



*Via Electronic and Certified Mail*

December 22, 2021

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**RE: Sixty-Day Notice of Intent to Sue Over Violations of Sections 7 and 9 of the Endangered Species Act Related to 88 Energy's Peregrine Exploration Program**

Dear Secretary Haaland, Director Stone-Manning, and Acting State Director Heinlein:

Pursuant to 16 U.S.C. § 1540(g), this letter serves as the Center for Biological Diversity's 60-day notice of intent to sue the U.S. Department of the Interior and the Bureau of Land Management (BLM) over violations of the Endangered Species Act (ESA).<sup>1</sup> Specifically, BLM is in violation of section 7 of the ESA because it is failing to ensure that its authorization and management of activities at 88 Energy's massive Peregrine Exploration Program in the National Petroleum Reserve-Alaska<sup>2</sup> is not likely to jeopardize the continued existence of the polar bear (*Ursus maritimus*) or adversely modify its critical habitat.<sup>3</sup> BLM is also in violation of section 9 of the ESA by permitting and managing these activities without the requisite incidental take authorizations, thereby causing an unauthorized take of an ESA-listed species.

The best way to remedy these violations would be to order an immediate suspension of operations at 88 Energy's Peregrine Exploration Program and reject the company's application

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<sup>1</sup> 16 U.S.C. § 1531, *et seq.*

<sup>2</sup> 88 Energy is the parent company of Emerald House.

<sup>3</sup> 16 U.S.C. § 1536.

for a permit to drill.<sup>4</sup> Continued oil and gas exploration and development is fundamentally incompatible with polar bear survival and recovery.

An overwhelming body of scientific literature confirms that the threats from Arctic climate change and resulting sea ice loss are worsening as global greenhouse gas emissions continue unabated. Indeed, range-wide studies project that most of the world’s polar bear subpopulations, including the Southern Beaufort Sea population, will go extinct within this century—and as early as mid-century—absent immediate, aggressive reductions in greenhouse gas pollution. Continued oil and gas activity not only exacerbates the climate crisis, it increases other harms to polar bears through oil spills, physical obstructions, den destruction, and disturbance from noise pollution, among other detrimental impacts.

At the very least, before allowing any additional activity under the Peregrine Exploration Plan to occur, BLM must engage in formal ESA consultation with the U.S. Fish and Wildlife Service (Service) to carefully analyze the impacts of such activities on polar bears and must ensure that the proper take authorizations are in place. Failure to do so would constitute a gross dereliction of the agency’s legal obligations and deprive polar bears of vitally important protections.

This letter is provided pursuant to the 60-day notice requirement of the ESA, to the extent such notice is deemed necessary by a court.<sup>5</sup> If BLM does not take action within 60 days to remedy its violations, the Center will pursue litigation. However, we urge BLM to contact us immediately to discuss options for avoiding litigation.

## LEGAL AND FACTUAL BACKGROUND

### I. The Endangered Species Act

In enacting the ESA, Congress recognized that certain species “have been so depleted in numbers that they are in danger of or threatened with extinction.”<sup>6</sup> Accordingly, a primary purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such . . . species.”<sup>7</sup>

To reach these goals, section 9 of the ESA prohibits any person, including any federal agency, from “taking” an endangered species without proper authorization through a valid incidental take permit.<sup>8</sup> The Service has extended this take prohibition through regulations to threatened species, including the polar bear.<sup>9</sup>

The ESA broadly defines the term “take” to mean “to harass, harm, pursue, hunt, shoot, wound,

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<sup>4</sup> BLM, 30 Day Federal Public Posting (December 8, 2021) (showing APD application “received/posted” for Merlin-2 on December 4, 2021).

<sup>5</sup> See 16 U.S.C. § 1540(g).

<sup>6</sup> 16 U.S.C. § 1531(a)(2).

<sup>7</sup> *Id.* § 1531(b).

<sup>8</sup> *Id.* § 1538(a)(1)(B).

<sup>9</sup> 50 C.F.R. §§ 17.31(a), 17.40(q)(1)–(2).

kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>10</sup> The Service has broadly defined “harm” by regulation to mean “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>11</sup> Courts have repeatedly found federal agencies liable for take of listed species where agency-authorized activities resulted in the take of ESA-listed species.<sup>12</sup>

Additionally, section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [its federally designated critical] habitat.”<sup>13</sup> To comply with this mandate, federal agencies must consult with the delegated agency of the Secretary of Commerce or Secretary of the Interior whenever their actions “may affect” a listed species or designated critical habitat and utilize the “best scientific and commercial data available” in doing so.<sup>14</sup> Where, as here, the agency action may affect polar bears and their critical habitat, BLM must consult with the Service. At the completion of formal consultation, the Service issues a biological opinion that determines whether the action is likely to jeopardize the continued existence of the species. If so, the opinion must specify reasonable and prudent alternatives that would avoid the likelihood of jeopardy and allow the action to proceed.<sup>15</sup>

A likelihood of jeopardy is found when “an action [ ] reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”<sup>16</sup> A jeopardy analysis requires the agency to consider the aggregate effects of past and ongoing human activities that affect the current status of the species and its habitat (“environmental baseline”); the indirect and direct effects of the proposed action, including the effects of interrelated and interdependent activities (“effects of the action”); and the effects of future state and private activities that are reasonably certain to occur (“cumulative effects”).<sup>17</sup> The Service must consider all of these factors in context of the current status of the species and its habitat.<sup>18</sup> Only where the Service concludes that all of these elements added together do not threaten a species’ survival and recovery can the agency issue a no-jeopardy opinion.<sup>19</sup>

If jeopardy is found, the opinion may specify reasonable and prudent alternatives (RPAs) that

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<sup>10</sup> *Id.* § 1532(19).

<sup>11</sup> 50 C.F.R. § 17.3; *see also Babbitt v. Sweet Home Ch. of Communities for a Great Oregon*, 515 U.S. 687 (1995) (upholding regulatory definition of harm).

<sup>12</sup> *See e.g., Defenders of Wildlife v. Env'tl. Prot. Agency*, 882 F.2d 1294, 1300–01 (8th Cir. 1989); *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997).

<sup>13</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

<sup>14</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

<sup>15</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>16</sup> 50 C.F.R. § 402.02.

<sup>17</sup> *Id.* §§ 402.14(h), 402.02.

<sup>18</sup> *Id.*

<sup>19</sup> *See Pac. Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Rec.*, 426 F.3d 1082, 1093 (9th Cir. 2005) (the proper “analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency’s proposed actions in the present and future human and natural contexts”).

avoid jeopardy.<sup>20</sup> If the Service concludes that the action or the RPAs will not cause jeopardy, but may result in the take of protected species, the Service will issue an incidental take statement (ITS) that specifies “the impact, i.e., the amount or extent, of . . . incidental taking” that may occur.<sup>21</sup> An ITS must also include “reasonable and prudent measures . . . necessary . . . to minimize such impact,<sup>22</sup> and must specify the permissible level of taking, “thus . . . serv[ing] as a check on the agency’s original decision that the incidental take of listed species resulting from the proposed action will not [jeopardize the continued existence of the species].”<sup>23</sup> In addition, when the species to be taken are marine mammals, the take must first be authorized pursuant to the Marine Mammal Protection Act (MMPA) and the ITS must include any additional measures necessary to comply with the MMPA take authorization.<sup>24</sup> For polar bears, incidental take authorized under the MMPA is exempt from the take prohibition under section 9.<sup>25</sup>

Even after the procedural requirements of a consultation are complete, the ultimate duty to ensure that an activity is not likely to cause jeopardy to a listed species lies with the action agency. An action agency’s reliance on an inadequate, incomplete, or flawed biological opinion cannot satisfy its duty to avoid the likelihood of jeopardy to listed species.<sup>26</sup>

## **II. Polar Bears Are Highly Imperiled and 88 Energy’s Exploration Program Will Harm Polar Bears Only Exacerbate the Species’ Dire Status**

BLM is well aware of the climate crisis and the role it is playing in driving the polar bear closer toward extinction. Alaska and the Arctic are on the front lines of the climate crisis, suffering rapid rates of sea ice loss and some of the most severe and rapid temperature rise on the planet.



Image: Susanne Miller, Fish and Wildlife Service

<sup>20</sup> 16 U.S.C. § 1536(b)(3).

<sup>21</sup> 50 C.F.R. § 402.14(i)(1)(i); *see also id.* § 1536(b)(4).

<sup>22</sup> 16 U.S.C. § 1536(b)(4).

<sup>23</sup> *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 911 (9th Cir. 2012).

<sup>24</sup> 16 U.S.C. § 1536(b)(4)(C). The MMPA also prohibits the “take” of marine mammals, including actions that kill the animals, as well as those that could injure them or disturb essential behaviors. *Id.* §§ 1362(13), (18), 1372(a).

<sup>25</sup> 50 C.F.R. §§ 17.31(a), 17.40(q)(1)–(2).

<sup>26</sup> *See, e.g., Florida Key Deer v. Paulison*, 522 F.3d 1133, 1145 (11th Cir. 2008) (action agency must independently ensure that its actions are not likely to cause jeopardy); *Pyramid Lake Tribe of Indians v. U.S. Dep’t of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (same).

The Arctic sea ice that polar bears depend on for survival is quickly decreasing in extent, thickness, and duration. As greenhouse gas emissions continue to rise, the Arctic is projected to be virtually ice-free in summer by 2040,<sup>27</sup> a shocking loss given that minimum summer sea ice averaged 2.64 million square miles during 1979 to 1992.<sup>28</sup> As summarized by the Fourth National Climate Assessment:

Since the early 1980s, annual average arctic sea ice has decreased in extent between 3.5% and 4.1% per decade, become thinner by between 4.3 and 7.5 feet, and began melting at least 15 more days each year. September sea ice extent has decreased between 10.7% and 15.9% per decade (*very high confidence*). Arctic-wide ice loss is expected to continue through the 21st century, *very likely* resulting in nearly sea ice-free late summers by the 2040s (*very high confidence*).<sup>29</sup>

One recent study tied each metric ton of CO<sub>2</sub> emissions to a sustained loss of three square meters of September Arctic sea ice area based on the robust linear relationship between monthly mean September sea ice area and cumulative CO<sub>2</sub> emissions.<sup>30</sup> Similar to other research,<sup>31</sup> this study concluded that limiting warming to 2°C is not sufficient to allow Arctic summer sea ice to survive, but that a rapid reduction in greenhouse gas emissions that limits global temperature rise to 1.5°C gives Arctic summer sea ice “a chance of long-term survival at least in some parts of the Arctic Ocean.”<sup>32</sup>

Rising temperatures are also causing Arctic permafrost to thaw at rapid rates, and coastal erosion is increasing as protective sea ice disappears and sea levels rise, jeopardizing the polar bear’s coastal habitat.<sup>33</sup> Longer sea ice-free seasons, higher ground temperatures, and relative sea level rise are expected to exacerbate flooding and accelerate erosion in many regions, leading to the loss of terrestrial habitat in the future.<sup>34</sup>

Sea ice loss due to climate change is harming polar bear populations in numerous ways including reductions in population size; declines in survival, reproductive success, and body condition; changes in distribution; changes in foraging behaviors; increased energetic and nutritional stress; increases in long-distance swimming; and an escalation in human-bear conflicts.<sup>35</sup>

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<sup>27</sup> NCA4 Vol. I at 29, 303.

<sup>28</sup> National Oceanic and Atmospheric Administration (NOAA), Climate Change: Arctic Sea Ice Summer Minimum, Climate.gov, Sept. 8, 2020, <https://www.climate.gov/news-features/understanding-climate/climate-change-minimum-arctic-sea-ice-extent>.

<sup>29</sup> NCA4, Vol. I at 29, 303.

<sup>30</sup> Notz, Dirk and Julienne Stroeve, Observed Arctic sea ice loss directly follows anthropogenic CO<sub>2</sub> emission, 354 *Science* 747 (2016), <https://science.sciencemag.org/content/354/6313/747/tab-pdf>.

<sup>31</sup> Schleussner, Carl-Friedrich et al., Science and policy characteristics of the Paris Agreement temperature goal, 6 *Nature Climate Change* 827 (2016).

<sup>32</sup> Notz and Stroeve, 2016 at 3-4.

<sup>33</sup> NCA4 Vol. II at 1197.

<sup>34</sup> *Id.* at 1216.

<sup>35</sup> See, e.g., Bromaghin, J.F, et al., Survival and abundance of polar bears in Alaska’s Beaufort Sea, 2001-2016, 11 *Ecology and Evolution* 14250 (2021); Atwood, Todd C. et al., Long-term variation in polar bear body condition and maternal investment relative to a changing environment, 32 *Global Ecology and Conservation* e01925 (2021); Whiteman, John P. et al, Phenotypic plasticity and climate change: can polar bears respond to longer Arctic summers with an adaptive fast? 186 *Oecologia* 369 (2018); Pagano, A.M. et al., High-energy, high-fat lifestyle

Ongoing and new oil and gas activities not only cause more of the greenhouse gas emissions already harming polar bears, but threaten the bears through, *inter alia*, oil spills, noise pollution, and physical obstructions.

For example, the noise from oil and gas activity can disturb or harm non-denning bears through increased energetic stress and displacement from preferred habitat across large distance. Snowmachine noise, for instance, has been shown to prompt significant avoidance responses in polar bears at distances up to 3,272 meters—over two miles.<sup>36</sup> Scientific information indicates that “[t]he greater the number of novel and unnecessary energy expenditures a polar bear needs to make, the greater the likelihood of going into a negative energy balance.”<sup>37</sup>

Noise pollution and other impacts from oil and gas activities are particularly detrimental to denning bears. As the Service has recognized, “it is thought that successful denning, birthing, and rearing activities require a relatively undisturbed environment.”<sup>38</sup> Noise pollution can scare denning polar bears out of their dens, which leads to likely injury or death of cubs.<sup>39</sup> And the impacts to mothers from seeking alternative den sites could impose additional, significant energetic costs that could have a latent effect on her survival, or that of her cubs.<sup>40</sup>

88 Energy’s Peregrine Exploration Program—a five-year, nearly year-round, oil and gas exploration program—will increase all of these harmful impacts. It involves extensive oil and gas activity concentrated in the southeast part of the Reserve, along the Colville River and near Umiat, in an area of currently free from oil and gas development.

In the summer, activities include hundreds of helicopter flights, takeoffs, and landings, passing along the same ground that had been the site of winter activity just months before. In the winter, the activities include the annual construction and deconstruction of more than 80 miles of snow and ice roads, the mobilization and demobilization of dozens of personnel and equipment to support multiple crew camps and drilling operations and nearly constant aircraft traffic. The winter activities also include construction and use of multiple airstrips to support crew shuttles of up to five roundtrip flights per week, and daily traffic across the snow road to mobilize and demobilize personnel, drilling equipment, and waste.

As part of its plan to access Merlin-2, 88 Energy has informed BLM that it intends to deviate from last year’s winter access route.<sup>41</sup> According to the revised exploration plan, the snow road

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challenges an Arctic apex predator, the polar bear, 359 *Science* 568 (2018); Pagano, Anthony M. et al., The seasonal energetic landscape of an apex marine carnivore, the polar bear, 10 *Ecology* e02959 (2020).

<sup>36</sup> Andersen, M. and J. Aars, Short-term behavioral response of polar bears (*Ursus maritimus*) to snowmobile disturbance, 31 *Polar Biology* 501 (2008).

<sup>37</sup> Amstrup, Steven, Polar Bears International, Comments on Arctic National Wildlife Refuge Leasing Draft Environmental Impact Statement at 43 (Mar. 8, 2019); *see also* Owen, Megan A., Estimating the Audibility of Industrial Noise to Denning Polar Bears, 85 *Journal of Wildlife Management* 384 (2021).

<sup>38</sup> 78 Fed. Reg. 35,364 36,673 (June 12, 2013).

<sup>39</sup> *See, e.g.*, Amstrup, S.C., Human disturbances of denning polar bears in Alaska, 46 *Arctic* 246 (1993).

<sup>40</sup> Amstrup Mar. 2019 Letter at 35.

<sup>41</sup> *See* 2021 SUPO at 3 (describing how the road will “generally follow the same alignment as winter 2021 before veering west . . .”); *see also* Emerald House, Peregrine Exploration Program, Surface Use Plan of Operations at A4, Fig. 1 (Dec. 2020) (2020 SUPO).

deviates significantly from the originally planned right-of-way, adding to the amount of road constructed in potential polar bear denning habitat.

The Service has repeatedly acknowledged that these types of oil and gas activities “take” polar bears under both the MMPA and the ESA. For example, the Service’s biological opinion for the 2021-2026 Beaufort Sea Incidental Take Regulations—which do not cover 88 Energy’s activities<sup>42</sup>—states that noise generated by similar oil and gas activity can take polar bears via Level B harassment by, *inter alia*, causing polar bears to: flee, run or swim away from a human or a human activity; abandon or avoid preferred movement corridors such as ice floes, leads, polynyas, a segment of coastline, or barrier islands; use a longer or more difficult route of travel instead of the intended path; interrupt their breeding, sheltering, or feeding behaviors such as by causing cubs to stop nursing or resting; as well as by causing lost hunting opportunity due to disturbance of prey.<sup>43</sup>

In that biological opinion, the Service concluded that these takes not only constituted takes under the MMPA, but the ESA as well.<sup>44</sup> Numerous courts have also recognized that “the ‘harassment’ form of taking includes activities . . . remote from actual injury,”<sup>45</sup> including disturbance.<sup>46</sup> And the road construction in potential denning habitat means dens could be damaged or denning bears scared out of their dens by noise, potentially leading to the death or injury of polar bear cubs.

Yet 88 Energy has expressly stated that it “will conduct activities without MMPA coverage through an Incidental Take Harassment Authorization or Letter of Authorization and [will] assume[] the risk of unauthorized polar bear take associated” with traffic from the Peregrine snow road.<sup>47</sup> This means the company has no take coverage insulating it from liability for take under the MMPA or ESA resulting from its activities this winter. Nor does BLM have any take coverage for causing this unauthorized take in permitting and managing the Peregrine Exploration Program.

## LEGAL VIOLATIONS

### **I. Violation of Section 7(a)(2) of the Endangered Species Act: Failure to Ensure Against Jeopardy to the Polar Bear or Adverse Modification to Critical Habitat**

BLM is in violation of section 7(a)(2) of the ESA. Pursuant to section 7(a)(2), BLM is required to ensure that any of its actions or approvals are “not likely to jeopardize the continued existence of any . . . threatened . . . species,”<sup>48</sup> including polar bears.<sup>49</sup> BLM is also required to ensure that

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<sup>42</sup> See 50 C.F.R. 18.122(a)(1), (b) (listing companies covered by the regulations).

<sup>43</sup> Fish and Wildlife Service, Biological Opinion for the Beaufort Sea Incidental Take Regulations 2021-2026 at 42 (Aug. 2021).

<sup>44</sup> *Id.*

<sup>45</sup> *Palila v. Haw. Dep’t of Land & Nat. Res.*, 852 F.2d 1106, 1108 (9th Cir. 1988); *Defs. of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1098-99 (E.D. Wash. 2006) (finding that snowmobiles that displaced caribou harassed the animals within the meaning of the ESA).

<sup>46</sup> *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 749 (9th Cir. 2020).

<sup>47</sup> 2021 SUPO at 22.

<sup>48</sup> 16 U.S.C. § 1536(a)(2).

<sup>49</sup> 50 C.F.R. § 17.11.

its actions and approvals do not destroy or adversely modify polar bear critical habitat.<sup>50</sup> This substantive duty applies to BLM’s permitting, management, and authorization of 88 Energy’s Peregrine Exploration Program.

The only biological opinion arguably covering 88 Energy’s activities is the 2020 biological opinion the Service issued on the National Petroleum Reserve-Alaska Integrated Activity Plan (IAP BiOp).<sup>51</sup> As the Center and others have previously explained to BLM, the IAP BiOp is legally flawed and does not ensure against the likelihood of jeopardy of polar bears from oil and gas activity in the NPR-A. Nor does it ensure against destruction or adverse modification of polar bear habitat from such activity.

For example, while the IAP BiOp acknowledges potential harm to polar bears from activities under the IAP, it fails to use the best available science to assess potential impacts to polar bears and their denning habitat—it fails to use readily available information about the location of denning habitat; estimated annual polar bear dens; and projected timing, frequency, and location of winter tundra travel to determine the probability that polar bear dens might be disturbed. It also fails to consider the impacts of greenhouse gas emissions from activity under the IAP on polar bears; or assess the extent to which mitigation measures would actually reduce the likelihood of harm to polar bears and instead largely relied on unspecified measures to be developed in the future.

Moreover, that programmatic opinion does not sufficiently analyze the specifics of 88 Energy’s Peregrine exploration activities or contain an ITS for such activities. Indeed, the IAP BiOp notes that it conducted a “framework programmatic consultation” because the specific project to occur under the IAP would “differ in their impacts and for which the likelihood, location, and specifics are currently uncertain”<sup>52</sup> and relies on future consultations between the Service and BLM to avoid jeopardy to polar bears and adverse modification to their critical habitat.<sup>53</sup> That consultation has not occurred for 88 Energy’s Peregrine Exploration Program. The IAP BiOp therefore cannot suffice for the consultation on BLM’s permitting, authorization, and management of 88 Energy’s Peregrine Exploration Program.

As such, BLM is failing to ensure that its actions in permitting, authorizing, and managing 88 Energy’s Peregrine Exploration Program will avoid the likelihood of jeopardy to polar bears or the destruction or adverse modification of its critical habitat.<sup>54</sup> Therefore, BLM has violated, and continues to violate, section 7(a)(2) of the ESA.<sup>55</sup>

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<sup>50</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 17.95.

<sup>51</sup> U.S. Fish and Wildlife Service, Fairbanks Fish and Wildlife Conservation Office, Biological Opinion for The National Petroleum Reserve-Alaska Integrated Activity Plan at 204, 209 (Nov. 17, 2020).

<sup>52</sup> *Id.* at Cover Letter.

<sup>53</sup> *Id.* at 175, at 182, 184–85, 207.

<sup>54</sup> 16 U.S.C. § 1536(a)(2); *see also, e.g., Defenders of Wildlife v. EPA*, 420 F.3d 946, 976 (9th Cir.2005), *rev'd on other grounds, Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010); *Pyramid Lake Tribe of Indians*, 898 F.2d at 1415.

<sup>55</sup> 16 U.S.C. § 1536(a)(2).

## II. Violation of Section 9 of the Endangered Species Act: Causing Unlawful Take of Polar Bears

BLM's continued authorization, permitting, and management of 88 Energy's Peregrine Exploration Program in the National Petroleum Reserve-Alaska without the requisite take authorizations violates the ESA's prohibition on the authorized "take" of polar bears.<sup>56</sup> The prohibition makes it unlawful for any person to "cause [an ESA violation] to be committed."<sup>57</sup> A "governmental third party pursuant to whose authority an actor directly exacts a taking . . . may be deemed to have violated the provisions of the ESA."<sup>58</sup>

As explained above, the Service has previously determined that activities such as construction, obstructions, vehicle traffic, and air traffic cause impacts to polar bears that constitute "take" under the ESA. 88 Energy's winter activities will include at least some of these activities, including additional road construction and vehicle traffic in potential polar bear denning habitat. Yet—despite previously seeking and obtaining authorization to take polar bears under the MMPA for its Peregrine exploration activities—88 Energy has stated that it does not intend to seek such coverage for this winter's activity.<sup>59</sup> This means that the oil company is not exempt from the ESA section 9 prohibitions.<sup>60</sup> BLM cannot permit any additional oil and gas activity without the oil company first obtaining incidental take authorization under the MMPA. If BLM does so, it will be causing an unauthorized take, in violation of section 9 of the ESA.<sup>61</sup>

### CONCLUSION

For the foregoing reasons, BLM is in violation of the ESA. If BLM does not act to remedy these violations within 60 days, our organization will initiate litigation in federal court to resolve the matter. We urge BLM to contact us immediately to discuss options for avoiding litigation.

Sincerely,

/s/ Kristen Monsell

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<sup>56</sup> 16 U.S.C. § 1538; 50 C.F.R. 17.

<sup>57</sup> *Id.* § 1538(g).

<sup>58</sup> *Strahan*, 127 F.3d at 163.

<sup>59</sup> 2021 SUPO at 22.

<sup>60</sup> 50 C.F.R. §§ 17.31(a), 17.40(q)(1)–(2).

<sup>61</sup> 16 U.S.C. § 1538(g).

cc:

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