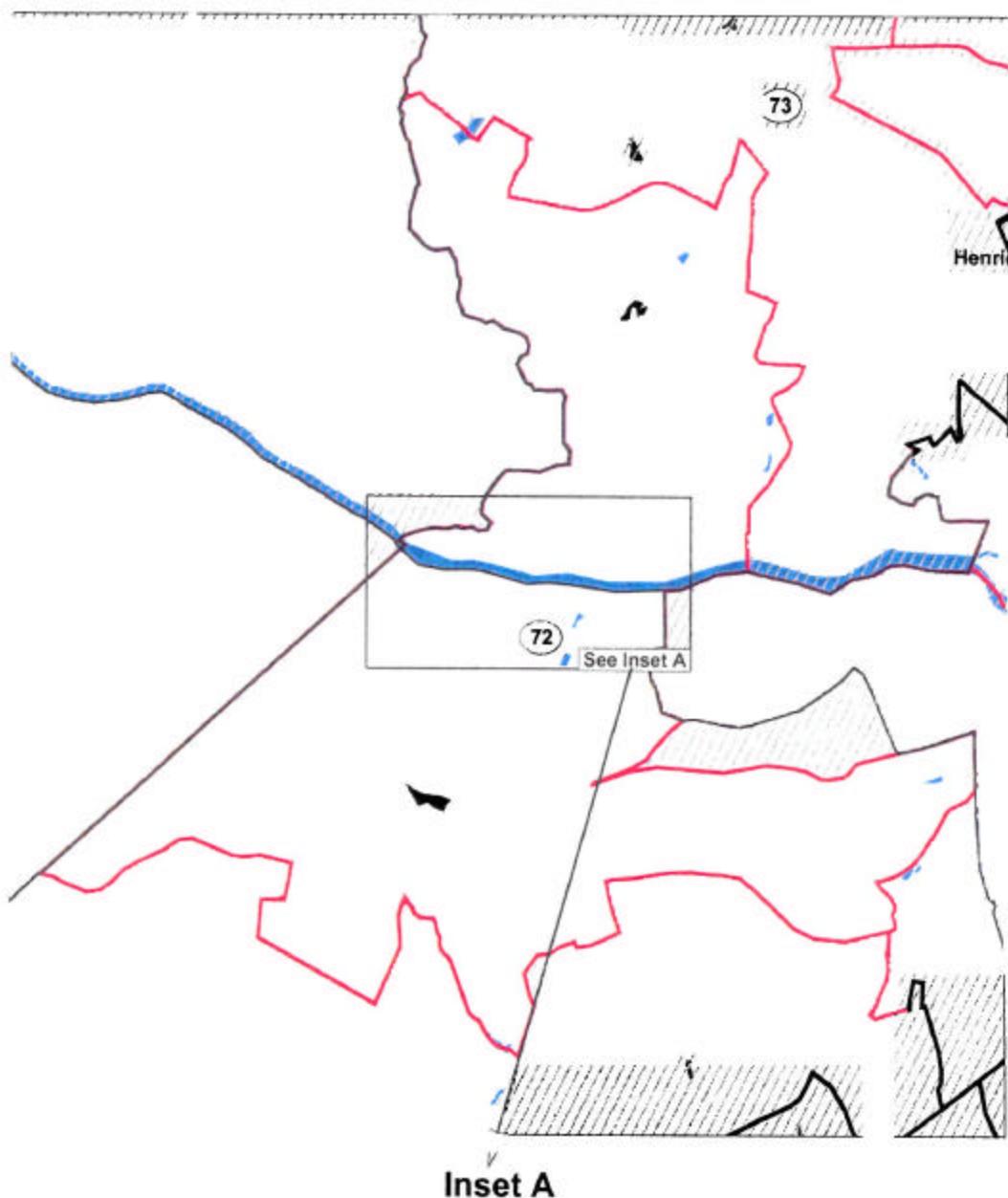
MAP 8
PROPOSED MILLER PLAN -- SENATE DISTRICT 16
Showing Lack of Road Travel over Water



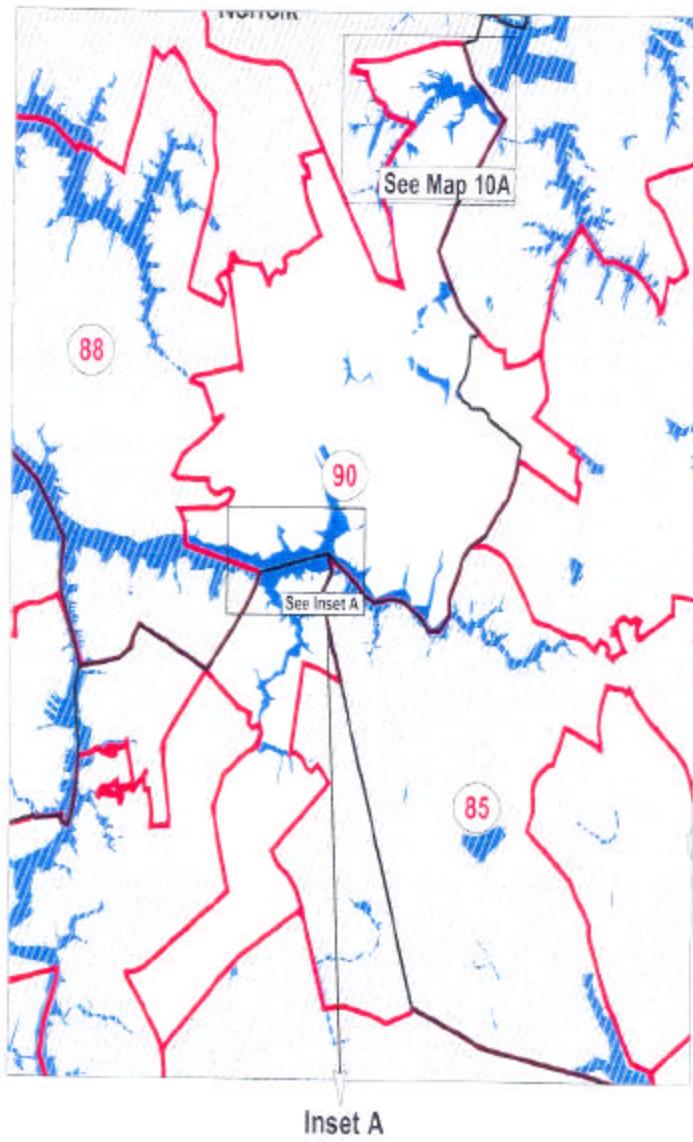
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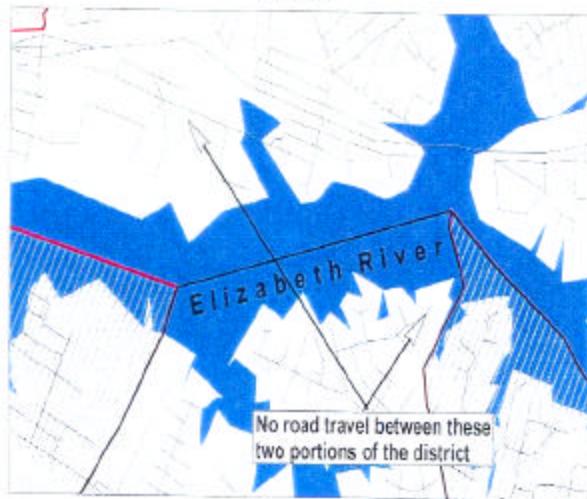
MAP 9
PROPOSED ROBINSON PLAN -- DELEGATE DISTRICT 72
Showing Lack of Road Travel over Water



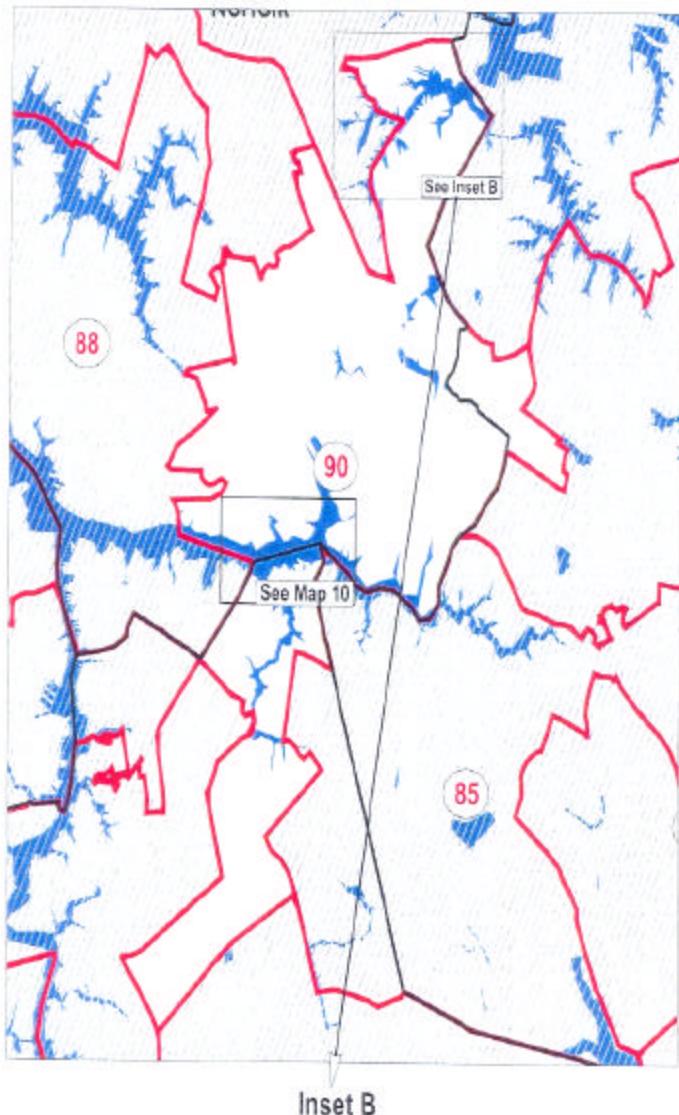
MAP 10
PROPOSED ROBINSON PLAN -- DELEGATE DISTRICT 90
Showing Lack of Road Travel over Water



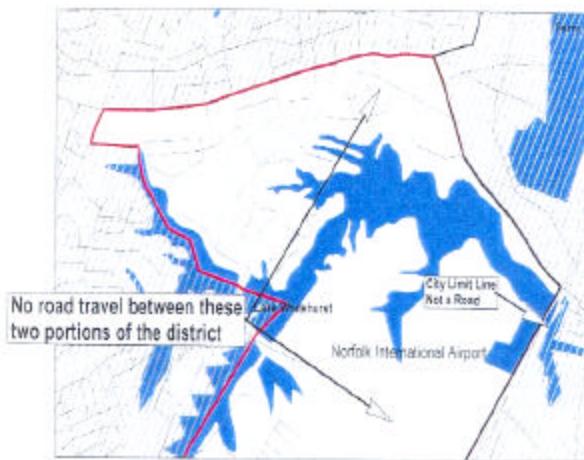
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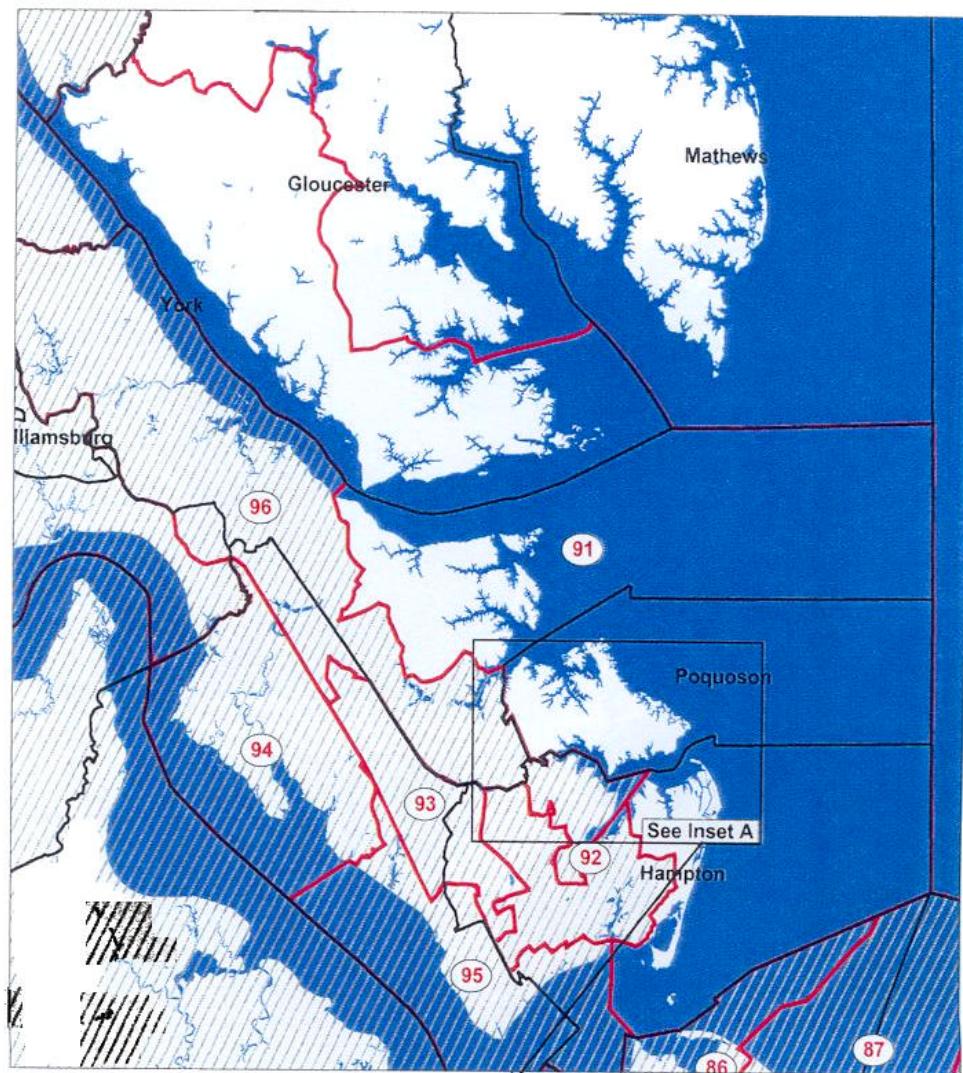
MAP 10A
PROPOSED ROBINSON PLAN -- DELEGATE DISTRICT 90
Showing Lack of Road Travel over Water



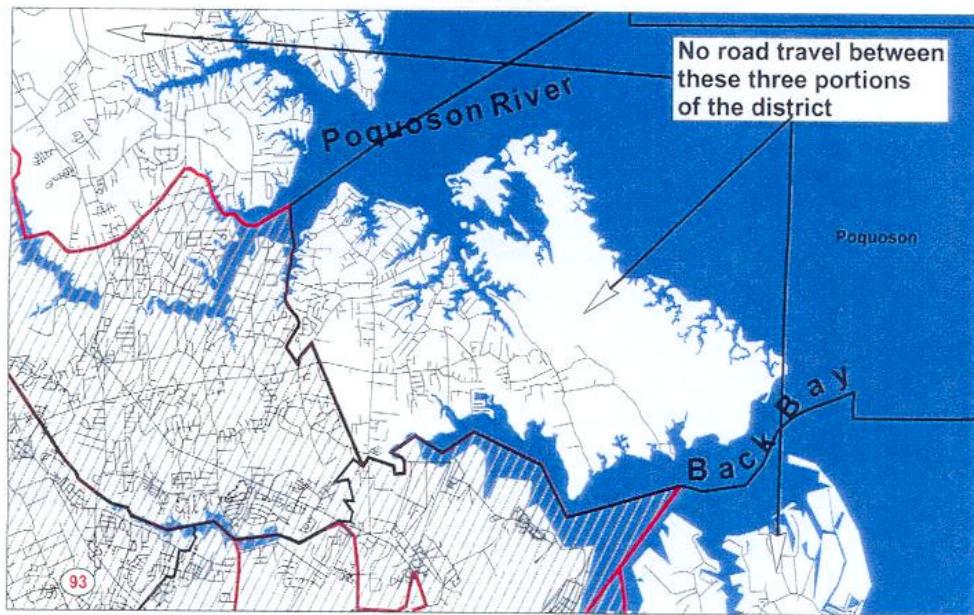
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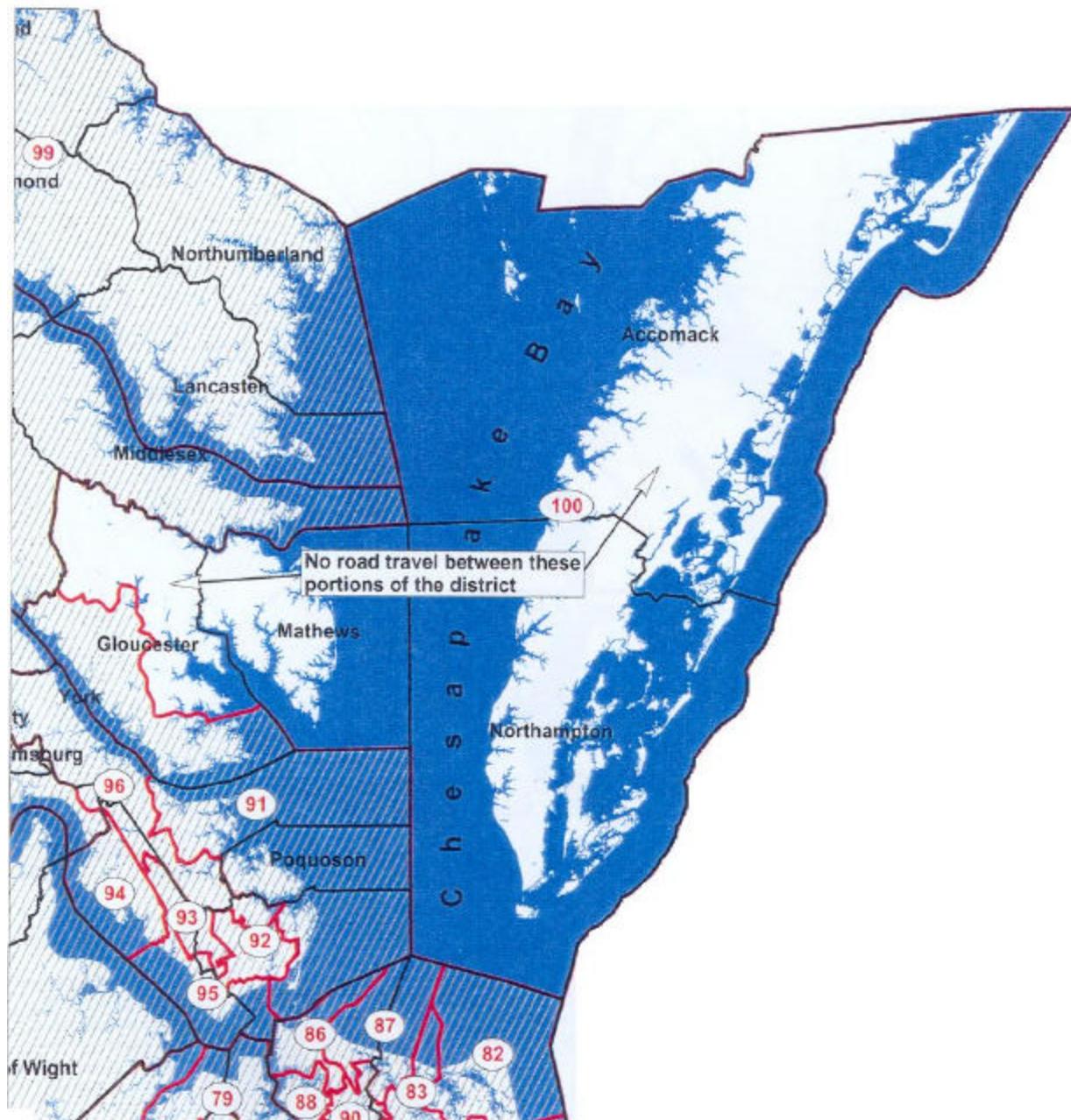
MAP 11
PROPOSED ROBINSON PLAN -- DELEGATE DISTRICT 91
Showing Lack of Road Travel over Water



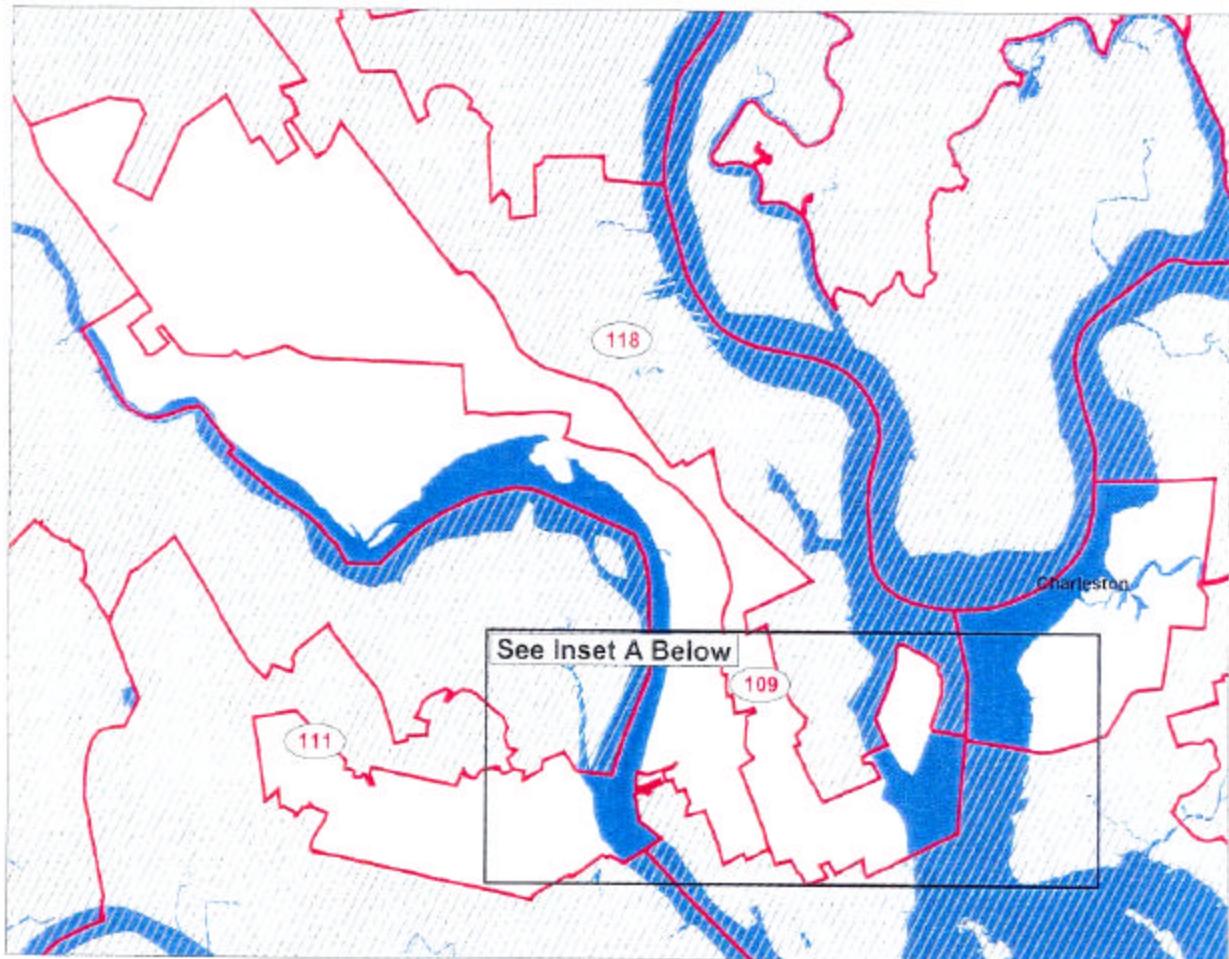
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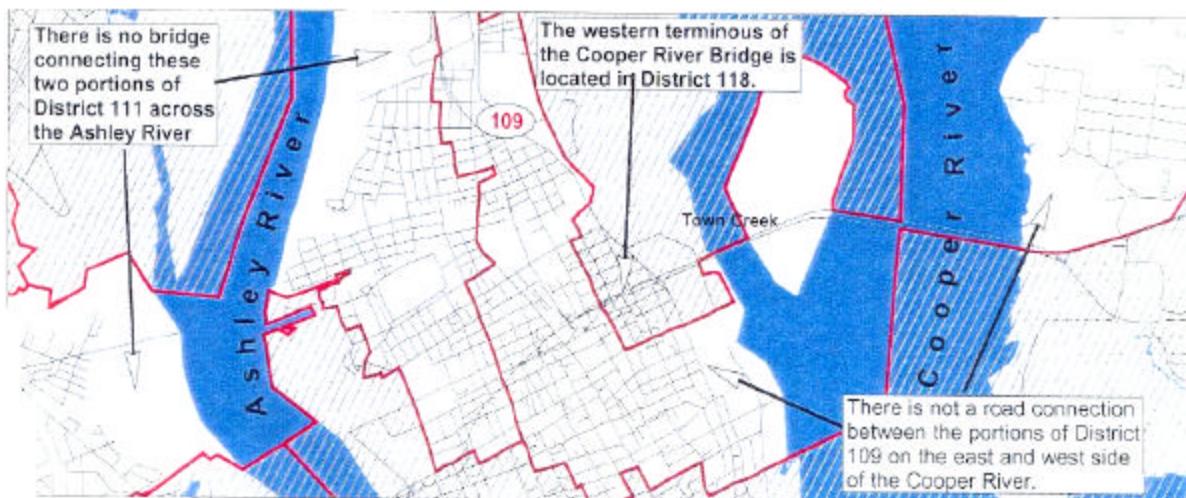
MAP 12
PROPOSED ROBINSON PLAN -- DELEGATE DISTRICT 100
Showing Lack of Road Travel over Water



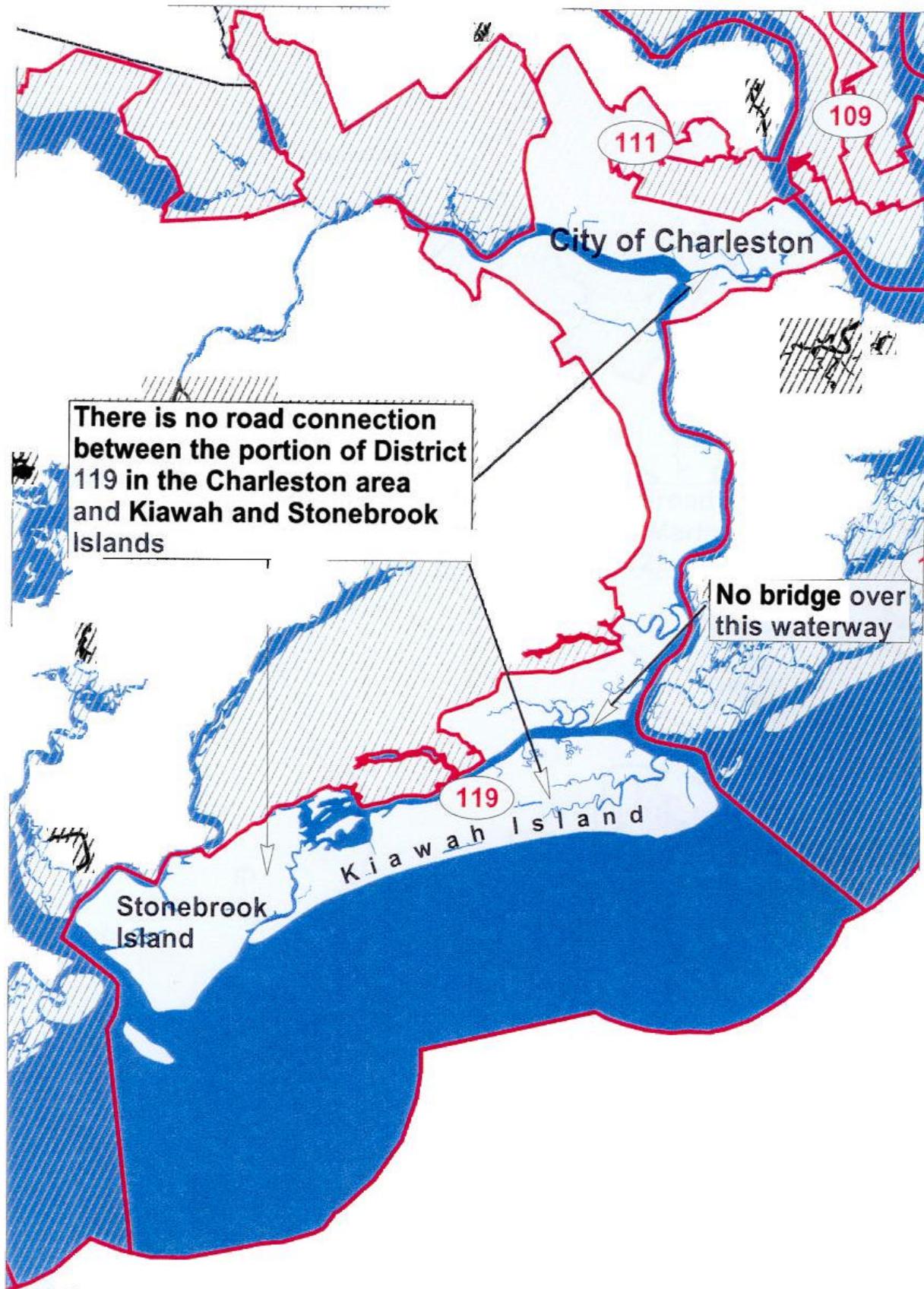
MAP 13
STATE OF SOUTH CAROLINA
Able v. Beasley - Court Approved Plan
STATE HOUSE DISTRICTS 109 & 111
Showing Lack of Road Travel over Water



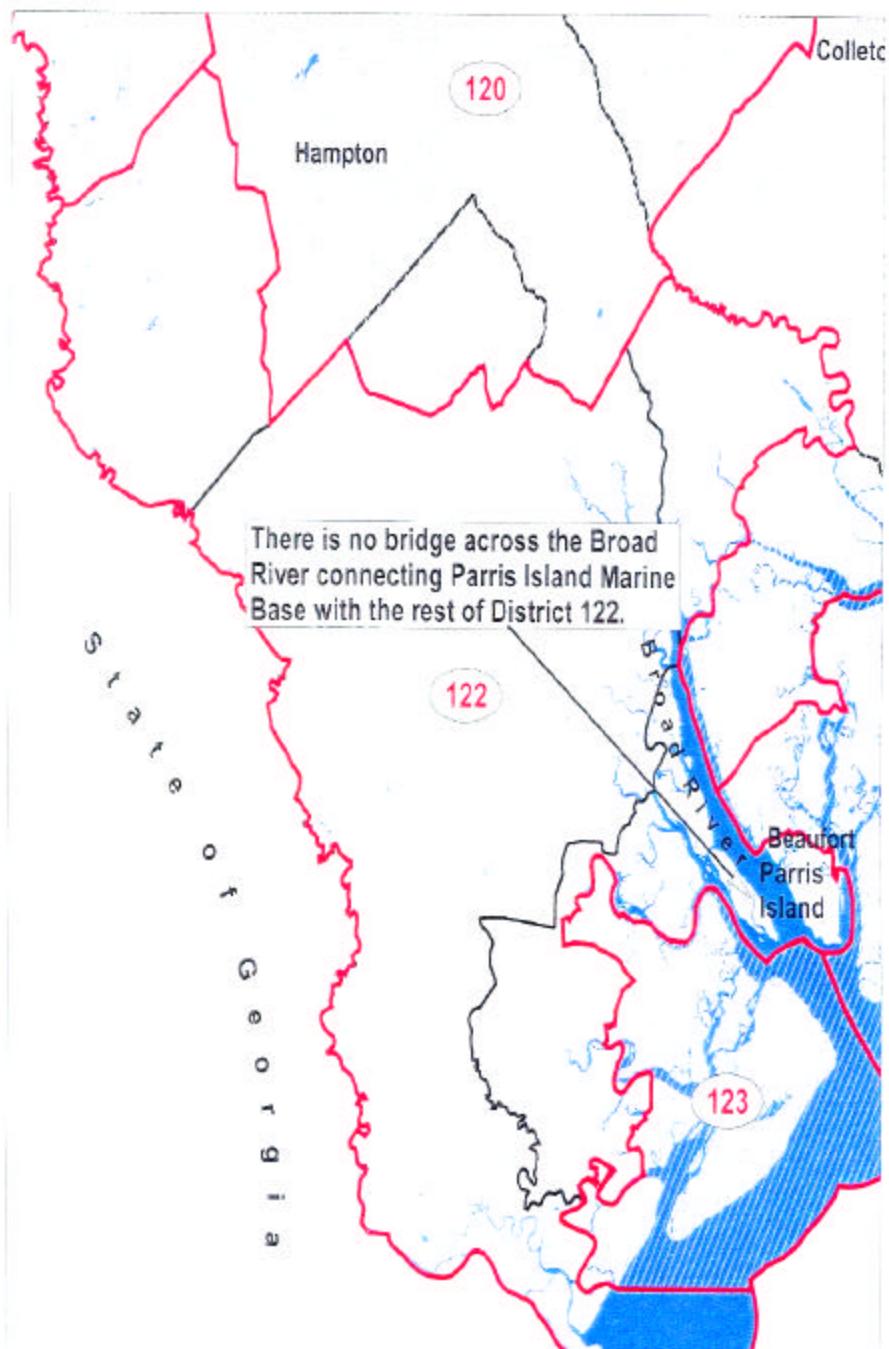
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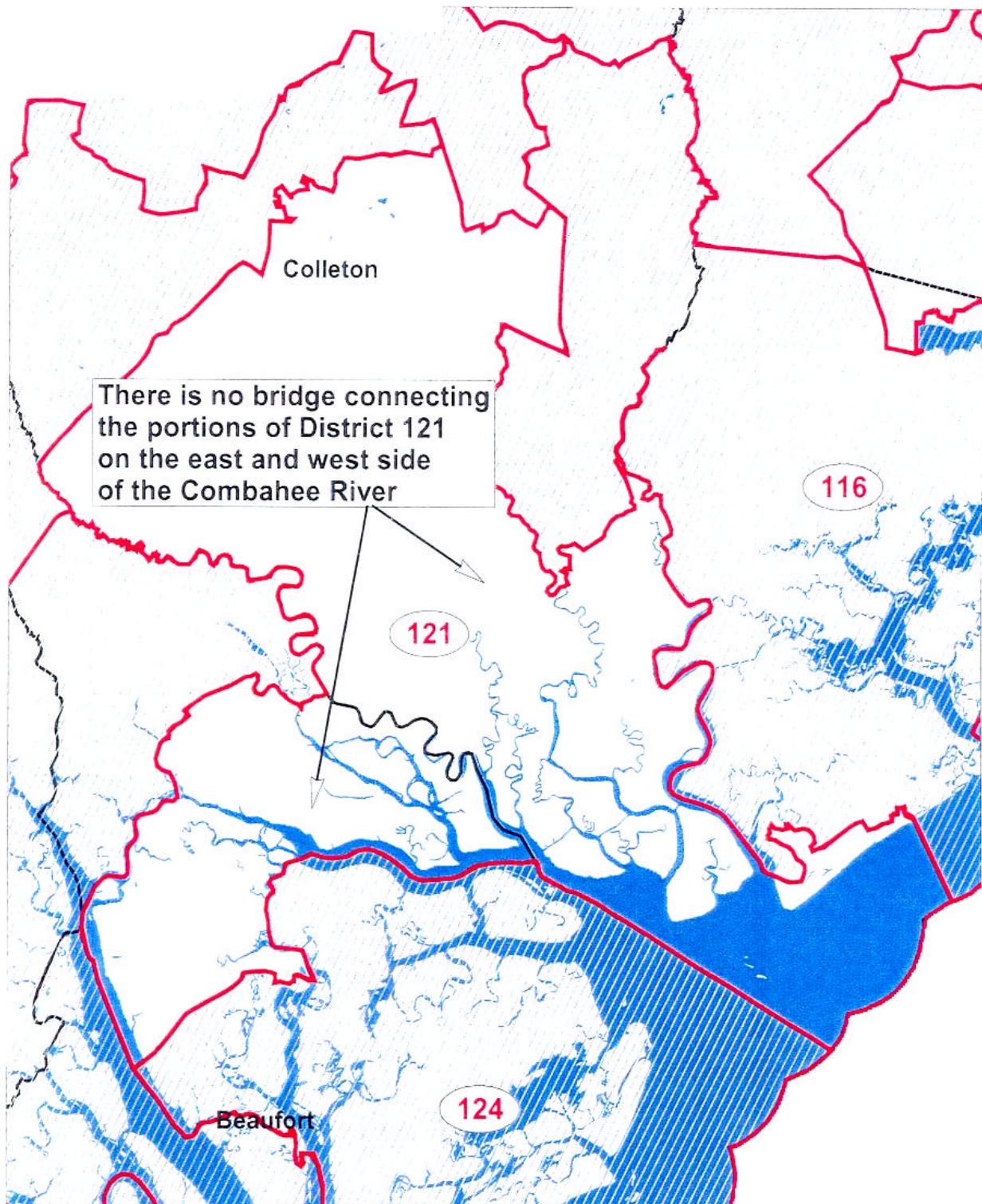
MAP 14
STATE OF SOUTH CAROLINA
Able v. Beasley - Court Approved Plan
STATE HOUSE DISTRICT 119
Showing Lack of Road Travel over Water



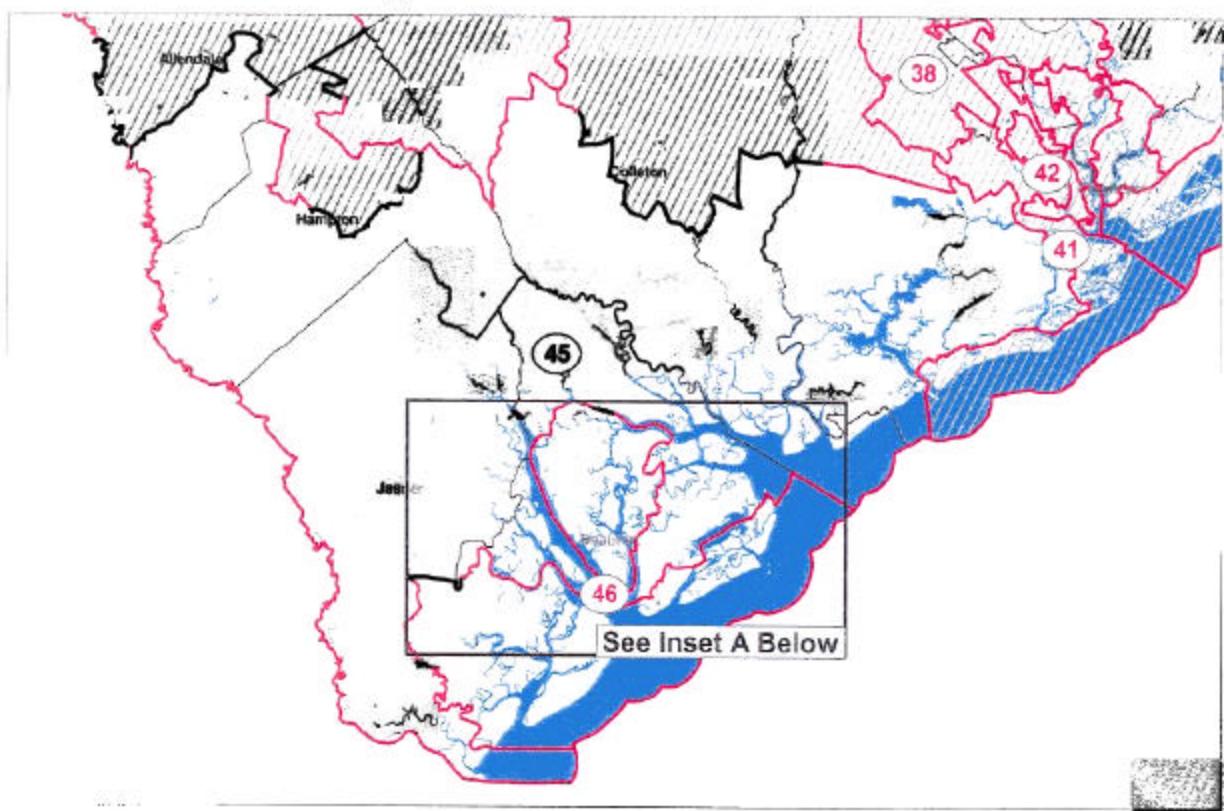
MAP 15
STATE OF SOUTH CAROLINA
Able v. Beasley - Court Approved Plan
STATE HOUSE DISTRICT 122
Showing Lack of Road Travel over Water



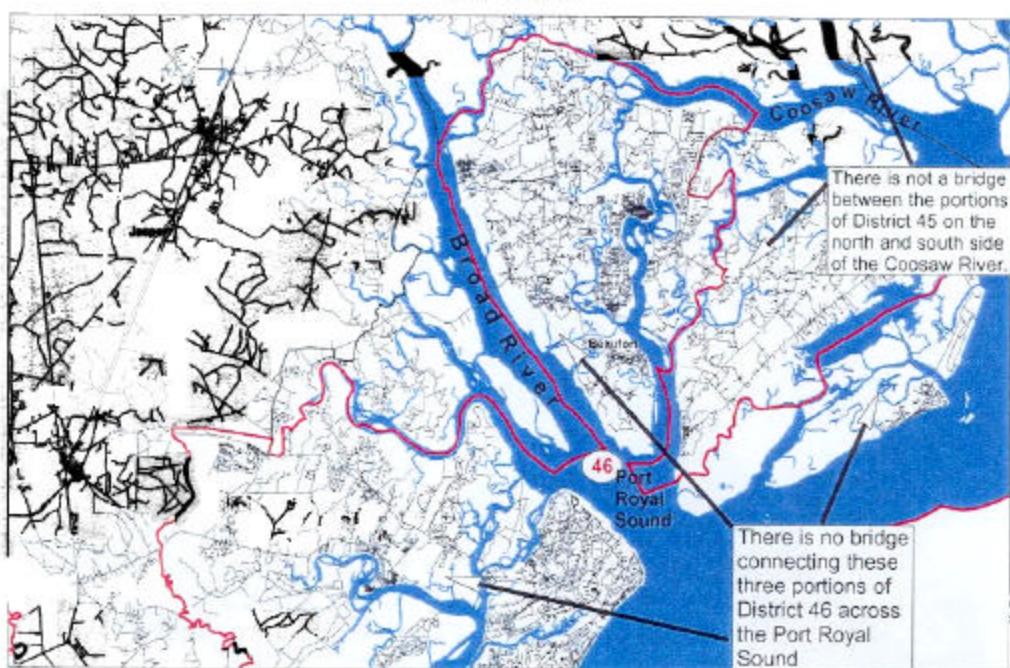
MAP 16
STATE OF SOUTH CAROLINA
Able v. Beasley - Court Approved Plan
STATE HOUSE DISTRICT 121
Showing Lack of Road Travel over Water



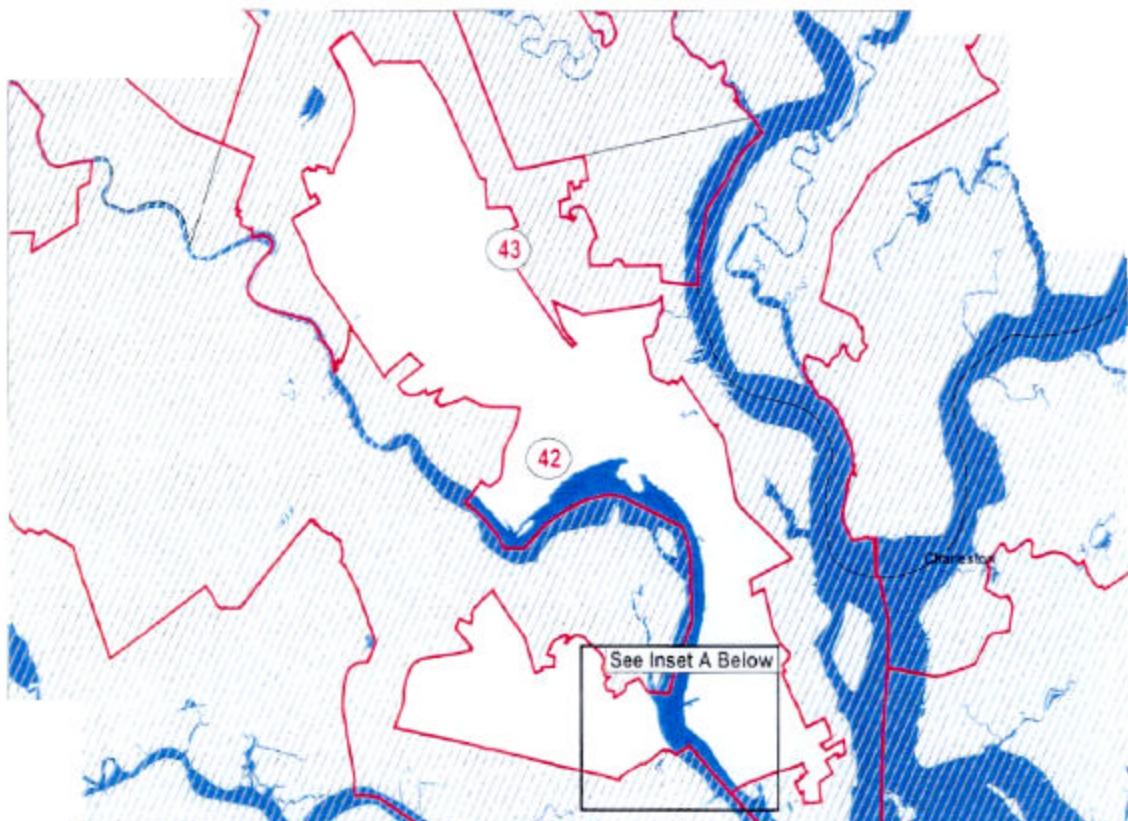
MAP 17
STATE OF SOUTH CAROLINA
Able v. Beasley - Court Approved Plan
STATE SENATE DISTRICTS 45 & 46
Showing Lack of Road Travel over Water



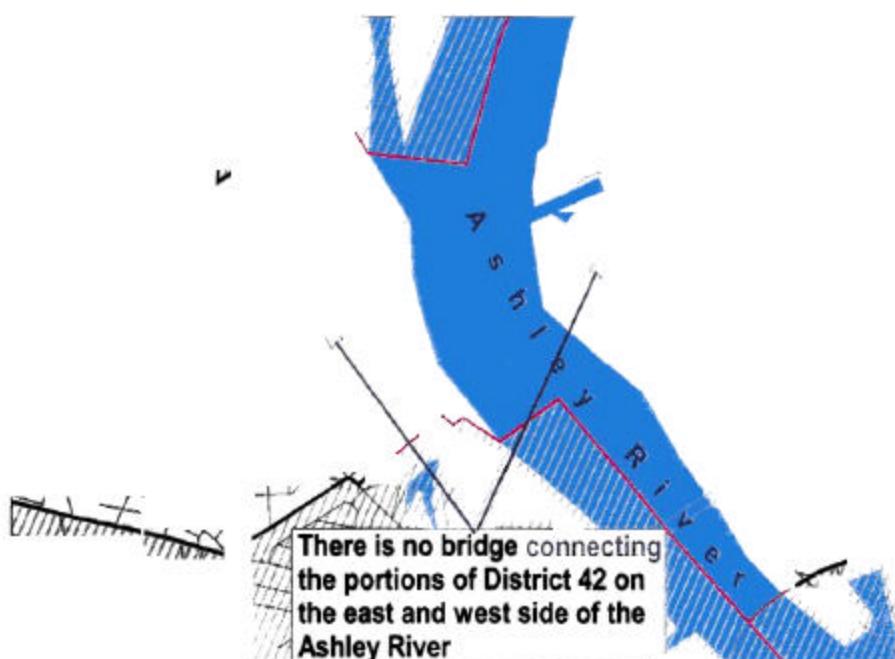
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MAP 18
STATE OF SOUTH CAROLINA
Able v. Beasley - Court Approved Plan
STATE SENATE DISTRICT 42
Showing Lack of Road Travel over Water



Inset A



MAP 19
STATE OF SOUTH CAROLINA
Able v. Beasley - Court Approved Plan
STATE SENATE DISTRICT 41
Showing Lack of Road Travel over Water

