November 15, 2010

Mr. James Foster
1941 O'Malley Rd.
Anchorage, AK 99507

Re: Native Allotment No. AA-7791; GCI Alaska United-Northwest cable

Dear Mr. Foster:

This letter, in addition to last Tuesday's e-mail, is in response to your November 8th packet of information. As I said in the e-mail, it is certainly true that your allotment has been the subject of a great deal of past litigation. Much of this litigation history is discussed in an Appendix to a U.S. Government Accountability Office report, GAO-04-923, at pages 55-58. I've attached a copy for your convenience.[1] I must caution you against interpreting the litigation history of *Alaska v. Babbitt (Foster)*, 75 F.3d 449 (9th Cir. 1995), *cert. denied* 519 U.S. 818 (1996), without the aid of an attorney experienced in this area of the law. There were no title issues settled by this litigation. The Ninth Circuit Court of Appeals decision held that the court did not have jurisdiction to consider title issues in the case and the U.S. Supreme Court did not, in fact, review this decision. The effect is that the underlying title issues will only be ruled upon and resolved at such time as the Federal government and you waive sovereign immunity and allow the competing claims to be subjected to full review. This has not been done, and as explained below, the likely outcome if it were done, holds a significant risk involving your allotment rights.

To the extent that at the time of earlier decisions, including the 1995 *Foster* decision, there may have been some ambiguity regarding an allottee's rights, this ambiguity was explicitly clarified in the later *Bryant* and *Norton* decisions.[2] These decisions leave no doubt that an allotment is void where it claims land that had already been appropriated for a material site when use and occupancy began after the date of the material site grant. I made reference to these decisions in my last letter to you and they are discussed further on pages 57-58 of the GAO Report. I know that you disagree, but these decisions bind me to stand by what I stated in my earlier letter. These later decisions mean that GCI has not trespassed on your land and that once there is a full adjudication on the merits, you will likely have no viable claim to an interest in the land covered by the 1961 material site grant. The State of Alaska DOT was therefore fully within its rights to grant a permit to GCI for the authorized use of this particular DOT right-of-way grant. Even if there were an issue related to GCI's permit, this would only be a matter of concern for

[1] The report is also available on the web at: http://www.gao.gov/new.items/d04923.pdf ; *See also*, GAO Testimony, GAO-06-1107T, at: http://www.gao.gov/new.items/d061107t.pdf .
[2] *Alaska v. Babbitt (Bryant)*, 182 F3d 676 (9th Cir. 1999); *Alaska v. Norton*, 168 F. Supp. 2d 1102 (D.Alaska 2001).

concern for the owner of the underlying interest, the Federal government, and not you. While I cannot and do not presume to give you legal advice, I believe you should seek to fully understand the risks of any action against GCI or the State that would subject your allotment to the result suffered by Mr. Bryant; that of having your having your claim to the entire material site acreage voided.

Nevertheless, I can still see an opportunity for settlement. I certainly have no authority to speak for the State DOT, however, my observation (which could be wrong) is that much of the 1961 material site grant is not being used, or going to be used. Therefore, it seems that DOT may be willing to relinquish some or all of this material site (except for an existing Parks Highway right-of-way) in exchange for a final resolution and settlement of your claims. Accordingly, it may be in your interest to raise the topic of settlement with DOT. It certainly couldn't hurt to ask. Of course, the BLM would have to agree to clear title to you for any acreage relinquished by DOT, and the BIA would likely have to agree to the settlement. But a settlement would remove the clouds over the current state of the title to parts of the allotment acreage you claim, and has the potential to result in your ownership of, and clear title in, considerably more acreage than you now have. I can't predict what the exact settlement would be, but it seems that a settlement would be in both your interest and in the interest of DOT. Of course, GCI's interests are aligned with the State's, and are entirely encompassed within the existing Parks Highway acreage. I would therefore encourage you to consider a dialogue with DOT, possibly with the assistance of the BLM and BIA.

After reviewing the history of uncertainties and litigation over your allotment, I can appreciate your frustration. To capitalize on the time I have taken to reconstruct the legal history and status of the property, I would be willing to discuss the situation with any parties to the extent it could help facilitate a satisfactory resolution to the overall issues. To that end, if you, the BLM/BIA, the Tanana Chiefs realty department or any representative you may chose have any further suggestions to sort out the respective rights and obligations of all parties, GCI stands ready to participate. It may be that there is a legal means to ensure the *status quo* is maintained and provide a roadmap towards a full and final resolution of title matters. I stand ready to discuss any that are suggested. Finally, as we have consistently stated, GCI stands ready to address such issues promptly and pay any proper compensation that a final resolution should call for.

Sincerely,

Mark R. Moderow
VP, State, Regulatory Affairs, and Corporate Counsel

Encl.