

# Wind Farm Legal Issues

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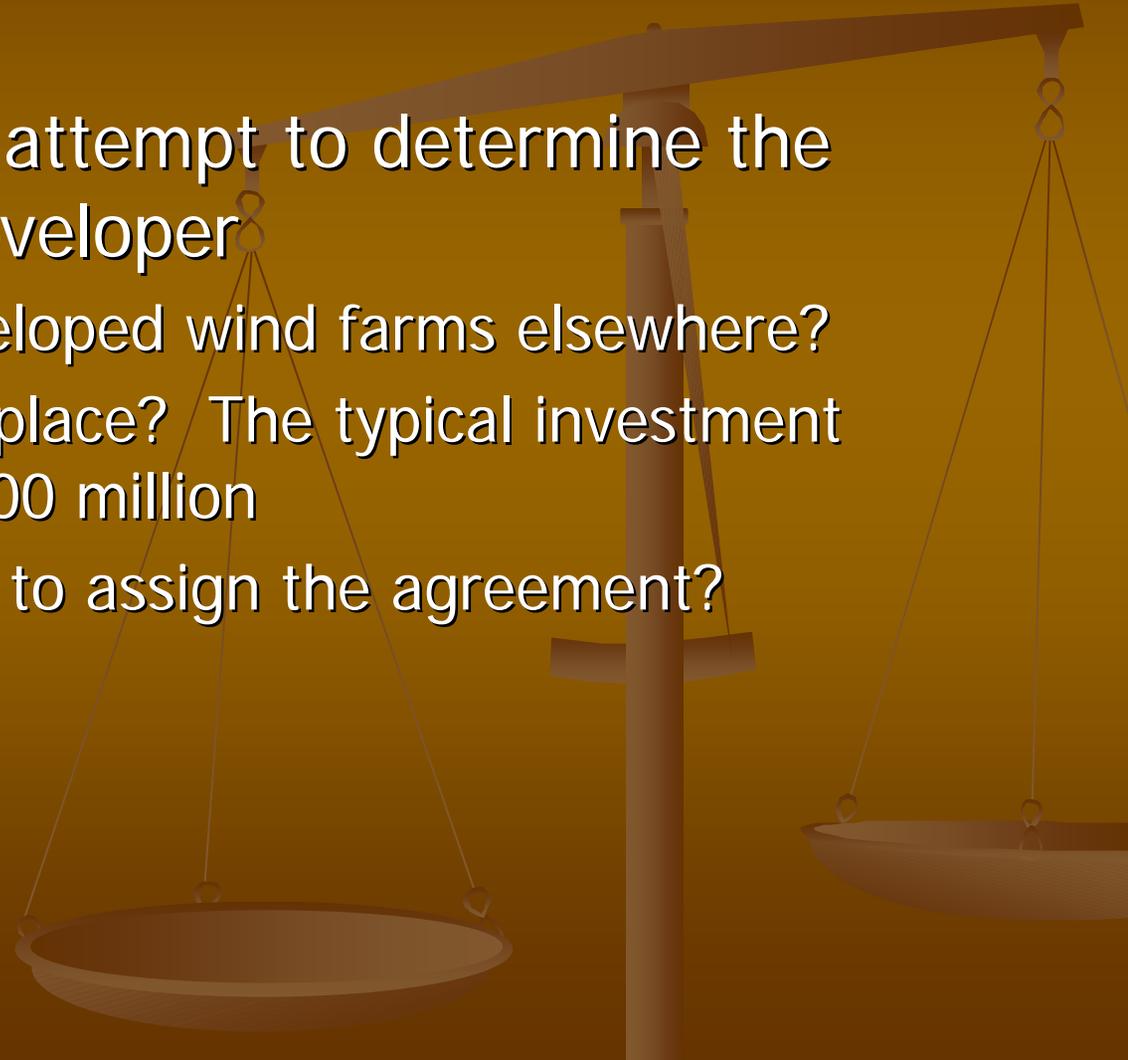
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# Wind Energy Development

## ■ Primary Issues

- Make a serious attempt to determine the intent of the developer
  - Have they developed wind farms elsewhere?
  - Is financing in place? The typical investment approaches \$100 million
  - Do they intend to assign the agreement?



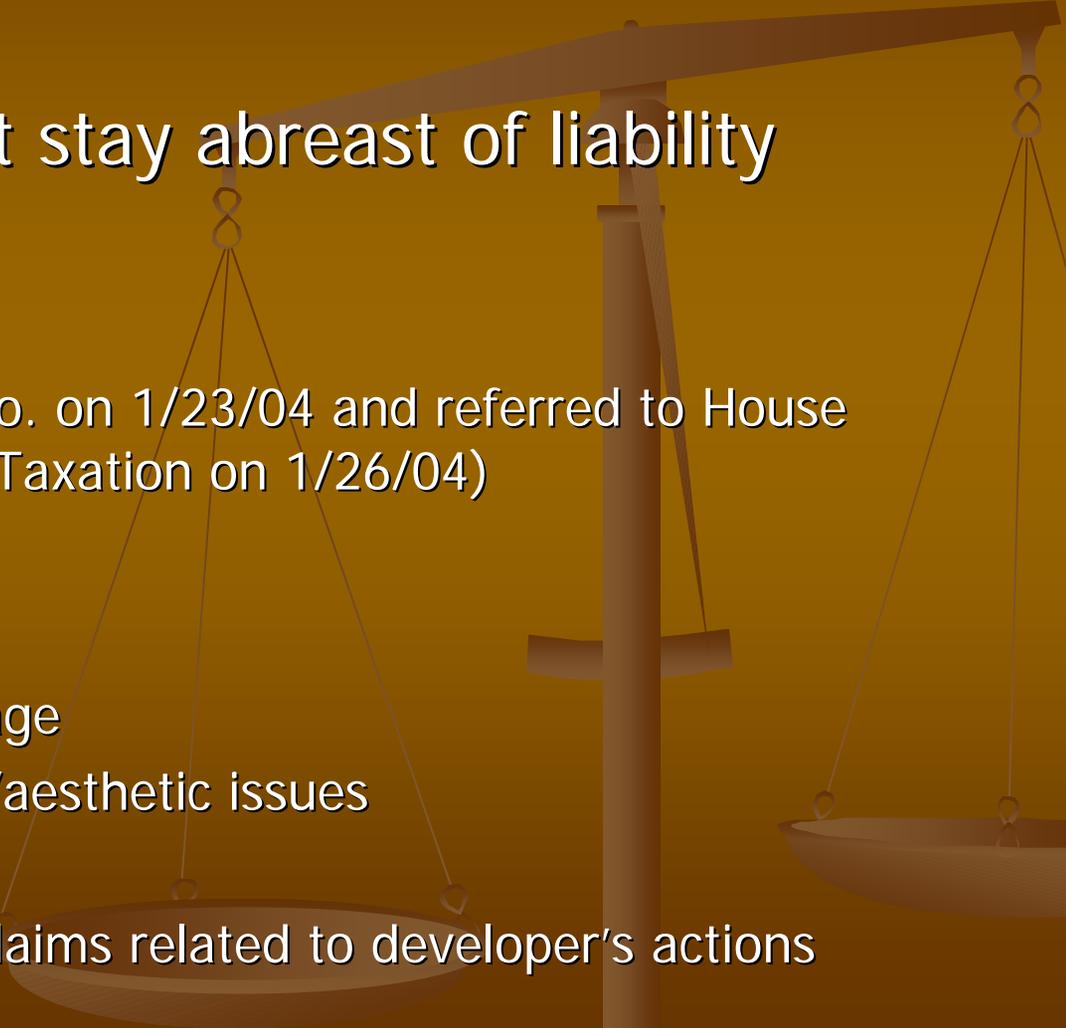
# Wind Energy Development



## ■ Primary Issues

- Carefully examine the structure of the land use agreement
  - Never sign a lease/easement agreement with a developer without first seeking legal counsel
    - Must developer consent to landowner's property use?
    - Is developer given rights not related to wind energy development?
    - What is the compensation structure?
      - Payment timing
      - Payment frequency
      - Payment for loss of crop cultivation

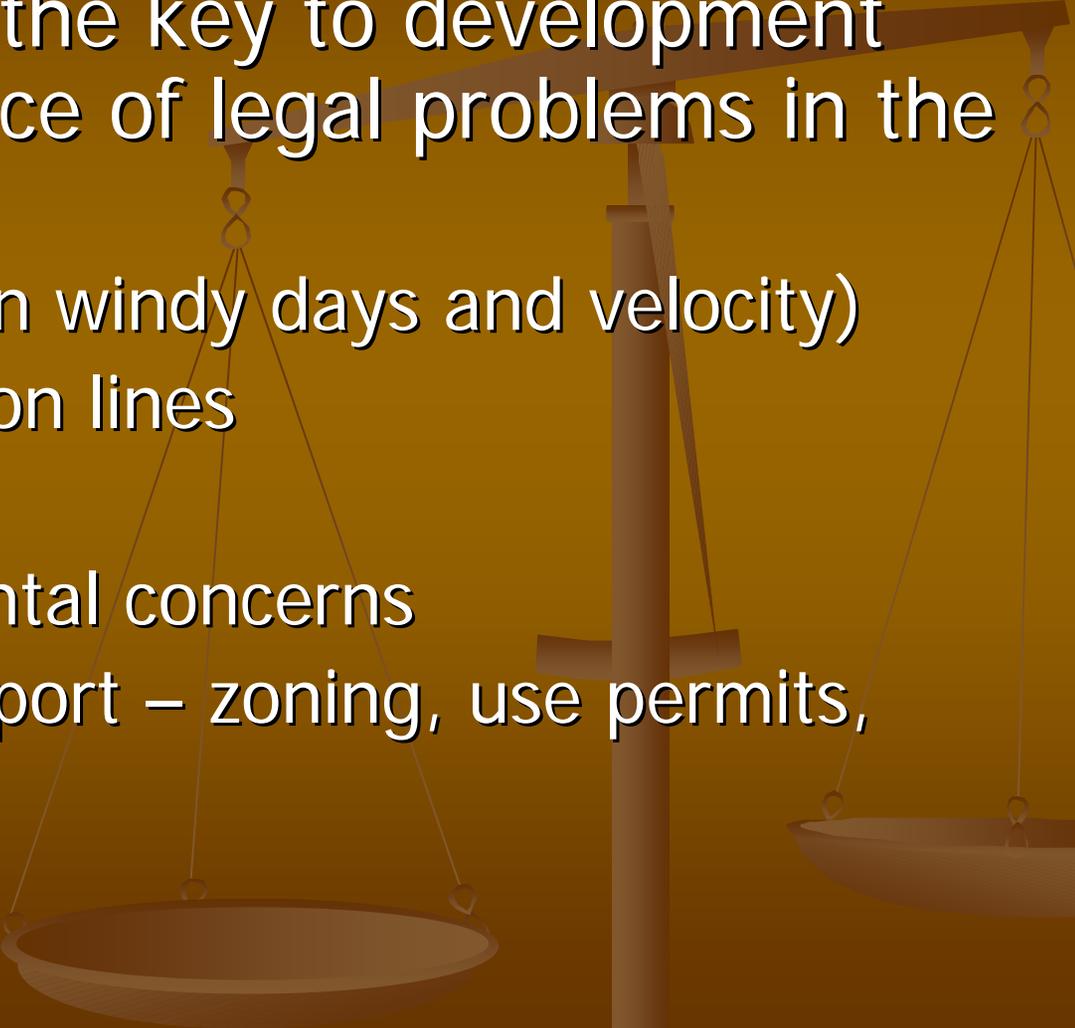
# Wind Energy Development



## ■ Primary Issues

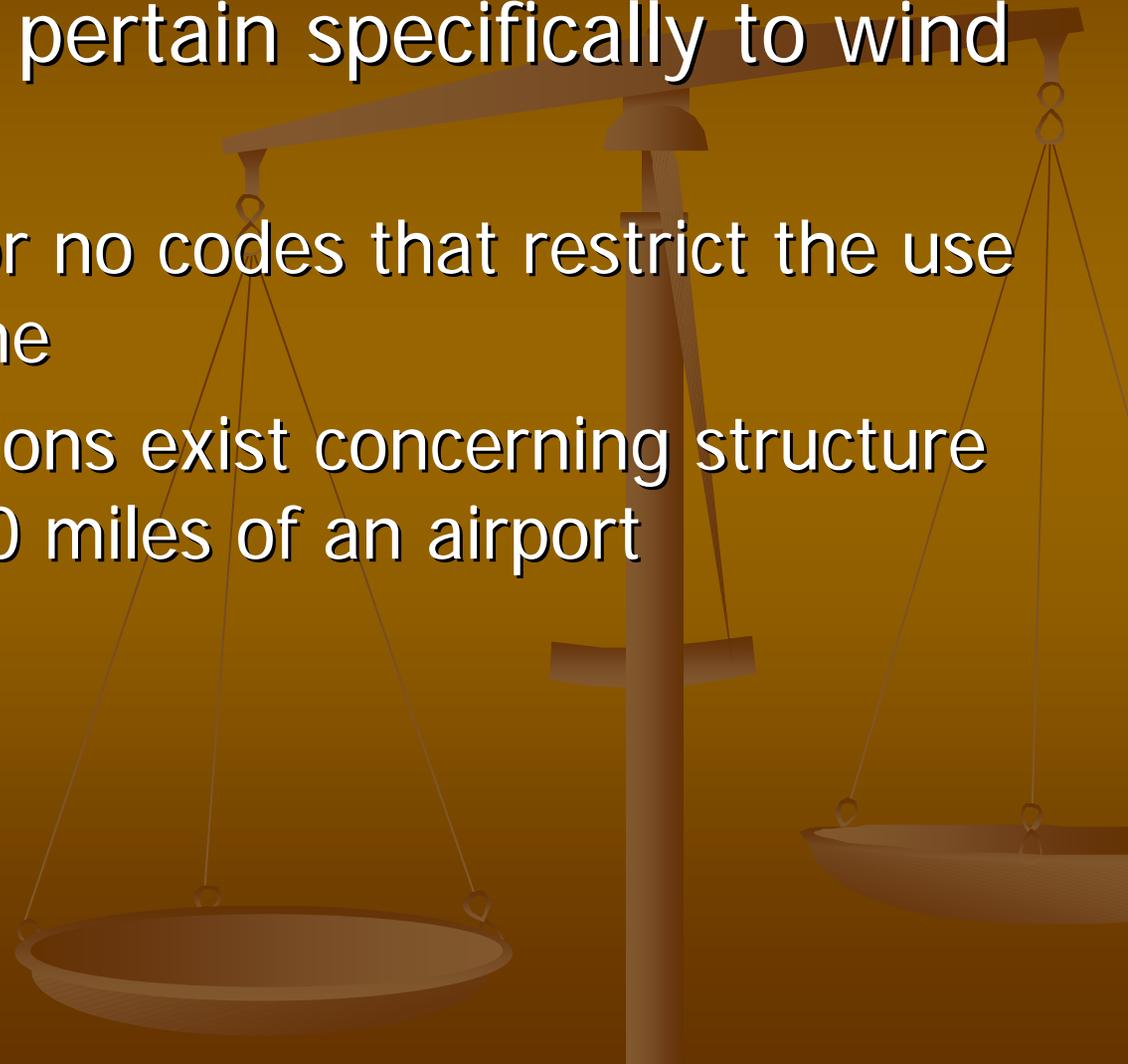
- Landowner must stay abreast of liability issues
  - Property taxes
    - H.B. 2579 (intro. on 1/23/04 and referred to House Committee on Taxation on 1/26/04)
  - Liability issues
    - Trespassers
    - Third party usage
    - Environmental/aesthetic issues
    - Nuisance
    - Lawsuits and claims related to developer's actions

# Wind Energy Development

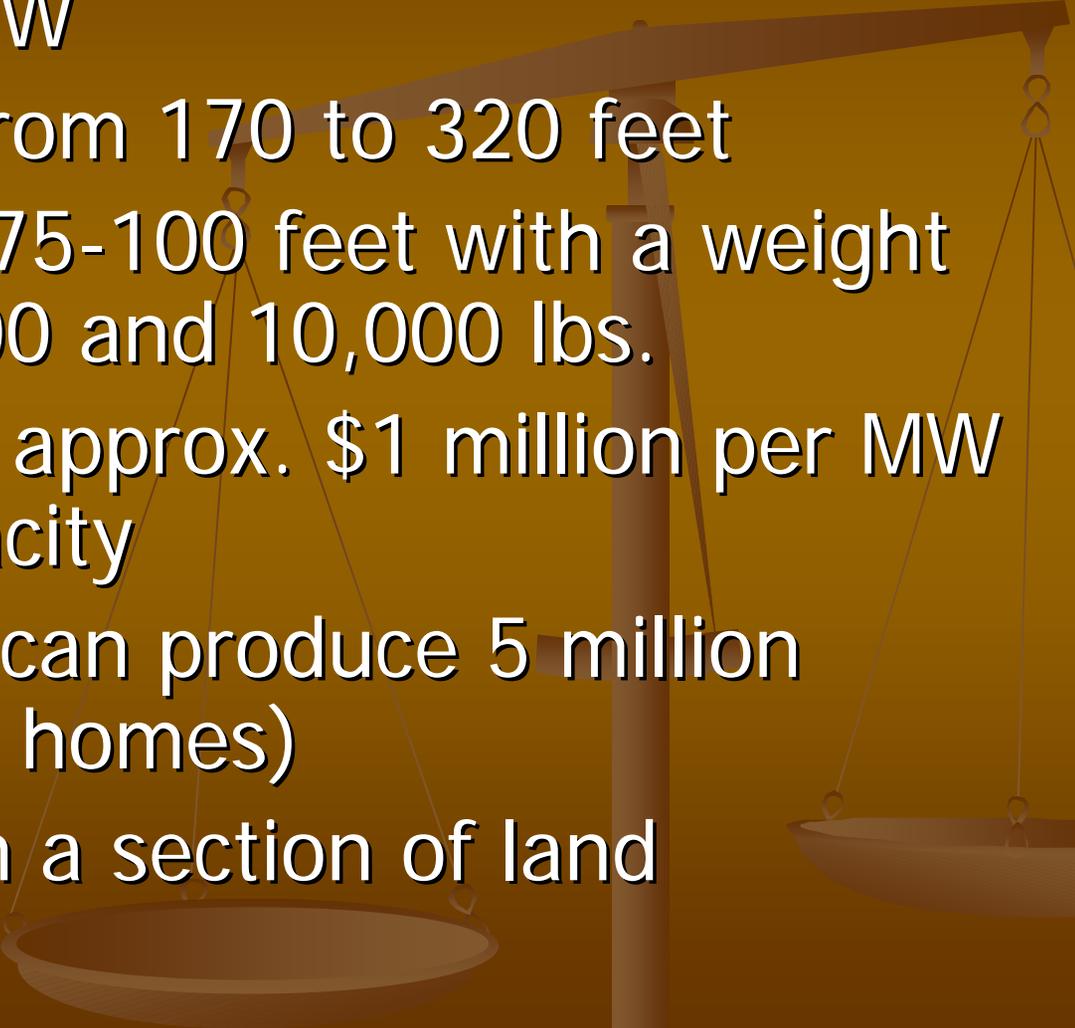
- Site selection is the key to development and the avoidance of legal problems in the future:
    - Windy (based on windy days and velocity)
    - Near transmission lines
    - Access to roads
    - Few environmental concerns
    - Community support – zoning, use permits, etc.
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# Zoning Ordinances, Building Codes and Land Use

- Few ordinances pertain specifically to wind systems
  - Generally few or no codes that restrict the use of a wind turbine
  - Federal regulations exist concerning structure height within 10 miles of an airport



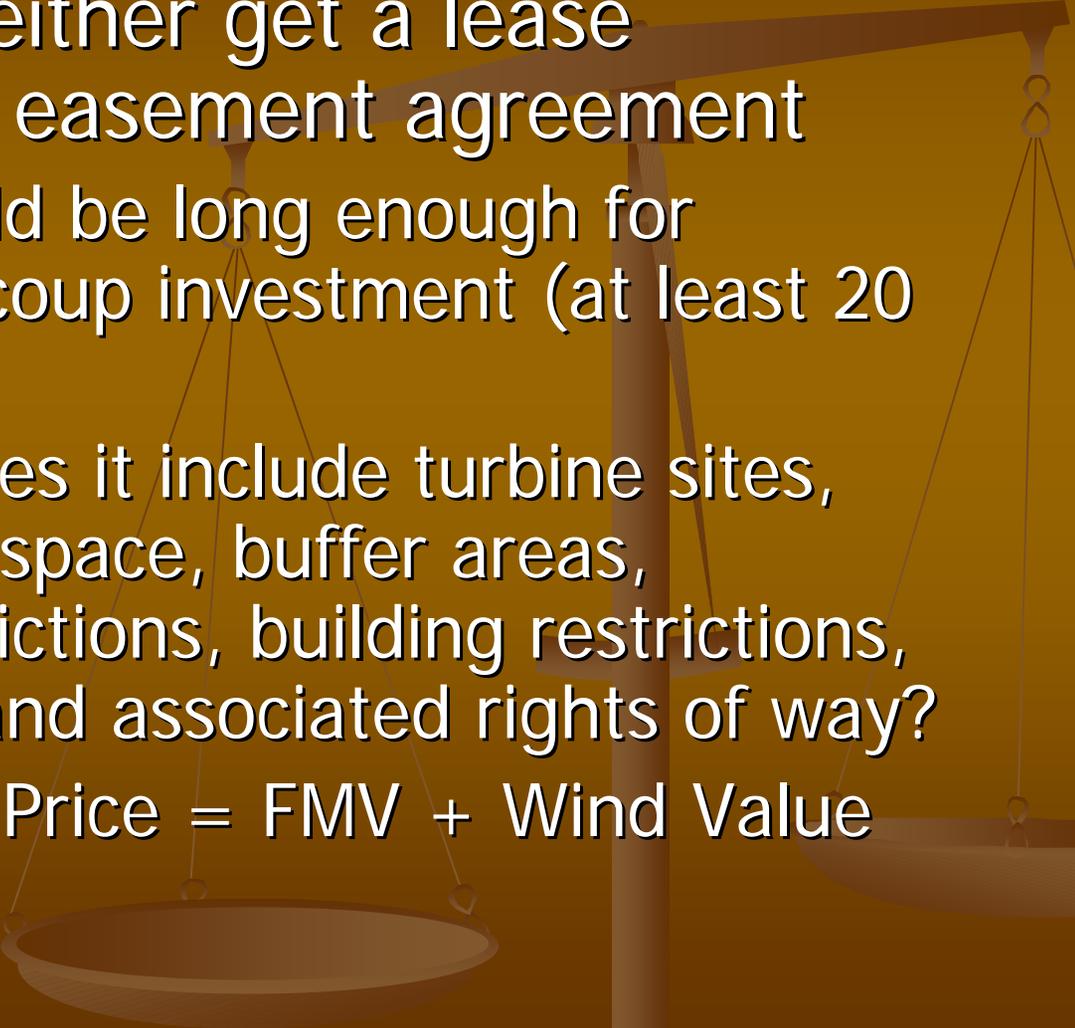
# Utility-Scale Wind Turbines

- 750 KW to 1.5MW
  - Tower heights from 170 to 320 feet
  - Blade diameter 75-100 feet with a weight of between 8,000 and 10,000 lbs.
  - Cost to install is approx. \$1 million per MW of installed capacity
  - 1.5 MW turbine can produce 5 million KW/yr (400-500 homes)
  - 6-12 turbines on a section of land
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# Wind Energy Agreements

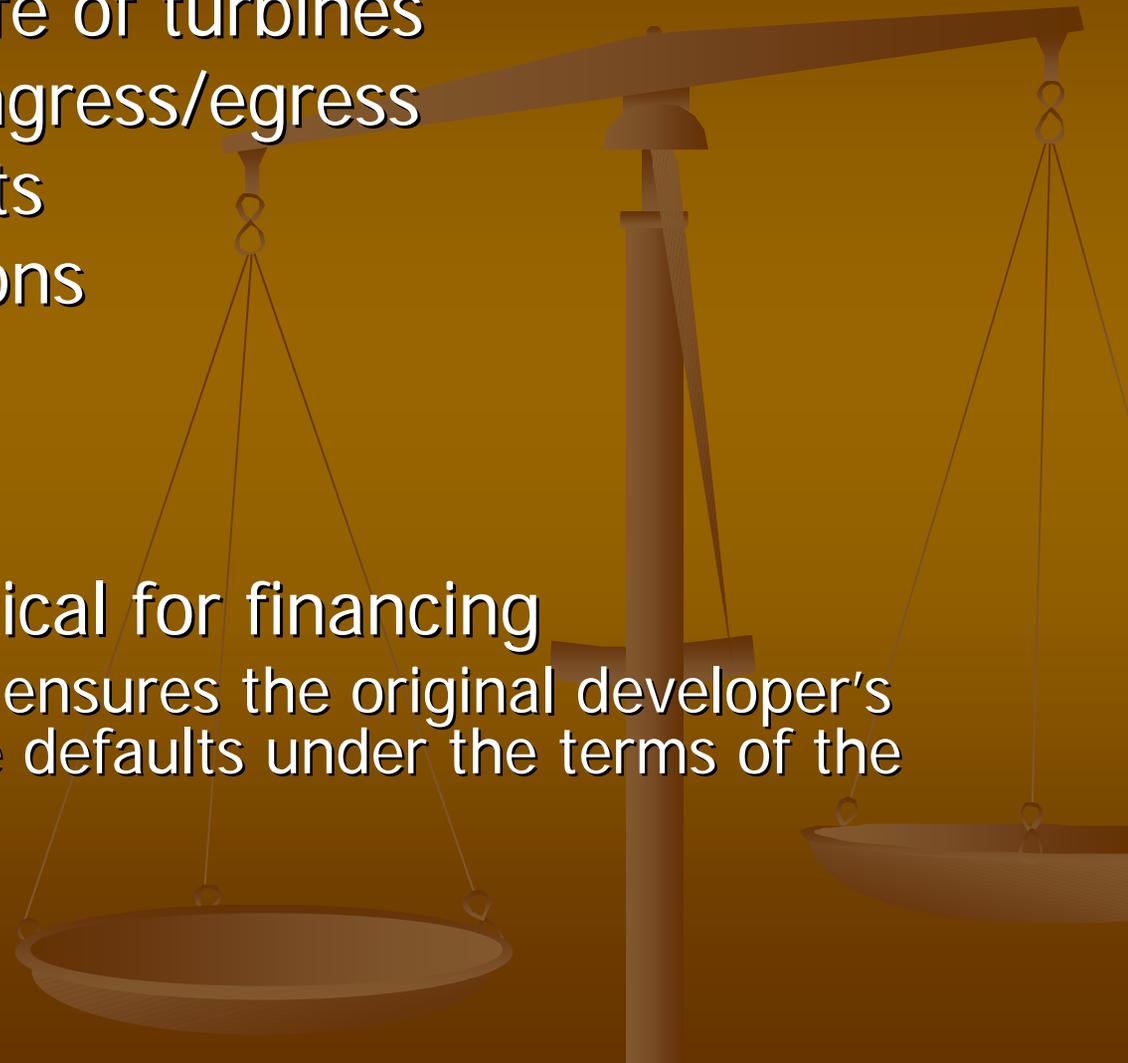
- Payment structure
  - Common fee is a minimum flat payment per turbine plus a royalty (% of revenue)
  - Every aspect is negotiable:
    - Annual percentage (2% first 15 years)
    - Future year escalation (4% second 15 years)
    - Guaranteed minimum (\$2,000 per turbine/yr)
    - Annual gross revenue (definition is the key)
      - Sale of electrons?
      - Sale of green credits?
  - Montezuma – 5 turbines, 20 yrs., \$300,000

# Wind Energy Contracts

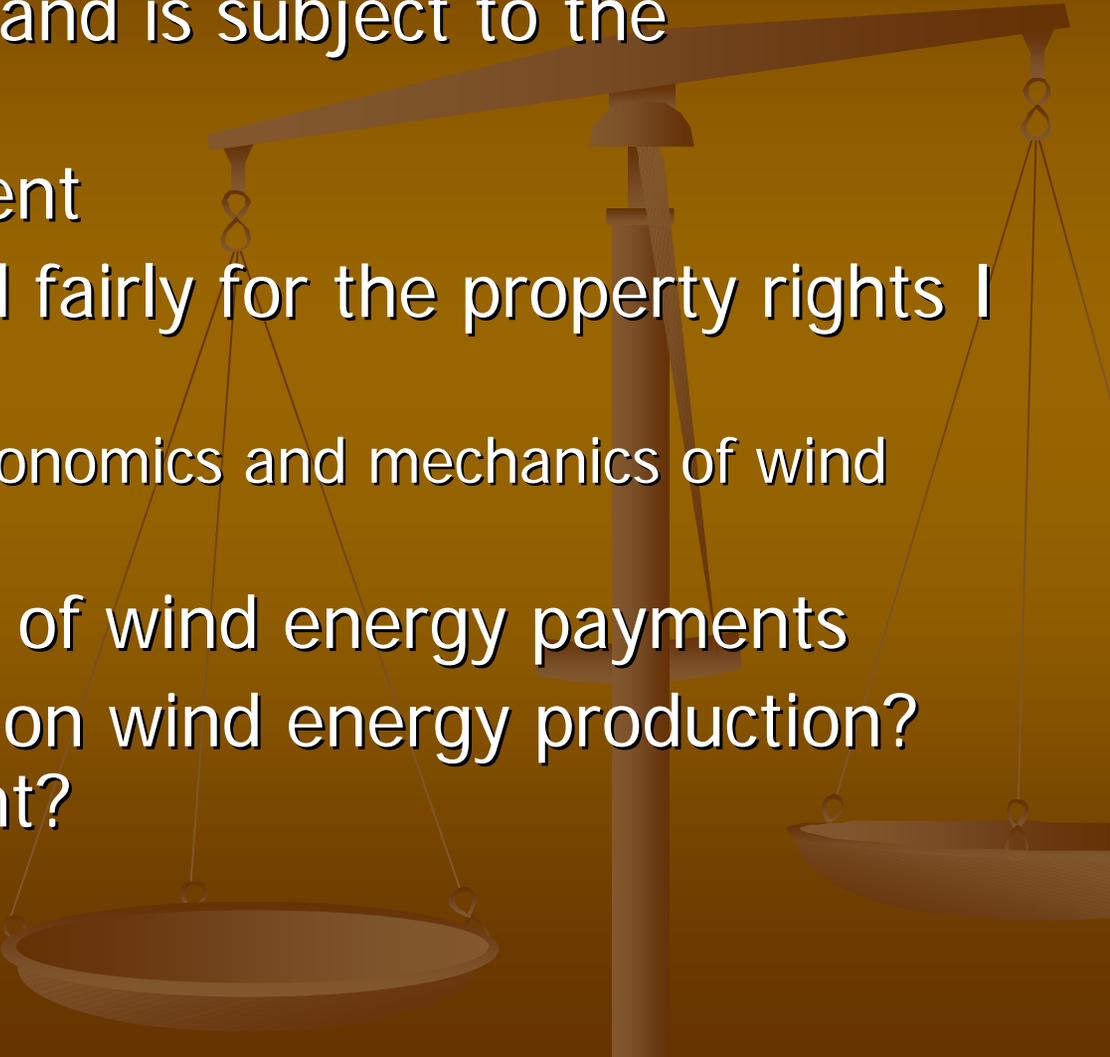
- Landowner will either get a lease document or an easement agreement
    - If lease, it should be long enough for developer to recoup investment (at least 20 yrs)
    - If easement, does it include turbine sites, substations, air space, buffer areas, vegetation restrictions, building restrictions, transmissions, and associated rights of way?
    - If sale of land:  $\text{Price} = \text{FMV} + \text{Wind Value}$
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# Wind Energy Contract Provisions

- Term of years – life of turbines
- Surface rights – ingress/egress
- Transmission rights
- Land use restrictions
  - Hunting?
  - Pasture burning?
- Compensation
- Assignability – critical for financing
  - Insert clause that ensures the original developer's liability if assignee defaults under the terms of the agreement

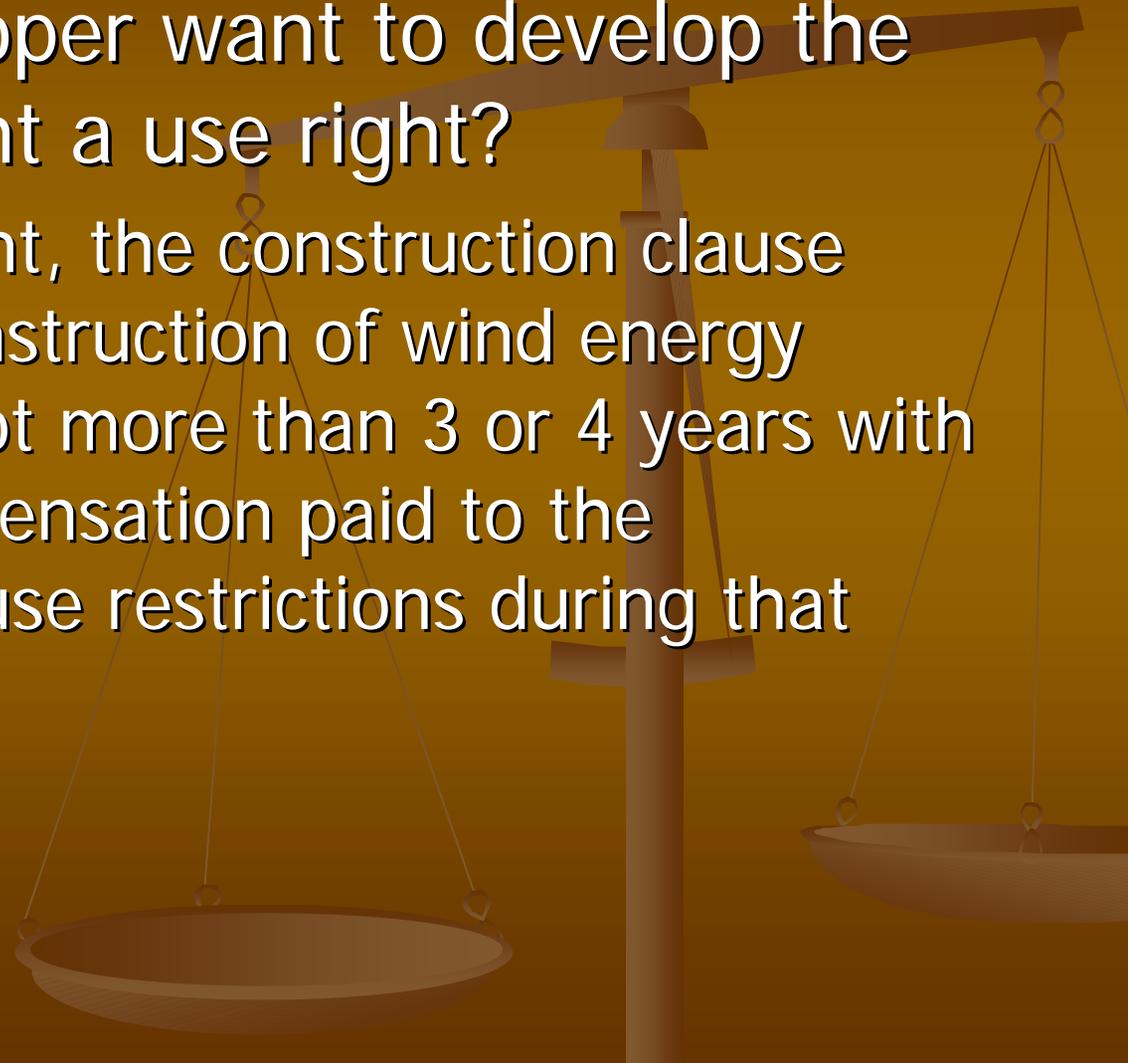


# Legal Issues for Landowners

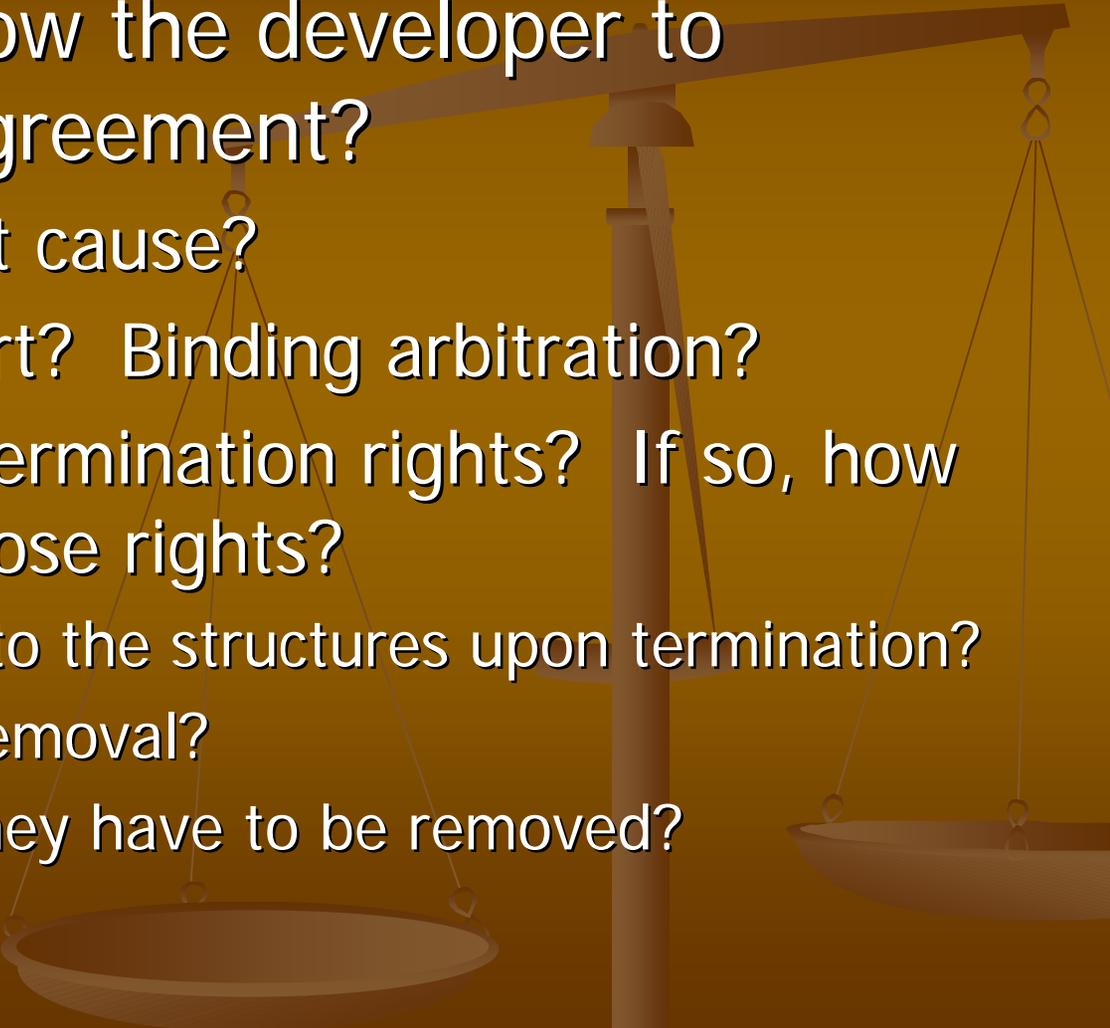
- How much of the land is subject to the agreement?
  - Length of agreement
  - Am I compensated fairly for the property rights I have given up?
    - Understand the economics and mechanics of wind energy production
  - Tax consequences of wind energy payments
  - Is payment based on wind energy production?  
Is it a fixed amount?
- 

# Legal Issues for Landowners

- Does the developer want to develop the land or just want a use right?
  - For development, the construction clause should limit construction of wind energy structures to not more than 3 or 4 years with adequate compensation paid to the landowner for use restrictions during that time



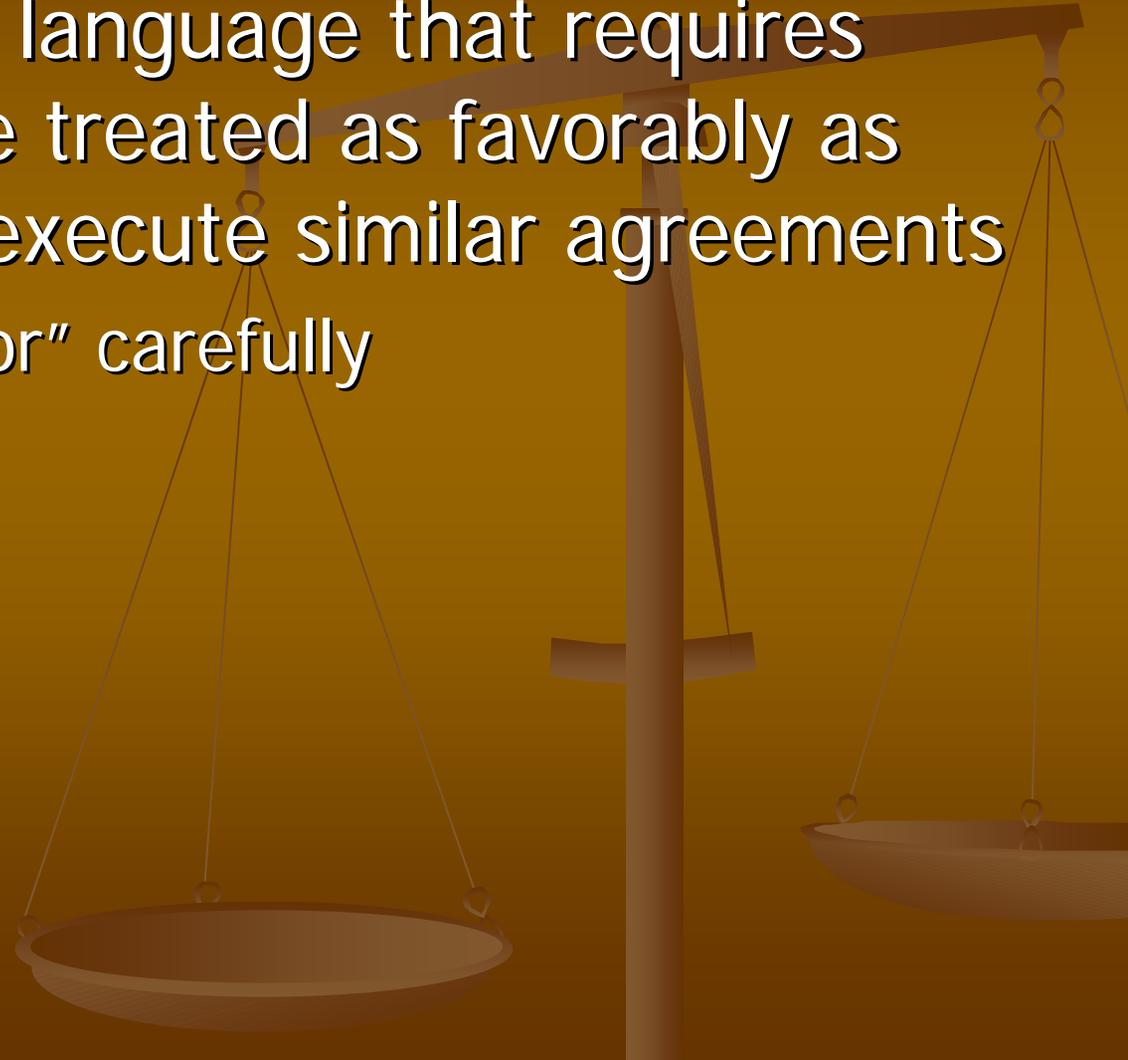
# Legal Issues for Landowners



- What events allow the developer to terminate the agreement?
  - Anytime without cause?
  - Can I go to court? Binding arbitration?
  - Do I have any termination rights? If so, how do I exercise those rights?
    - What happens to the structures upon termination?
    - Who pays for removal?
    - How soon do they have to be removed?

# Wind Energy Agreements

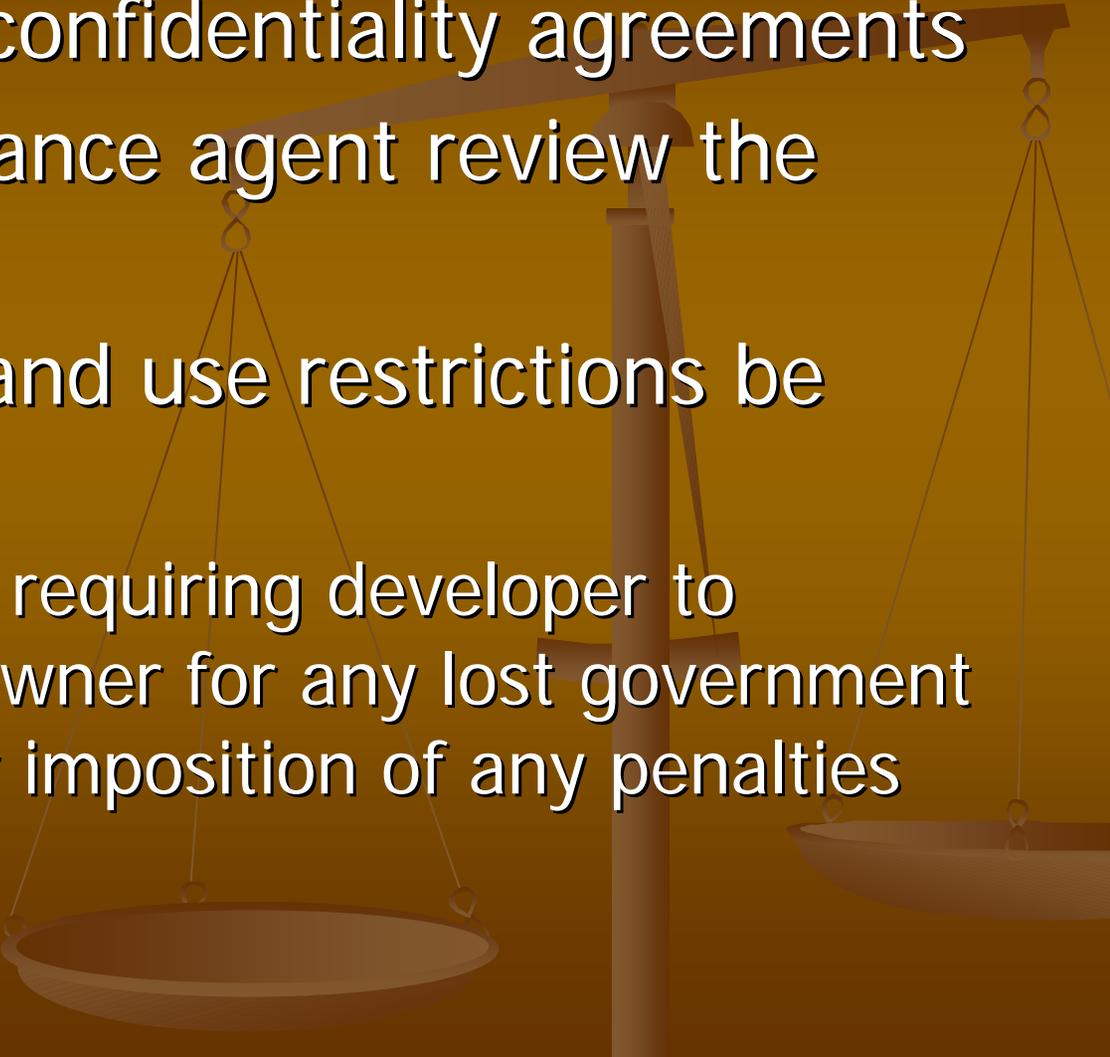
- Consider clause language that requires landowner to be treated as favorably as neighbors that execute similar agreements
  - Define “neighbor” carefully



# Wind Energy Agreements

- Require that the agreement be recorded (not just a memorandum of the lease agreement)
  - Eliminates problem of having to find agreement on subsequent sale
  - HB 2280 (intro. KS House 2/2003) would have required recordation of lease agreement. Later amended and died in committee
  - S.B. 331 (intro. KS Senate on 1/22/04 and referred next day to Sen. Comm. On Util.)

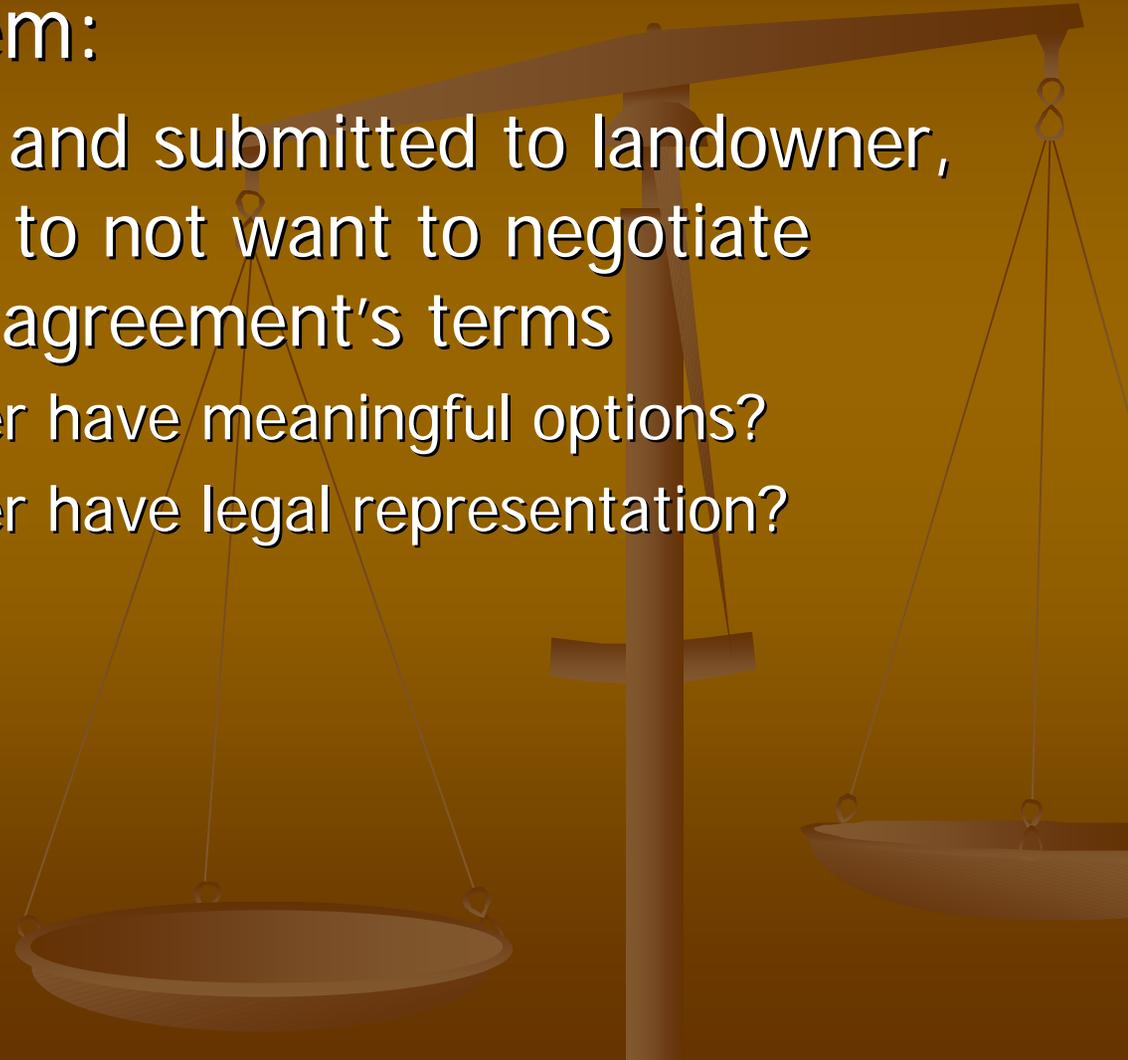
# Wind Energy Agreements



- Never agree to confidentiality agreements
- Have your insurance agent review the agreement
- Will any USDA land use restrictions be violated?
  - Consider clause requiring developer to indemnify landowner for any lost government payments or for imposition of any penalties

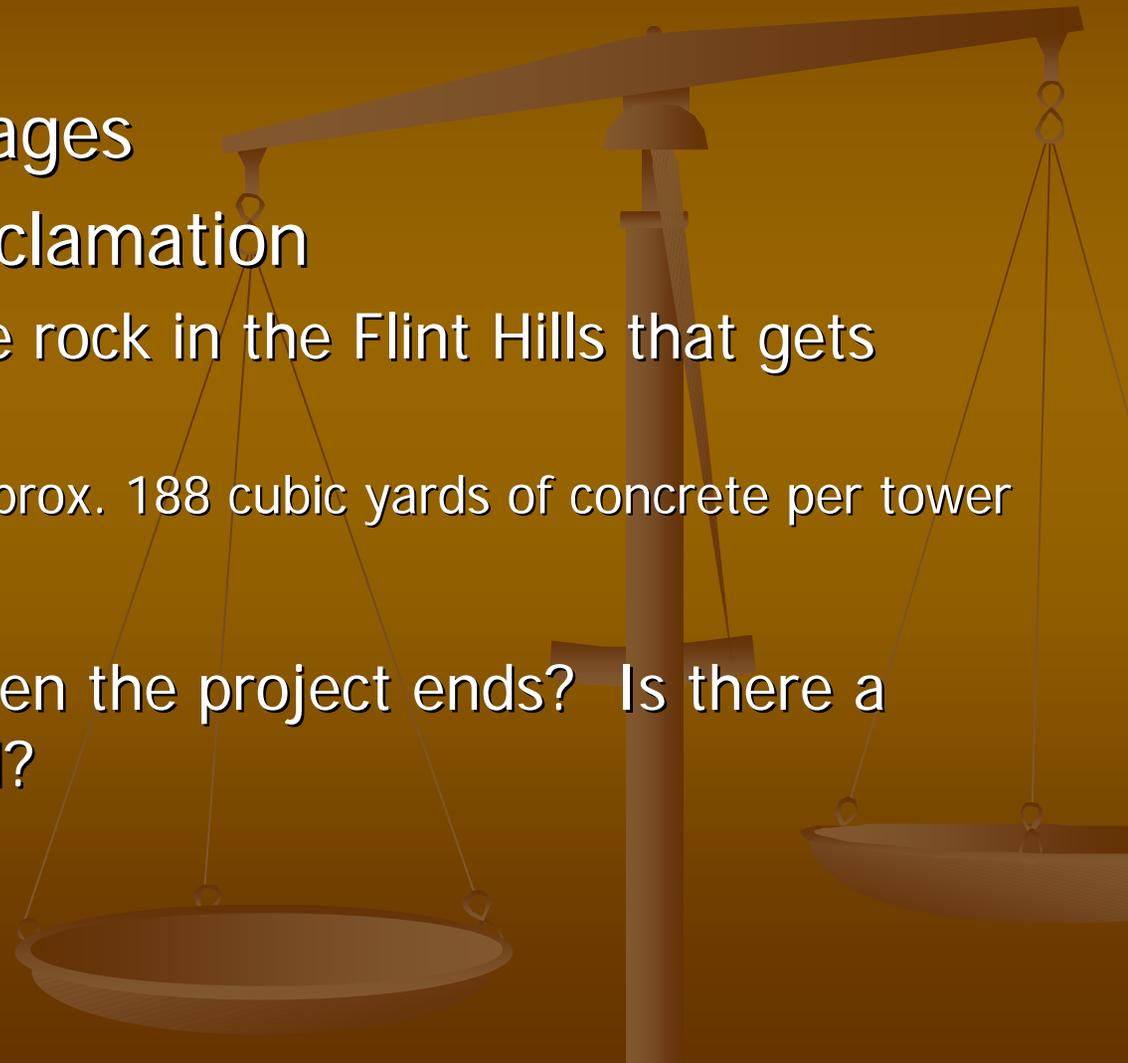
# Negotiating a Wind Energy Agreement

- Common problem:
  - Once proposed and submitted to landowner, company tends to not want to negotiate changes to the agreement's terms
    - Does landowner have meaningful options?
    - Does landowner have legal representation?



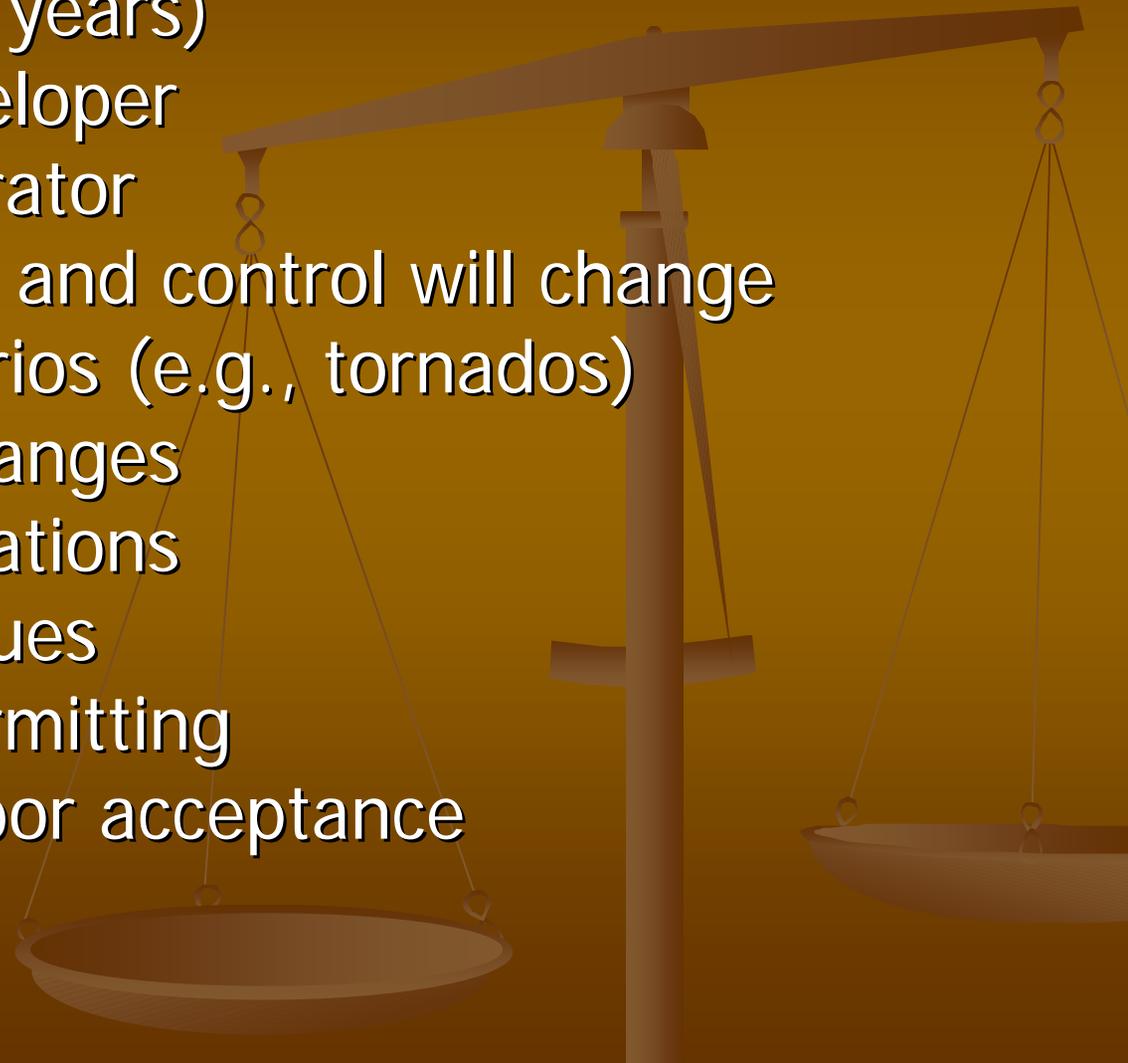
# Wind Energy Contract Provisions

- Indemnification
- Mitigation of damages
- Excavation and reclamation
  - E.G., who gets the rock in the Flint Hills that gets excavated?
    - Note: It takes approx. 188 cubic yards of concrete per tower
- Restoration
  - What happens when the project ends? Is there a need to post bond?

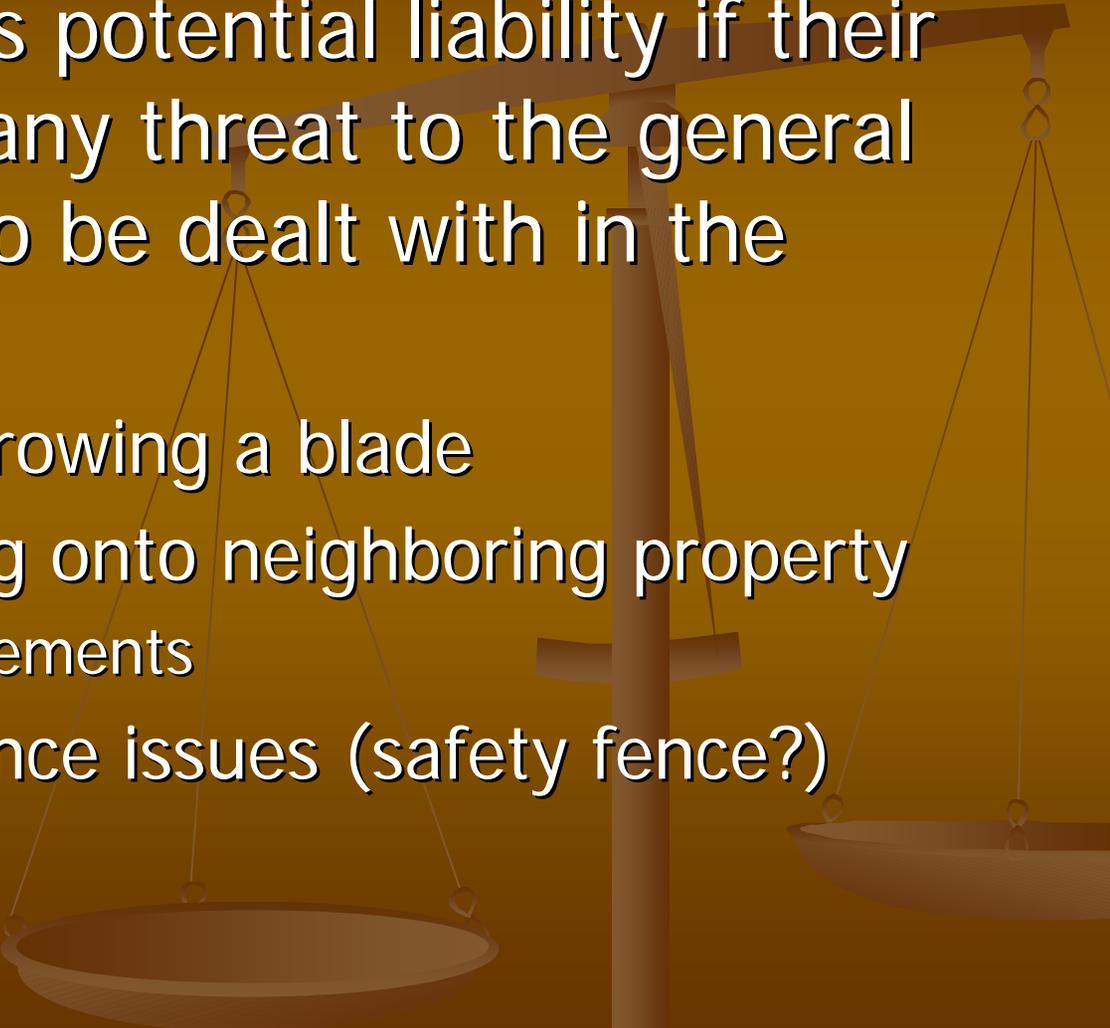


# Risk Evaluation for Landowners

- Long term (25-30 years)
- Evaluation of developer
- Evaluation of operator
- Project ownership and control will change
- Worst-case scenarios (e.g., tornados)
- Energy market changes
- Unrealistic expectations
- Environmental issues
- Siting, zoning, permitting
- Family and neighbor acceptance

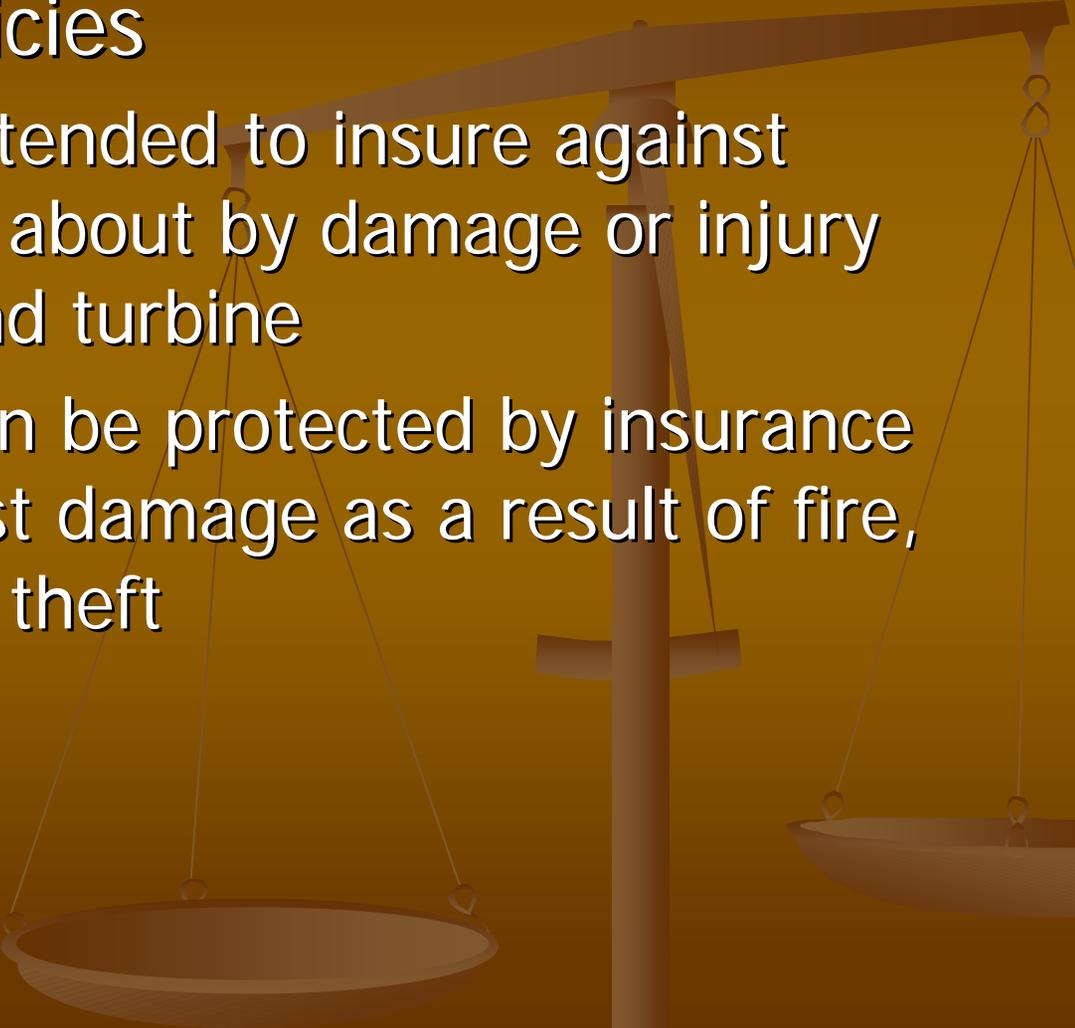


# Liability and Insurance



- Landowner faces potential liability if their property poses any threat to the general public. Issues to be dealt with in the contract:
  - Wind turbine throwing a blade
  - Tower collapsing onto neighboring property
    - Set-back requirements
  - Attractive nuisance issues (safety fence?)

# Liability and Insurance

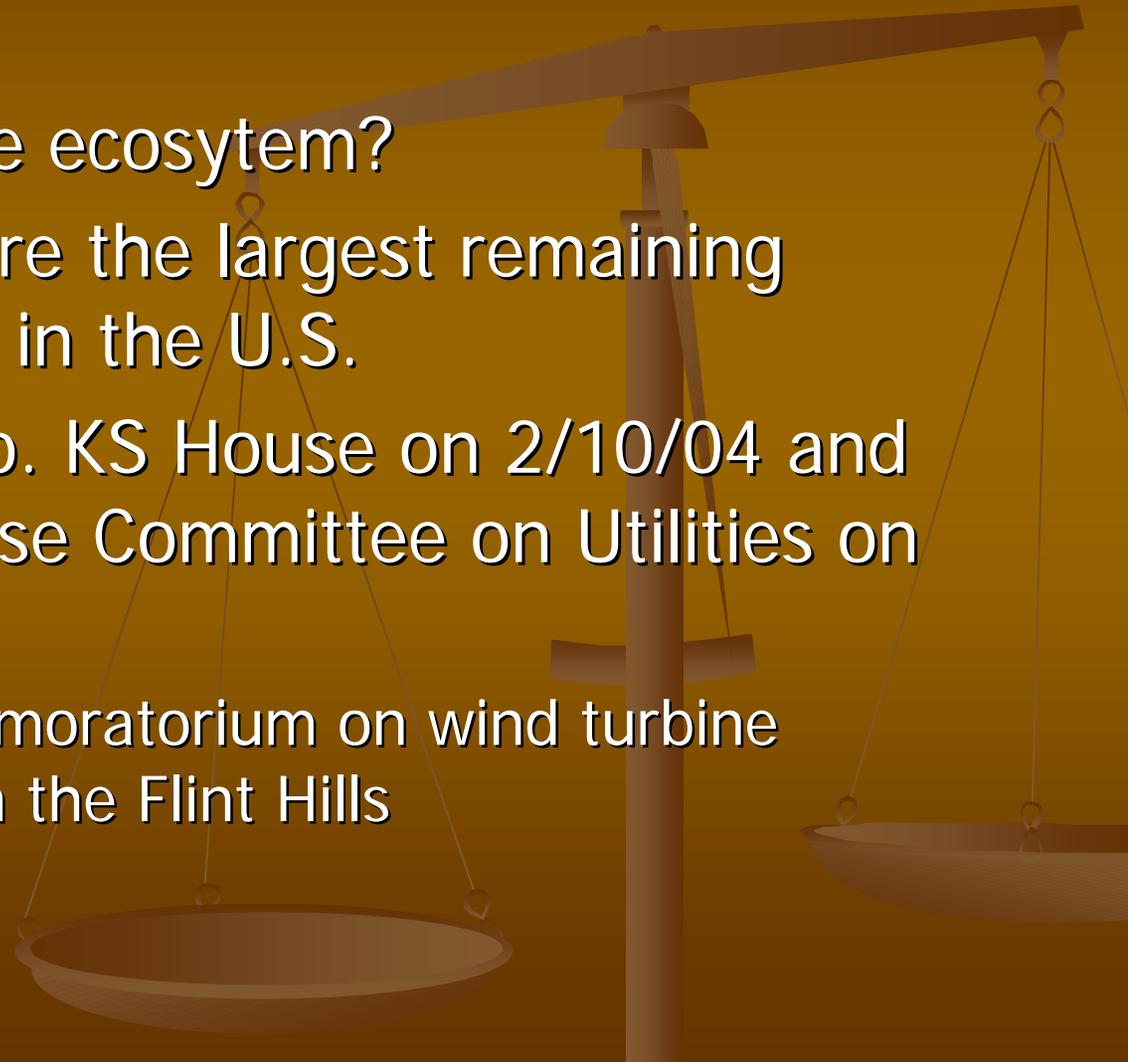


- Homeowner policies
  - Many can be extended to insure against liability brought about by damage or injury caused by a wind turbine
  - Wind turbine can be protected by insurance coverage against damage as a result of fire, lightning, ice or theft

# Environmental Concerns

## ■ Flint Hills

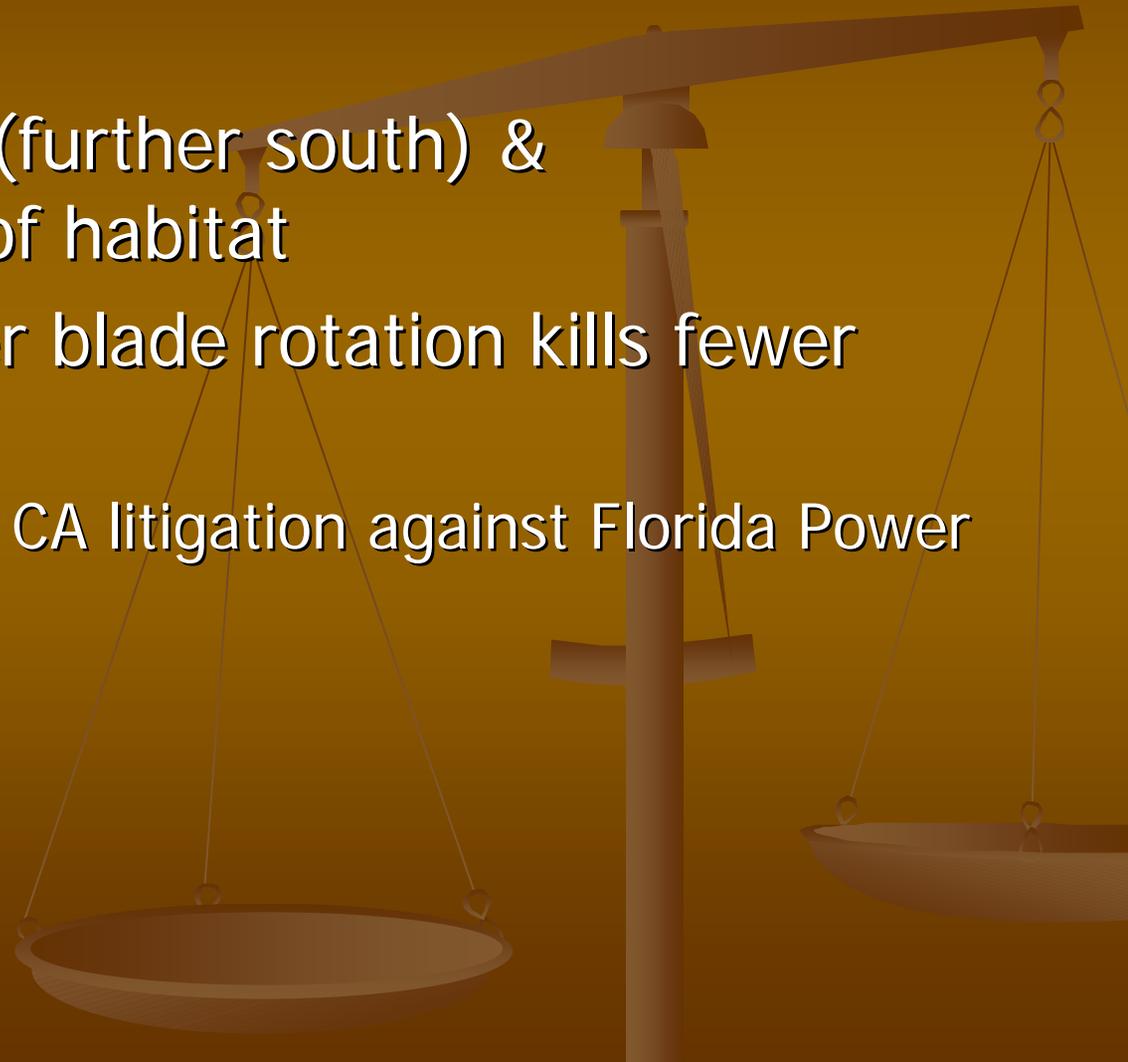
- Threat to prairie ecosystem?
- The Flint Hills are the largest remaining tallgrass prairie in the U.S.
- H.B. 2799 (intro. KS House on 2/10/04 and referred to House Committee on Utilities on 2/11/04
  - Would place a moratorium on wind turbine development in the Flint Hills



# Environmental Concerns

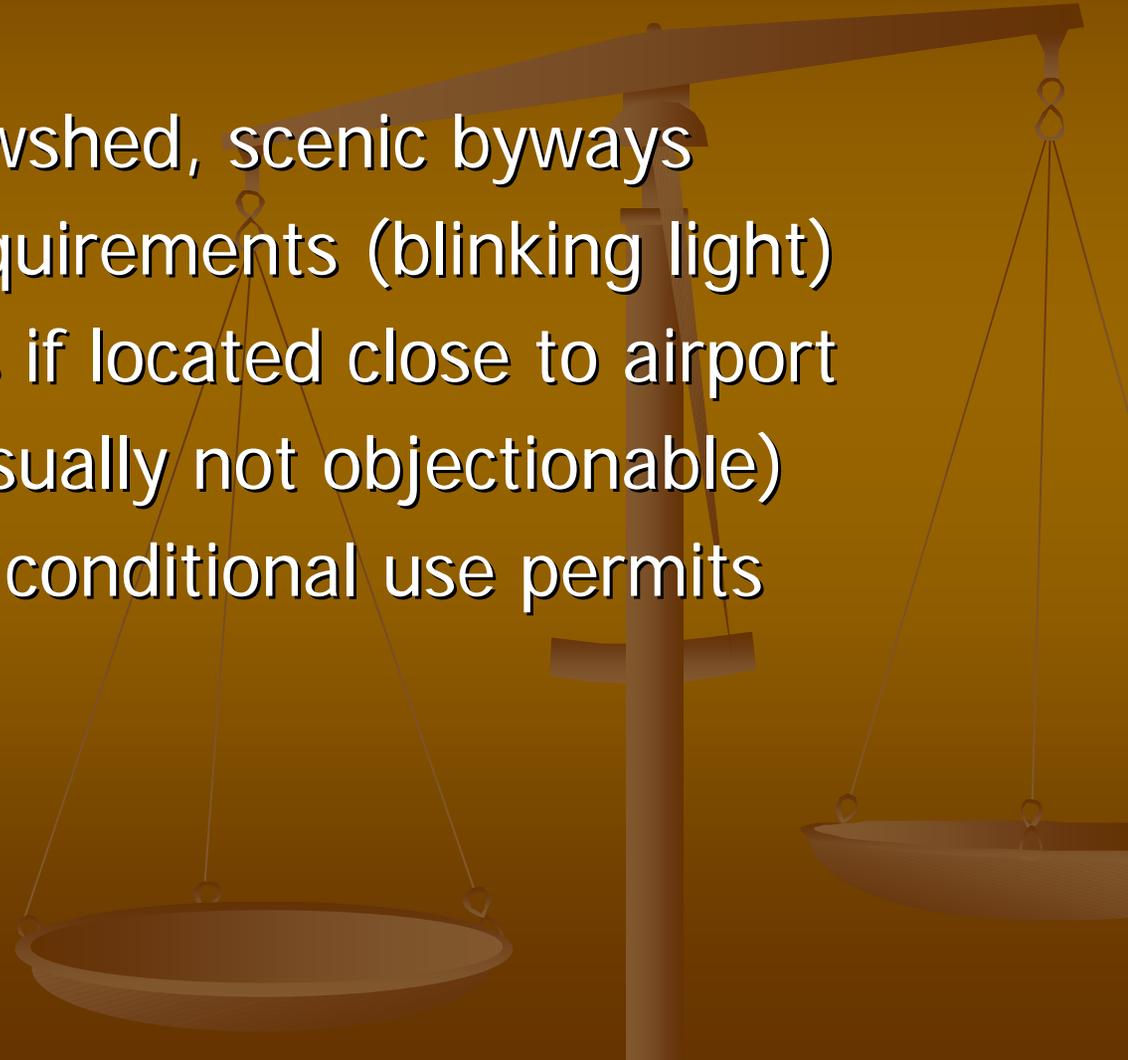
## ■ Avian issues

- Prairie chicken (further south) & fragmentation of habitat
- Bird kills (slower blade rotation kills fewer birds)
  - Altamont Pass, CA litigation against Florida Power and Light



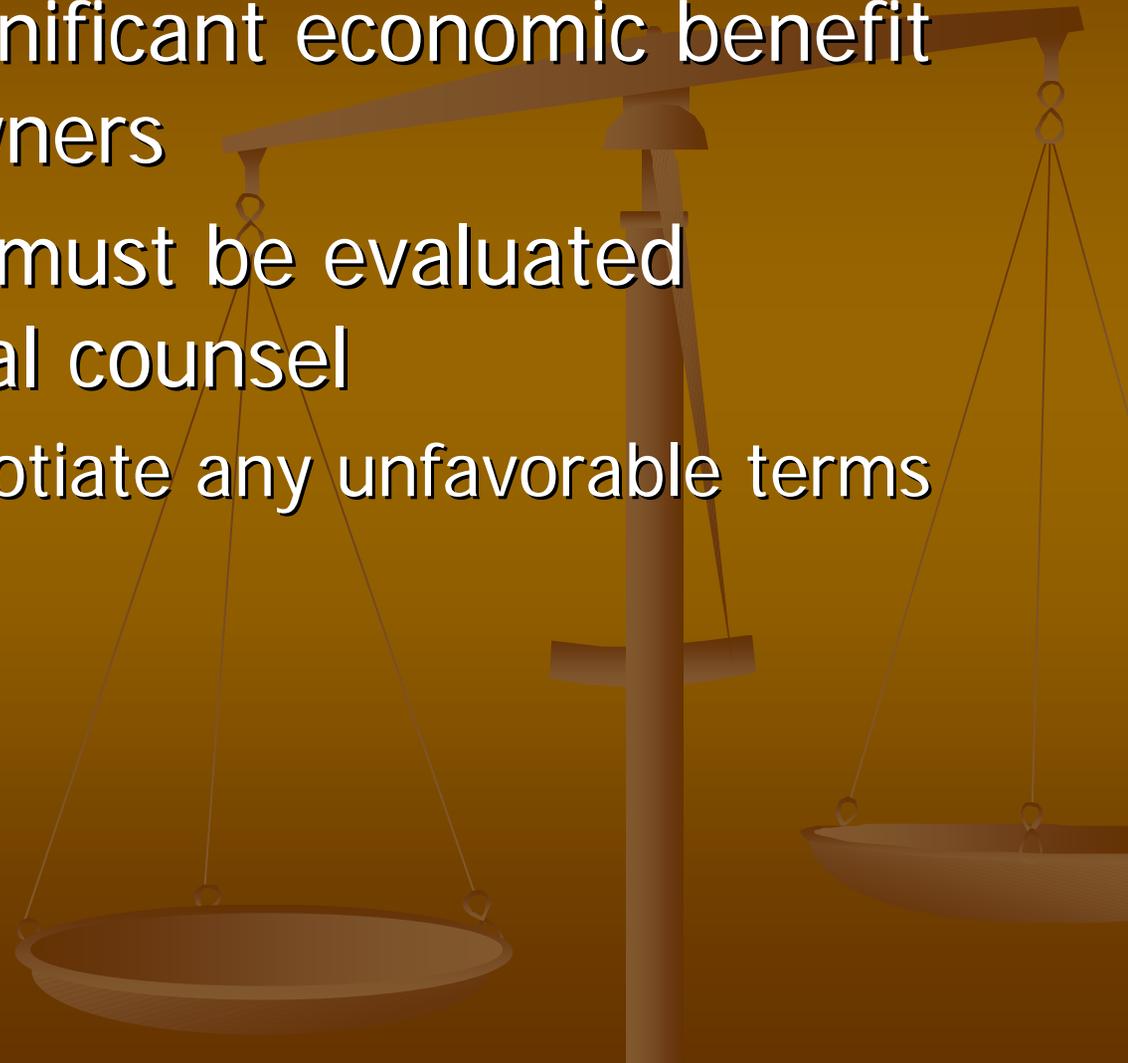
# Environmental Concerns

- Aesthetics
  - Viewscape, viewshed, scenic byways
  - FAA lighting requirements (blinking light)
  - FAA restrictions if located close to airport
  - Noise issues (usually not objectionable)
  - County zoning, conditional use permits



# Wind Farming in Kansas

- Potential for significant economic benefit for rural landowners
- All agreements must be evaluated carefully by legal counsel
  - Attempt to negotiate any unfavorable terms



# THANK YOU!

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