

## BOARD MEMORANDUM

**Date:** June 19, 2025

**To:** Board of Trustees, School and Institutional Trust Lands Administration

**From:** Troy Herold, Assistant Managing Director, Energy & Minerals

**Re:** Proposed Revisions to Administrative Rules for Renewable Energy Lease Agreements (R850-170)

### Summary

Staff proposes to amend Section R850-170 of the agency's administrative rules governing renewable energy lease agreements. The revisions clarify that trust lands may not be leased for less than the fair market value of the leasehold and are being made in response to a recommendation from the 2024 performance audit of the Trust Lands Administration by the Office of the Legislative Auditor General ("OLAG").

Staff originally proposed changes to Section R850-170 during the Board of Trustees (Board) meeting held on March 20, 2025. During the meeting, Vice Chair Harris questioned whether one of the changes could negatively impact financing for long-term energy projects. The Board voted to postpone action on the proposed rule amendments and appointed an ad hoc committee composed of Vice Chair Harris and Mr. Simons to work with staff to further evaluate the matter.

Based on guidance from the ad hoc committee and discussion during the Board meeting, staff revised the proposed amendments to the rules governing renewable energy lease agreements in R850-170 as presented in Appendix B.

### Key Information and Background

Background: On August 20, 2024, the OLAG released "A Performance Audit of the School and Institutional Trust Lands Administration: Improving Controls, Accountability, and Proactive Management" (the "Audit"). Section 1.2 of the Audit concluded that the administrative rules for surface special use lease agreements and renewable energy lease agreements are unclear as currently written and could be misinterpreted as allowing for the receipt of less than fair market value for the lease of trust lands. Receiving less than fair market value for the lease of trust lands would be a violation of Utah Code. The relevant pages from the Audit are attached as Appendix A. The OLAG offered the following recommendation in the Audit to address their concerns:

#### Recommendation 1.4

*The School and Institutional Trust Lands Administration should revise the Administrative Rules for Special Use Lease Agreements and Renewable Energy Lease Agreements to ensure that the criteria for*

*setting lease rates are clear and consistent with Utah Code pertaining to the receipt of no less than fair market value for the lease of trust lands.*

**Proposed Rule Revisions:** To address the audit recommendation, the agency established an internal working group composed of management, lease managers, and legal staff to draft proposed revisions to the administrative rules for special use leases and renewable energy lease agreements.

The Board approved revised rules for surface special use leases (R850-30) during its meeting held February 20, 2025. Nearly identical revisions to the rules governing renewable energy leases agreements were initially brought before the Board on May 20, 2025. Following the concerns raised during the meeting, the proposed amendments have been updated, and a redlined version of the current proposed rule revisions is attached as Appendix B.

**Board Discussion and Ad Hoc Committee:** During the Board meeting, a question was raised about the proposed changes in R850-170-700 Lease Rates; Subsection 2; which was modeled after the surface leasing rules and stated “If a lease rate is lower than the value calculated pursuant to Subsection R850-170-700(1)(a), the agency shall reserve the right to terminate the lease before the end of the term.”

The concern with respect to this provision was that it may impact the ability of lessees to obtain financing for long-term energy projects. The ad hoc committee and staff have reviewed the issue and recommend that the language of concern in subsection 2 be eliminated from the revised renewable energy leasing rules.

The ad hoc committee and staff also reviewed the comparable subsection in the surface leasing rules and recommend that the language should remain in the rules as previously approved by the Board on February 20, 2025. Requiring a termination clause for lower rent leases such as agricultural leases can help the agency avoid long-term entanglements that may preclude the agency from taking advantage of a higher and better use.

**Rulemaking Process:** If the proposed rule revisions are approved by the Board, the agency will file the proposed rule revisions with the Utah Office of Administrative Rules. The Office of Administrative Rules then submits the rules to the Governor's Office of Management and Budget and the Legislature's Administrative Rules Review Committee for review. The proposed rules are also published for a 30-day public comment period. Once filed with the Office of Administrative Rules, it generally takes 3-5 months for the rules to become effective.

### **Requested Agency Action**

The agency recommends that the Board approve the revised administrative rules for renewable energy leases and offers the following proposed motion:

*“I Move to approve the revised administrative rules for renewable energy leases as presented and direct the agency to proceed with the administrative rulemaking process.”*

## Appendix A

### EXHIBIT A



#### **Administrative Rules Governing the Establishment of Certain Lease Rates Are Unclear, and Could Result in Less Than Fair Market Value**

*Utah Code*<sup>12</sup> requires that SITLA receive fair market value for its land, a mandate that is reiterated in SITLA's *Administrative Rules*. However, *Administrative Rules* for Special Use Lease Agreements and Renewable Energy Leases Agreements are unclear. These *Administrative Rules* should be clarified to assure that the agency received fair market value for the lease of trust lands. SITLA reports that these types of leases generated about \$7.3 million in Fiscal Year 2023 (5% of SITLA's total revenue).

*Administrative Rules* state that the agency may base lease rates on a value other than the market value of the fee title to the subject property if the director determines that it is in the best interest of the beneficiaries and the agency has the right to terminate the lease before the end of its term. SITLA explained that the market value of the fee title to the subject property is separate and distinct from the market value of the leasehold (lease rate) that is being granted. The lease rate can be informed using various criteria outlined in *Administrative Rules*.

One of the criteria that may be used to inform the market value of the lease rate is to consider the market value of the fee title to the subject property (i.e. the appraised value as if it were being sold) and multiply it by an agency-determined interest rate. In some cases, SITLA runs this calculation and determines that if the lease rate were based solely upon this criteria that it would exceed the rate that has been negotiated with a prospective lessee. *Administrative Rules* allow for such negotiations for specific lease rate between a willing lessee and lessor after reasonable exposure in a competitive market, with the director's approval. SITLA explained the intent of the *Administrative Rules* is to prevent the issuance of long-term leases without an exit clause in these cases so that they can be terminated early if a better opportunity presents itself.



**As written, *Administrative Rules* for some leases could be misinterpreted for the receiving of less than fair market value.**

These sections of *Administrative Rules* are unclear as written and run the risk of being misinterpreted, potentially resulting in SITLA receiving less than fair market value for the lease of trust lands. SITLA should clarify the distinction between the market value of the leasehold and the market value of the subject property in *Administrative Rules* and ensure that they are in alignment with *Utah Code*.

<sup>12</sup> 53C-1-204(b)(iii): Policies established by SITLA's board shall "require the return of not less than fair market value for the use, sale, or exchange of school and institutional trust assets..."



In contrast, *Administrative Rules* for establishing the fair market value of surface group sale parcels are clear. We reviewed all of SITLA's land sales for its surface group dating back to 2013 and did not find a single case where SITLA received less than fair market value on those sales.

Additionally, the Office of the State Auditor samples surface and development land sales each year to check whether they were sold for fair market value. Their tests for Fiscal Years

2021 to 2023 did not identify any instances where less than fair market value was received on those sampled transactions.



**Reviews from our office and the Office of the State Auditor have not identified any land sales that went for less than fair market value.**

#### RECOMMENDATION 1.4

The School and Institutional Trust Lands Administration should revise the *Administrative Rules* for Special Use Lease Agreements and Renewable Energy Lease Agreements to ensure that the criteria for setting lease rates are clear and consistent with *Utah Code* pertaining to the receipt of no less than fair market value for the lease of trust lands.

### 1.3 Controls over SITLA's Financial Operations Could Be Improved

Similar to its operational controls, SITLA's financial controls should also be improved. SITLA's internal control memo states that both the Division of Finance and the Office of the State Auditor audit SITLA and play a role in monitoring SITLA's internal controls. Monitoring from the Division of Finance has not been happening due to resource constraints and changing programs. This has left a gap in SITLA's controls that the board was not aware of.

SITLA's board is ultimately responsible for ensuring that the agency is managed according to law, including having sound internal controls. The board was unaware that some of SITLA's internal controls were incomplete. SITLA's internal control memo states that they ensure proper internal controls by

 **Discontinuation of some Division of Finance programs have left SITLA's internal control monitoring limited.** following the Division of Finance's Internal Control Program. This program requires agencies to establish the five elements of internal control: 1) the control environment, 2) risk assessment, 3) control activities, 4) information and communication, and 5) monitoring. Section 1.1 of this chapter addressed

## Appendix B

### **R850. School and Institutional Trust Lands, Administration.**

#### **R850-170. Renewable Energy Lease Agreements.**

##### **R850-170-100. Authorities.**

This rule implements Sections 6, 8, 10, and 12 of the Utah Enabling Act, Articles X and XX of the Utah Constitution, and Subsections 53C-1-302(1)(a)(ii) and 53C-4-101(1), which authorize the director to establish rules for leasing trust lands.

##### **R850-170-150. Planning.**

1. In addition to those other planning responsibilities described in this Rule R850-170, the agency shall:

- (a) Submit proposals to lease trust lands for renewable energy projects to the Resource Development Coordinating Committee (RDCC) unless the proposal is exempt from such review;
- (b) Evaluate comments received through the RDCC process; and
- (c) Evaluate comments received through the request for proposal process pursuant to Section R850-170-600 or the solicitation process pursuant to Section R850-170-800.

##### **R850-170-200. Exemption from Development Transaction Rules.**

The director may exempt renewable energy leases issued on Development Property as defined in Subsection R850-140-250(1) from Rule R850-140 if the renewable energy leases are issued according to this Rule R850-170 and if the exemption is consistent with the land management objectives found in Rule R850-2.

##### **R850-170-300. Terms of Leases.**

Lease terms, including extensions, should not normally be for longer than 51 years. The agency may issue leases for a term longer than 51 years if a longer term is consistent with the land management objectives found in Rule R850-2.

##### **R850-170-400. Categories of Renewable Energy Leases.**

1. Renewable energy leases are categorized as follows:
  - (a) solar;
  - (b) wind;
  - (c) energy storage; and
  - (d) geothermal.

2. The agency may grant exploration and options to lease the renewable resources on a parcel according to the requirements of this Rule R850-170 if doing so would encourage exploration of undefined resources.

##### **R850-170-500. Other Business Arrangements.**

1. The agency may enter into other business arrangements (OBAs), such as joint venture agreements, that are consistent with the purposes of the Act.
2. OBAs are exempt from these R850-170 rules.
3. OBAs and any amendments to OBAs must be approved by the Board of Trustees.

##### **R850-170-600. Requests for Proposals.**

1. The agency may issue a request for proposals (RFP) for renewable energy projects on trust lands.

2. The agency shall give notice of the RFP to lessees or permittees of record on the subject property and shall advertise the RFP by methods determined by the agency to increase exposure of the subject property to qualified applicants.

3. In response to the RFP, an applicant may propose a sale, lease, joint development, exchange, or other business arrangement.

4. The agency shall evaluate proposals using the following criteria:

- (a) income potential;
- (b) potential enhancement of trust lands;
- (c) development timeline;
- (d) applicant qualifications;
- (e) desirability of proposed use; and
- (f) any other criterion deemed appropriate by the agency.

5. The agency may charge non-refundable application and review fees, as specified in the RFP.

6. Applicants selected in the RFP process are exempt from the application process in Section R850-170-800.

#### **R850-170-700. Lease Rates.**

1. The agency may not lease trust lands for less than the fair market value of the leasehold. The agency shall base the fair market lease rates on either the market value or income producing capability of the subject property and may require any commercially reasonable type of consideration, including rent, percentage rent, use payments, impact charges, escalating charges, balloon payments, and in-lieu payments. The agency may base lease rates on any of the following criteria, in combination or otherwise:

- (a) the market value of the subject property multiplied by the current agency-determined interest rate;
- (b) responses to RFPs, pursuant to Section R850-170-600, or solicitations for competing applications, pursuant to Section R850-170-800
- (c) comparable lease data;

(de) market value of the proposed use of the subject property;

(ed) rates schedules approved by the director; and

(fe) the administrative costs of leasing the subject property and a desired minimum rate of return.

2. If a lease rate is lower than the value calculated pursuant to Subsection R850-170-700(1)(a),

the agency shall reserve the right to terminate the lease before the end of the term. The agency may base lease rates on a value other than the market value of the subject property if the director determines it is in the best interest of the beneficiaries and the agency has the right to terminate the lease before the end of the term.

3. Lease Review and Adjustment Procedures.

(a) The agency shall review renewable energy leases periodically as specified in the lease agreement and may adjust lease rates, the amount of financial guaranty, the amount of required insurance, and other similar lease provisions to ensure the agency receives no less than fair market value for the subject property and is adequately protected against a lessee's breach. Periodic lease reviews should normally be no longer than every five years.

(b) The agency may base lease rate adjustments on changes in market value including appreciation of the subject property, changes in established indices, or other methods that are appropriate and in the best interest of the trust beneficiaries.

(c) If the lease does not specify the rate of adjustment, the rate of adjustment will be based on the Consumer Price Index, published by the U.S. Bureau of Labor Statistics, All Urban Consumers, Western Region Average, All Items (1982-84 = 100), or if the Consumer Price Index is no longer published, a substitute index published by a governmental agency and comparable to the Consumer Price Index. The adjusted lease rate cannot be less than the lease rate for the immediately preceding review period.

(d) The director may suspend, defer, or waive lease adjustments in specific instances, based on a written finding that the suspension, deferral, or waiver is in the best interest of the trust beneficiaries.

**R850-170-800. Solicitation of Competing Applications.**

1. On acceptance by the agency of a completed application, the agency shall solicit competing interest in the subject parcel. The director may waive this requirement if it is in the best interest of the trust beneficiaries.
2. Renewable energy facilities to support extraction of the mineral estate of the subject property when the mineral estate is not a trust asset is exempt from the requirements of Section R850-170-800.
3. The agency shall solicit competing interest in the subject parcel in a manner designed to increase exposure of the subject property to qualified applicants. The agency may implement the solicitation through print media, internet, signage, direct mail, or other appropriate marketing methods. The agency shall also give at least 30 days' notice by certified mail to:
  - (a) the legislative body of the county in which the subject parcel is located; and
  - (b) lessees or permittees of record on the subject property.
4. The notice of solicitation of competing interest must include:
  - (a) a general description of the subject parcel and a brief description of its location, including township, range, and section;
  - (b) the contact information of the agency office where interested parties can obtain more information; and
  - (c) any other information that may create interest in the subject parcel that does not violate the confidentiality of the initial application. The successful applicant is responsible for the cost of the advertising.
5. The agency may solicit competing interests on trust lands when no application has been received by advertising a parcel pursuant to the process described in this Section R850-170-600 or any other means, when in the best interest of the trust beneficiaries.
6. In response to a solicitation, an applicant may propose a sale, lease, joint development, exchange, or other business arrangement.

**R850-170-900. Competing Proposals.**

1. If the agency receives credible competing proposals in response to the solicitation process conducted pursuant to Section R850-170-800, the agency may select a proposal using the following methods:
  - (a) Sealed Bid Process.
    - (i) The agency shall give the competing applicants notice setting forth the date on which the applicants must submit a final sealed proposal to the agency.
    - (ii) The agency may reject proposals received after the established due date.
    - (iii) The agency may require proposals for a lease to include the first year's rental, proposals for a sale to include a down payment on the proposed purchase price, and payments to cover the agency's costs of advertising and application fees.
    - (iv) The agency shall evaluate proposals using the following criteria:
      - (A) income potential;
      - (B) potential enhancement of trust lands;
      - (C) development timeline;
      - (D) applicant qualifications;
      - (E) desirability of proposed use; and
      - (F) any other criterion deemed appropriate by the agency.
  - (b) The agency may negotiate with the applicants or interested persons to create a proposal that best satisfies the objectives of Rule R850-2.
2. The agency may terminate the application process at any time in its sole discretion.

**R850-170-1000. Lease Determination Procedures.**

The agency may not lease trust lands when a lease:

1. would be inconsistent with board policy or would not be in the best interest of the trust beneficiaries;
2. would create significant obstacles to future mineral development; or
3. would foreclose future development or management options that would likely result in greater long term economic benefit.

#### **R850-170-1100. Renewable Energy Lease Provisions.**

Each lease must contain provisions necessary to ensure responsible management of trust lands, including those provisions enumerated under Section 53C-4-202 and the following provisions:

1. the term of the lease;
2. the lease rate and other payments due to the agency;
3. reporting of technical and financial data;
4. reservation for mineral exploration and development and other compatible uses, unless waived by the director;
5. operation requirements;
6. lessee's consent to suit in any dispute arising under the terms of the lease or as a result of operations carried on under the lease;
7. procedures of notification;
8. transfers of lease interest by lessee;
9. terms and conditions of lease forfeiture; and
10. protection of the state from liability associated with the actions of the lessee on the subject property.

#### **R850-170-1200. Financial Guarantees.**

1. The agency may require a lessee to provide a financial guaranty to the agency to ensure compliance with lease terms including performance, payment, and reclamation. The financial guaranty must be in a form and in an amount acceptable to the agency.
2. If a lessee assigns a lease, the agency is not obligated to release the financial guaranty of the assignor until the assignee submits an equivalent replacement financial guaranty or any lease obligations, including reclamation, have been satisfied.
3. The agency may increase the amount of the financial guaranty in reasonable amounts at any time by giving lessee 30 days' written notice stating the increase and the reasons for the increase.

#### **R850-170-1300. Lease Assignments and Subleases.**

1. Assignments.
  - (a) A lessee may only assign a renewable energy lease if the agency consents to the assignment. Any assignment made without such approval is voidable at the agency's option.
  - (b) On the effective date of an assignment, the assignee is bound by the terms of the lease to the same extent as if the assignee were the original lessee, any conditions in the assignment to the contrary notwithstanding.
  - (c) An assignor must provide the agency with a copy of the assignment document, which must be a sufficient legal instrument, properly executed, with the lease number, the land involved, the name and address of the assignee, and the interest transferred clearly indicated.
  - (d) As a condition of the approval of an assignment, the agency shall require:
    - (i) the assignee to accept the most current applicable lease form unless continuation of the existing form is clearly in the best interests of the trust beneficiaries; and
    - (ii) the assignee be satisfactory to the agency.
2. Subleases.
  - (a) A lessee may only sublease a renewable energy lease if the agency consents to the sublease. A sublease made without such approval is voidable in the agency's discretion.

(b) The lessee must indemnify the agency for actions or inactions of the sublessee and the agency may look to either the lessee or the sublessee for compliance with the lease.

(c) The agency may require lessee and sublessee to provide annual financial documentation that clearly identifies the revenue generated on the property by sublessee and the revenue paid by sublessee to lessee.

(d) A lessee must provide the agency with a copy of the sublease document, which must be a sufficient legal instrument, properly executed, with the lease number, the land involved, the name and address of the sublessee, and the interest subleased clearly indicated.

(e) The agency may charge the lessee sublease rates based on the then current market rental value of the subject property, the revenue paid by sublessee to lessee, and such other factors as the agency deems reasonable.

(f) Rather than approve the sublease, the agency may require that the sublessee enter into a new lease with the agency for the subleased portion of the property.

#### **R850-170-1400. Lease Amendments.**

1. The agency may amend a lease if the amendment would be consistent with Rule R850-2. Unless waived by the director, the agency shall solicit competing interest pursuant to Section R850-170-800 if:

(a) the total amended acreage exceeds 150% of the original acreage;

(b) the lease term, including any extensions, is longer than 51 years; or

(c) the proposed amended purpose of the lease is substantially different from the original purpose.

2. The agency may condition approval of an amendment on the lessee accepting the current lease form.

**KEY: administrative procedures, leases, trust land management, request for proposals**

**Date of Last Change: August 8, 2022**

**Authorizing, and Implemented or Interpreted Law: 53C-1-302(1)(a); 53C-4-101(1); 53C-4-202**