

Wind Farm Legal Issues

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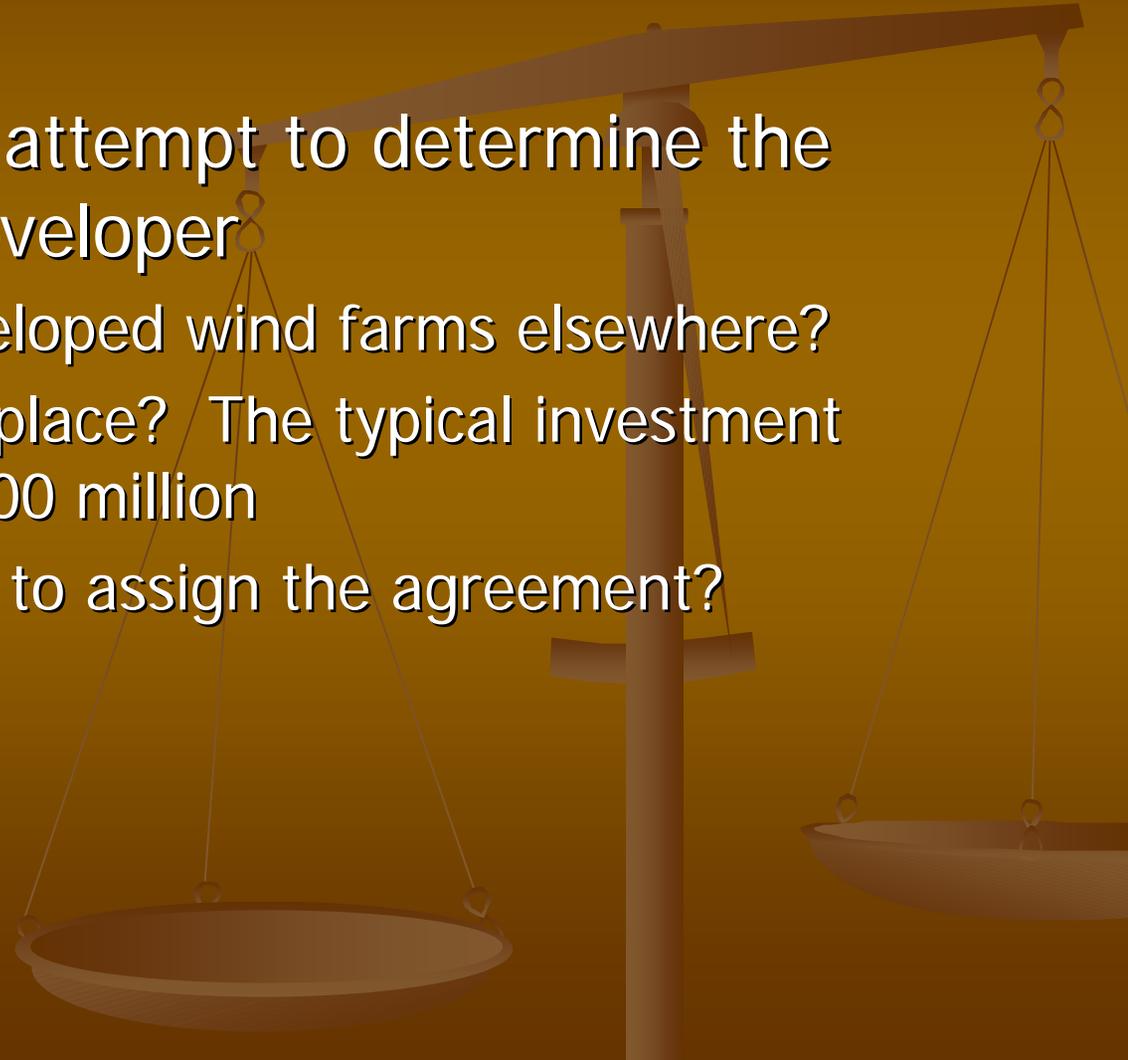
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Wind Energy Development

■ 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?



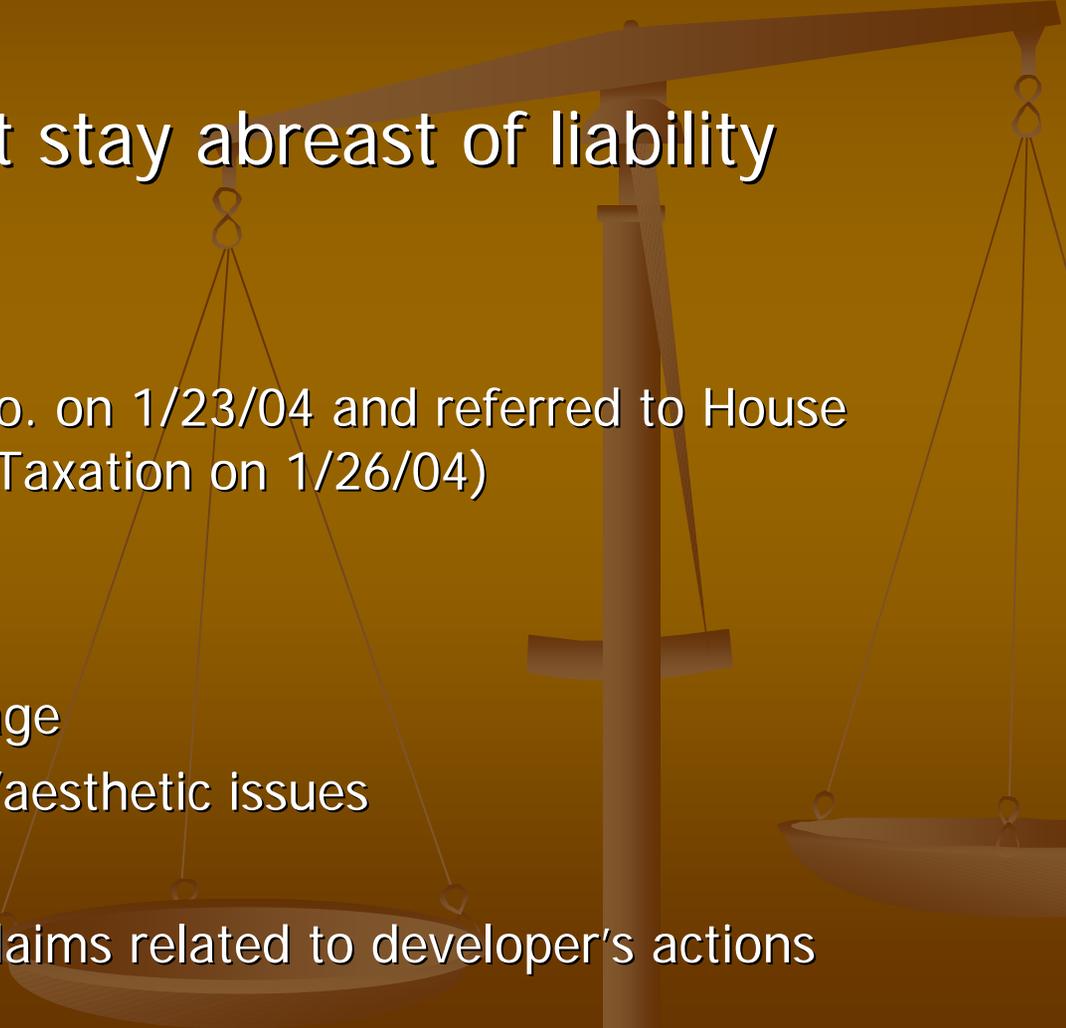
Wind Energy Development



■ 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

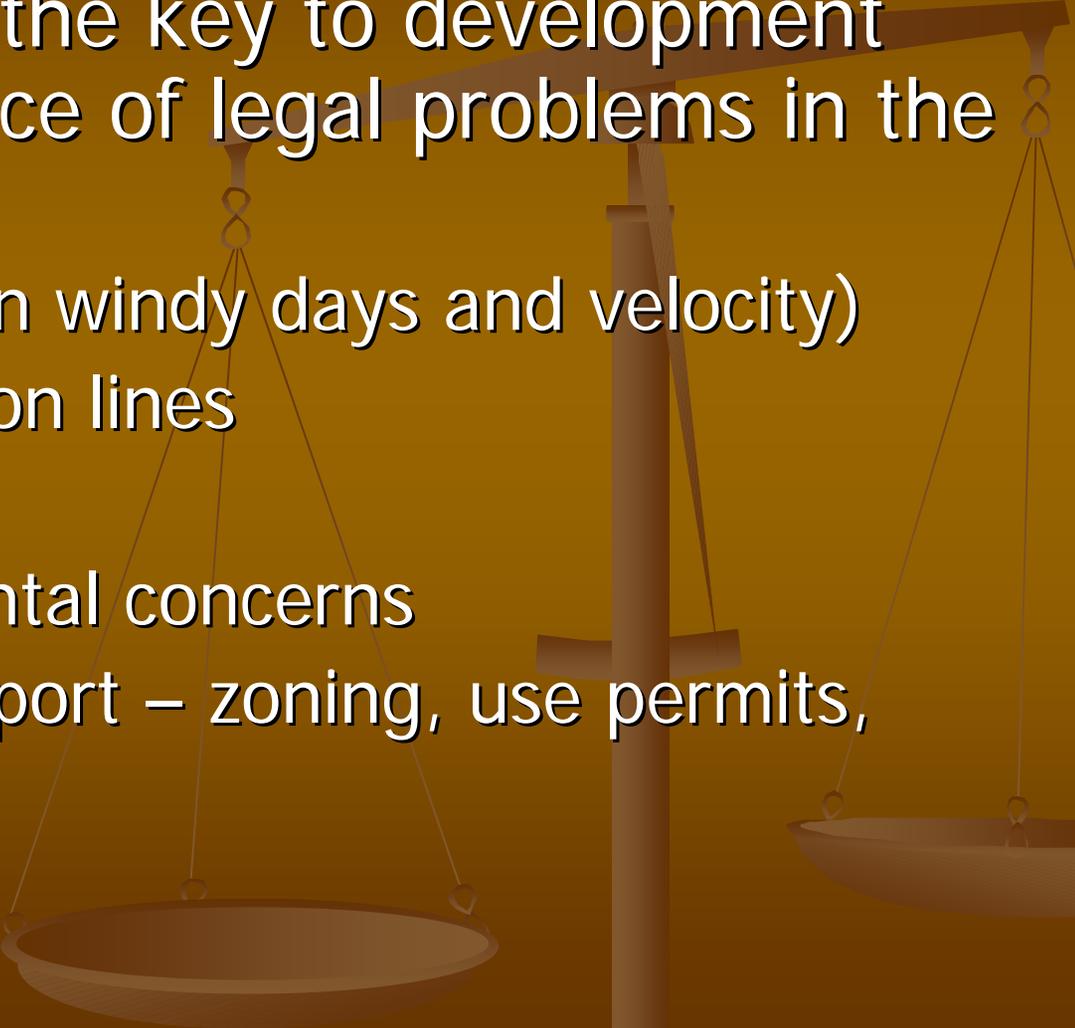
Wind Energy Development



■ Primary Issues

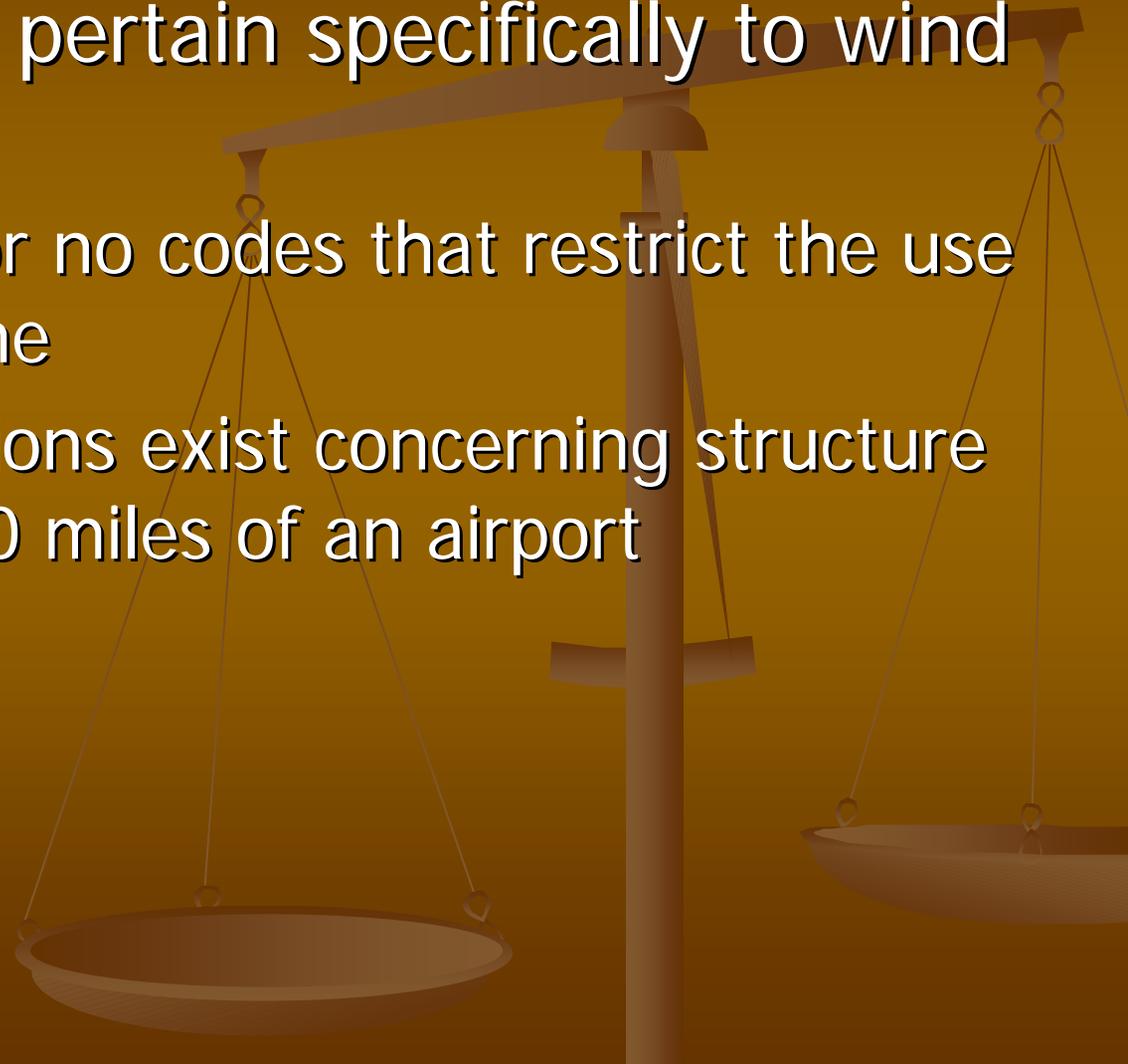
- Landowner must stay abreast of liability issues
 - Property taxes
 - H.B. 2579 (intro. on 1/23/04 and referred to House Committee on Taxation on 1/26/04)
 - Liability issues
 - Trespassers
 - Third party usage
 - Environmental/aesthetic issues
 - Nuisance
 - Lawsuits and claims related to developer's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

Wind Energy Development

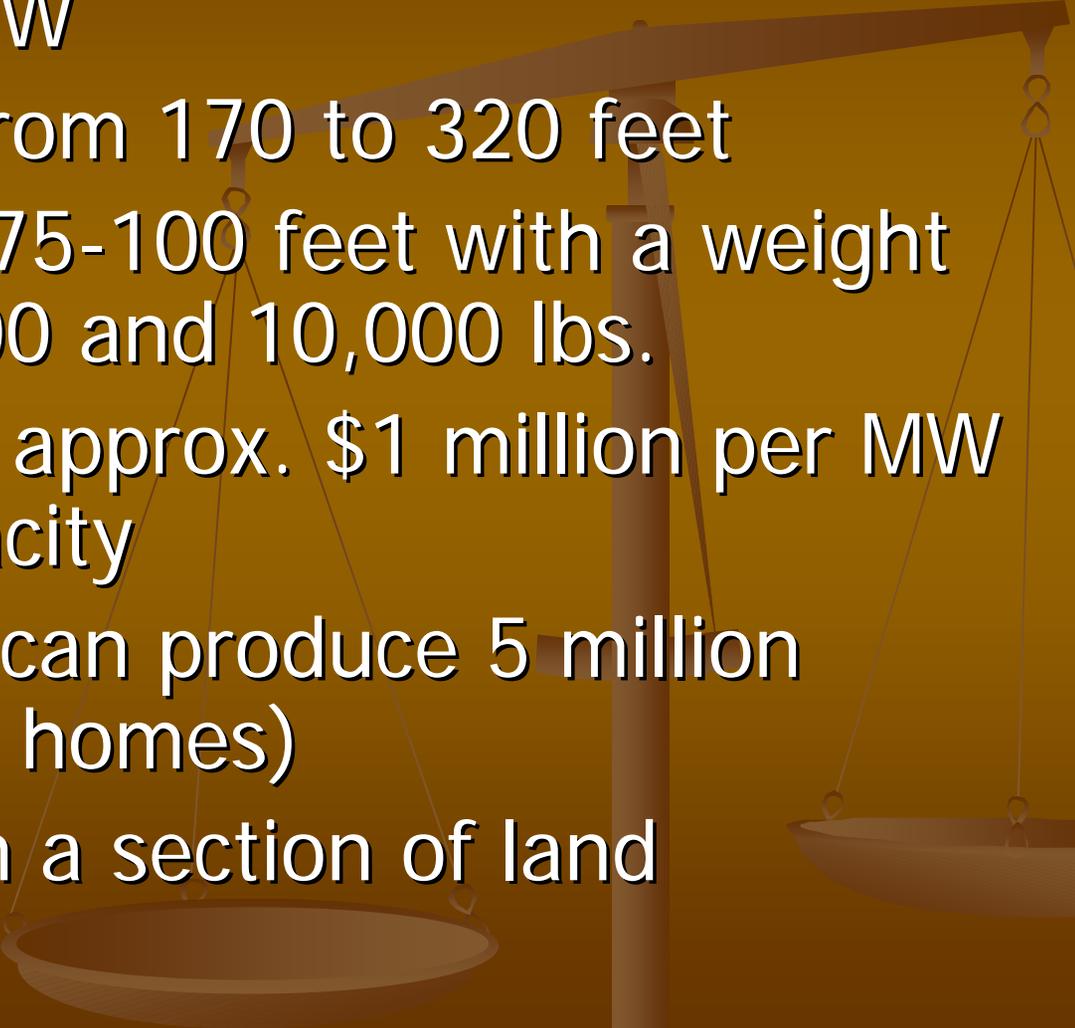
- Site selection is the key to development and the avoidance of legal problems in the future:
 - Windy (based on windy days and velocity)
 - Near transmission lines
 - Access to roads
 - Few environmental concerns
 - Community support – zoning, use permits, etc.
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Zoning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

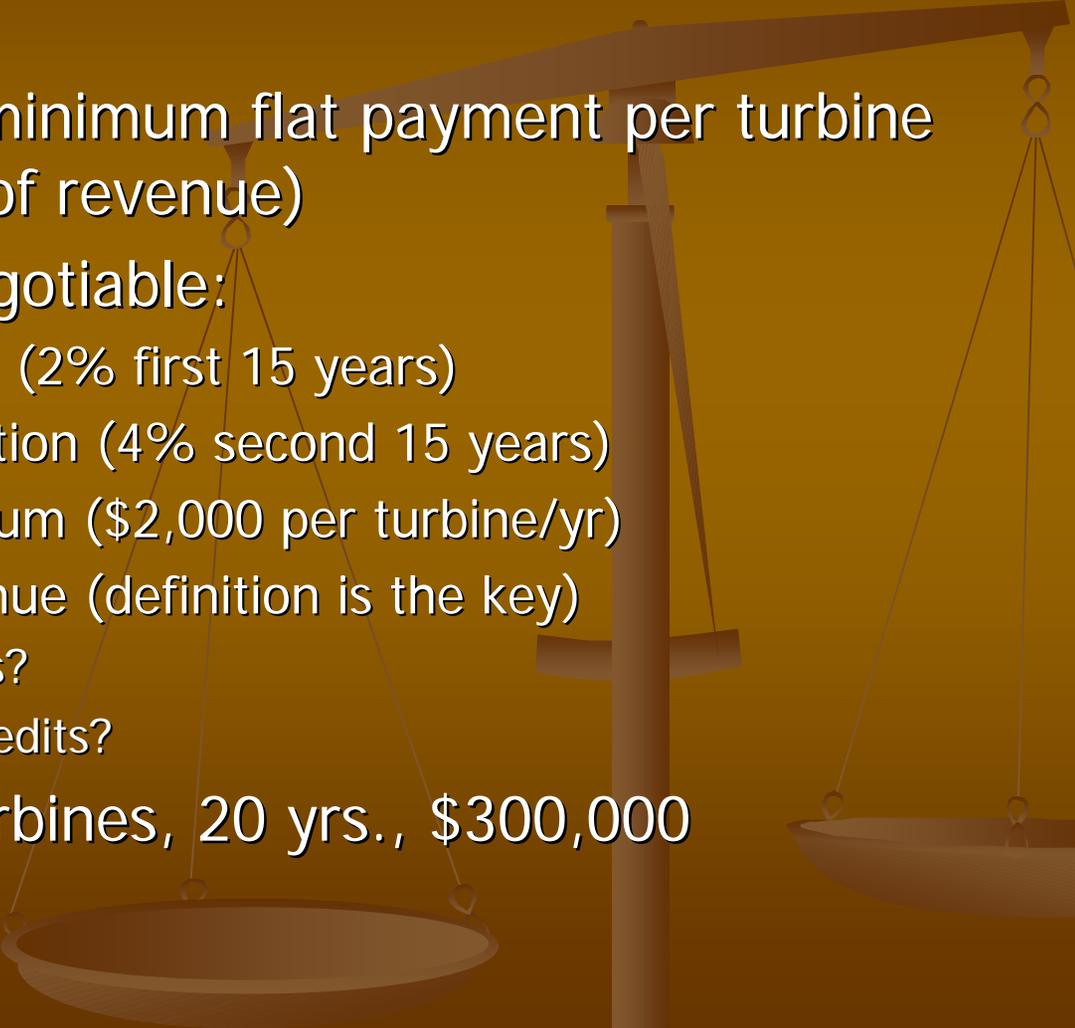
- Few ordinances pertain specifically to wind systems
 - Generally few or no codes that restrict the use of a wind turbine
 - Federal regulations exist concerning structure height within 10 miles of an airport



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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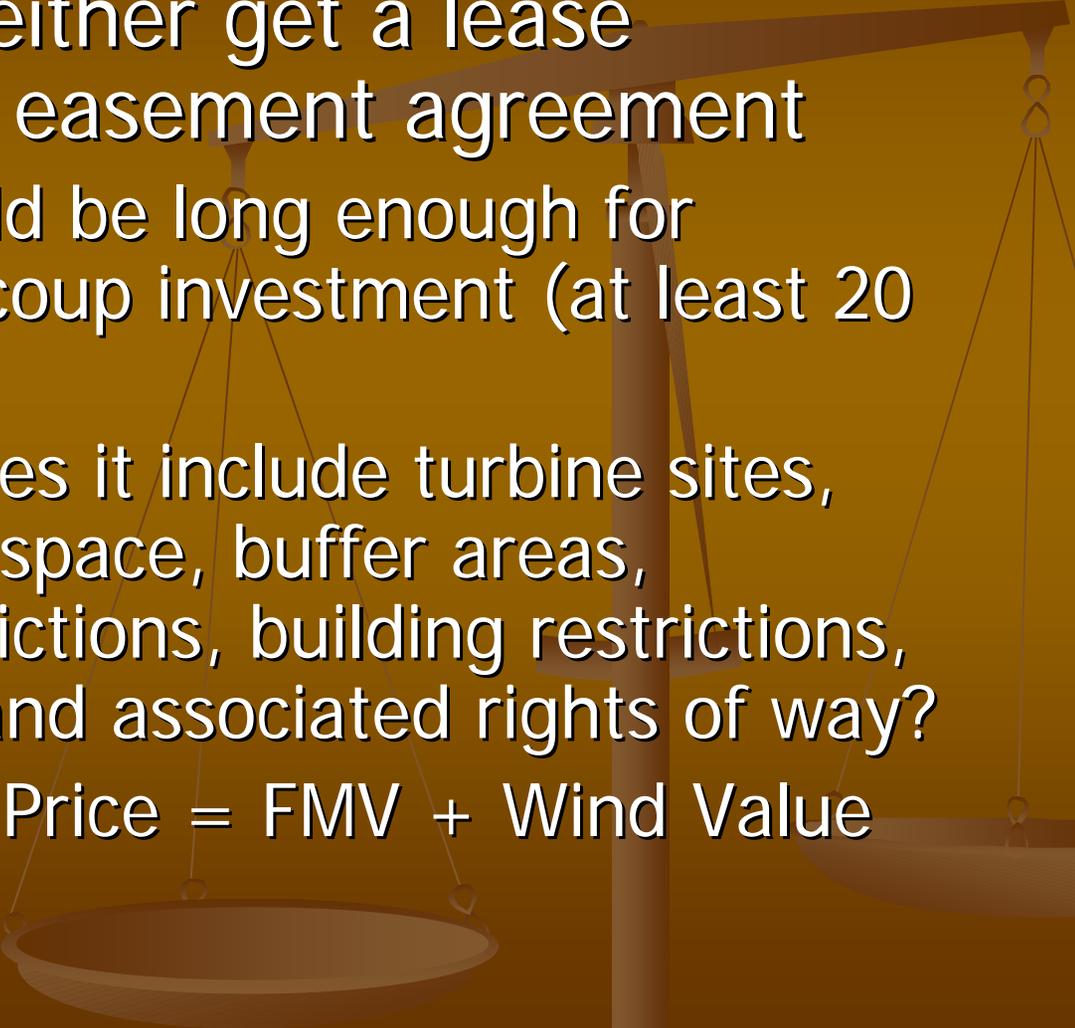
Wind Energy Agreements



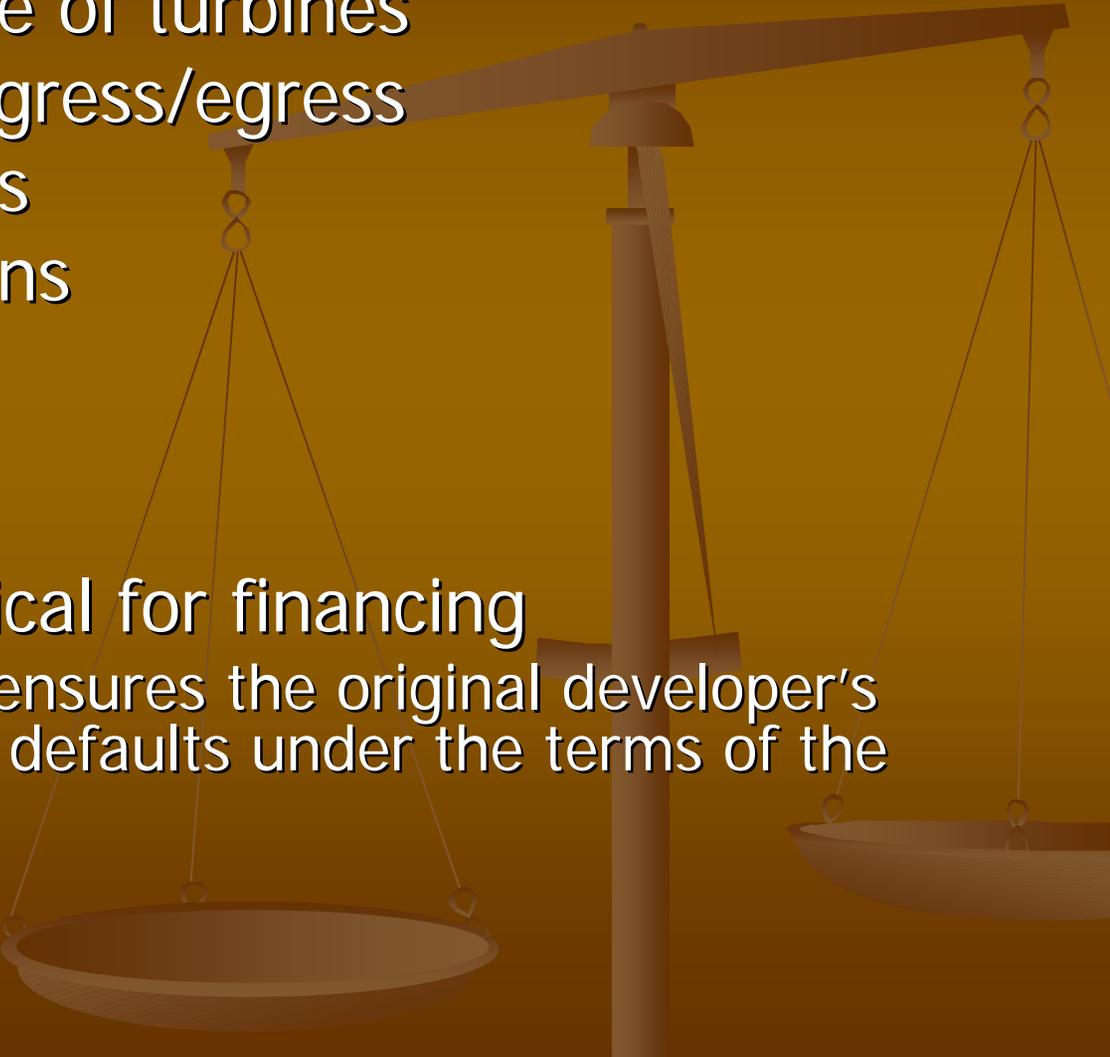
■ Payment structure

- 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

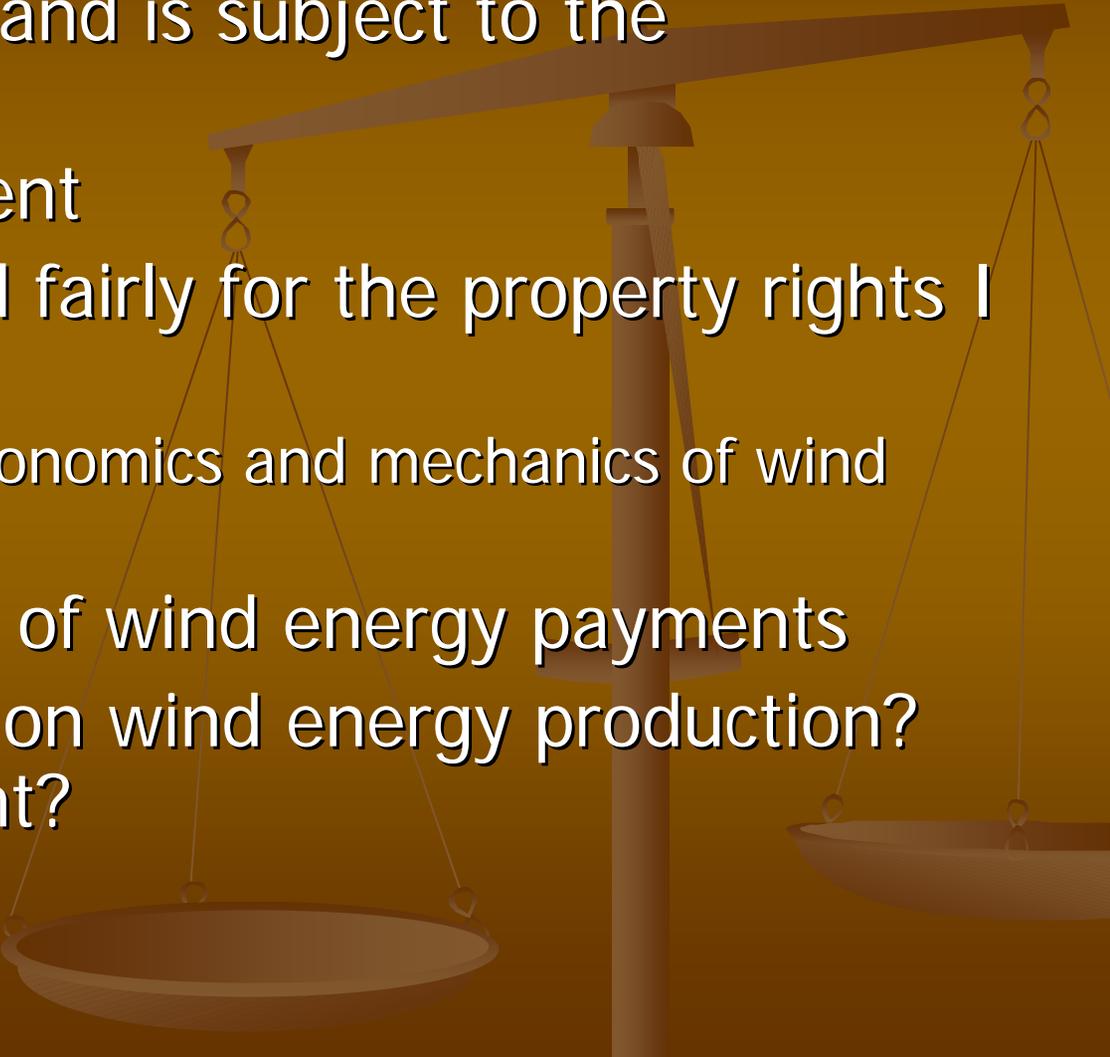
Wind Energy Contracts

- 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

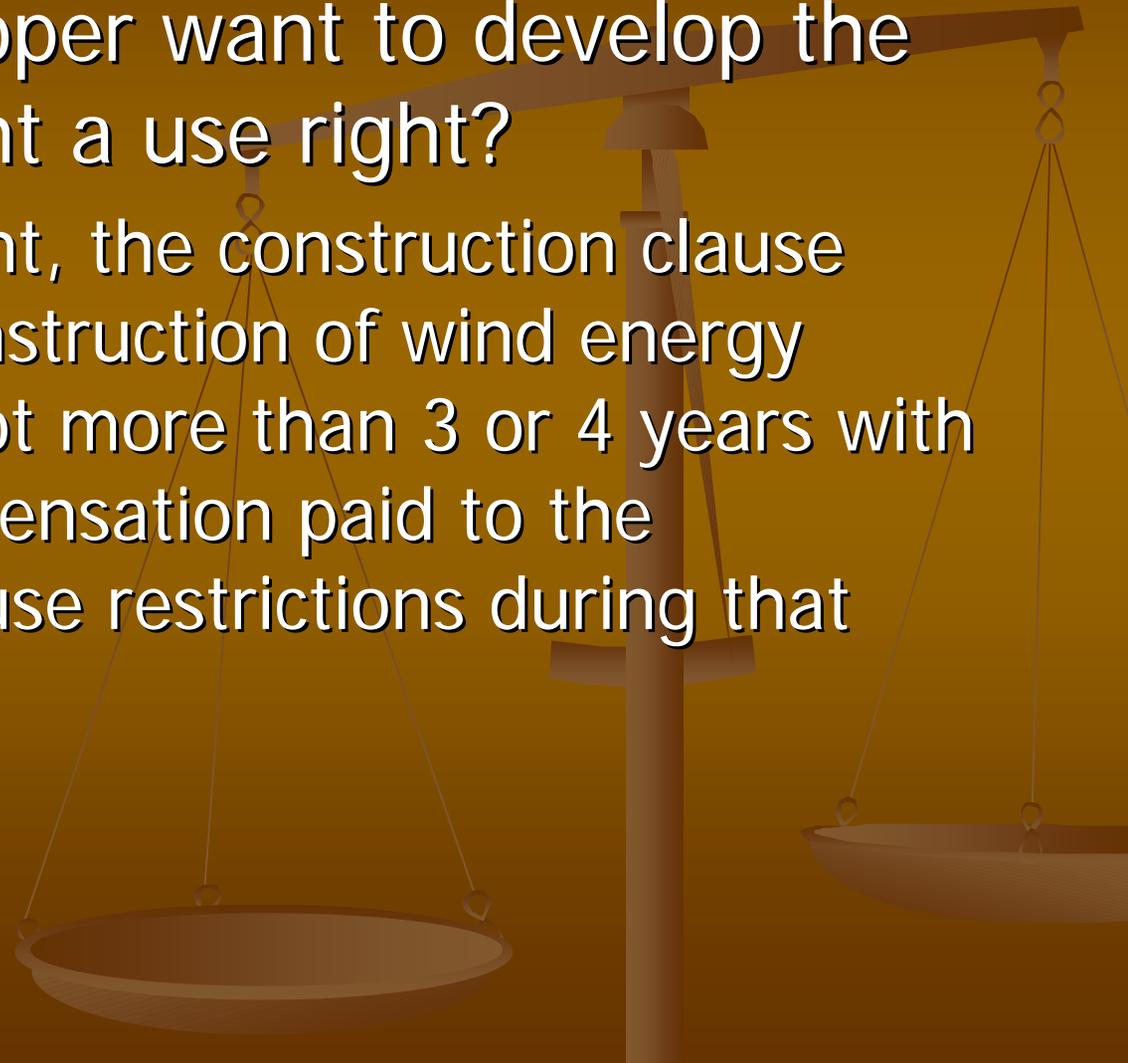
- Term of years – life of turbines
 - Surface rights – ingress/egress
 - Transmission rights
 - Land use restrictions
 - Hunting?
 - Pasture burning?
 - Compensation
 - Assignability – critical for financing
 - Insert clause that ensures the original developer's liability if assignee defaults under the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

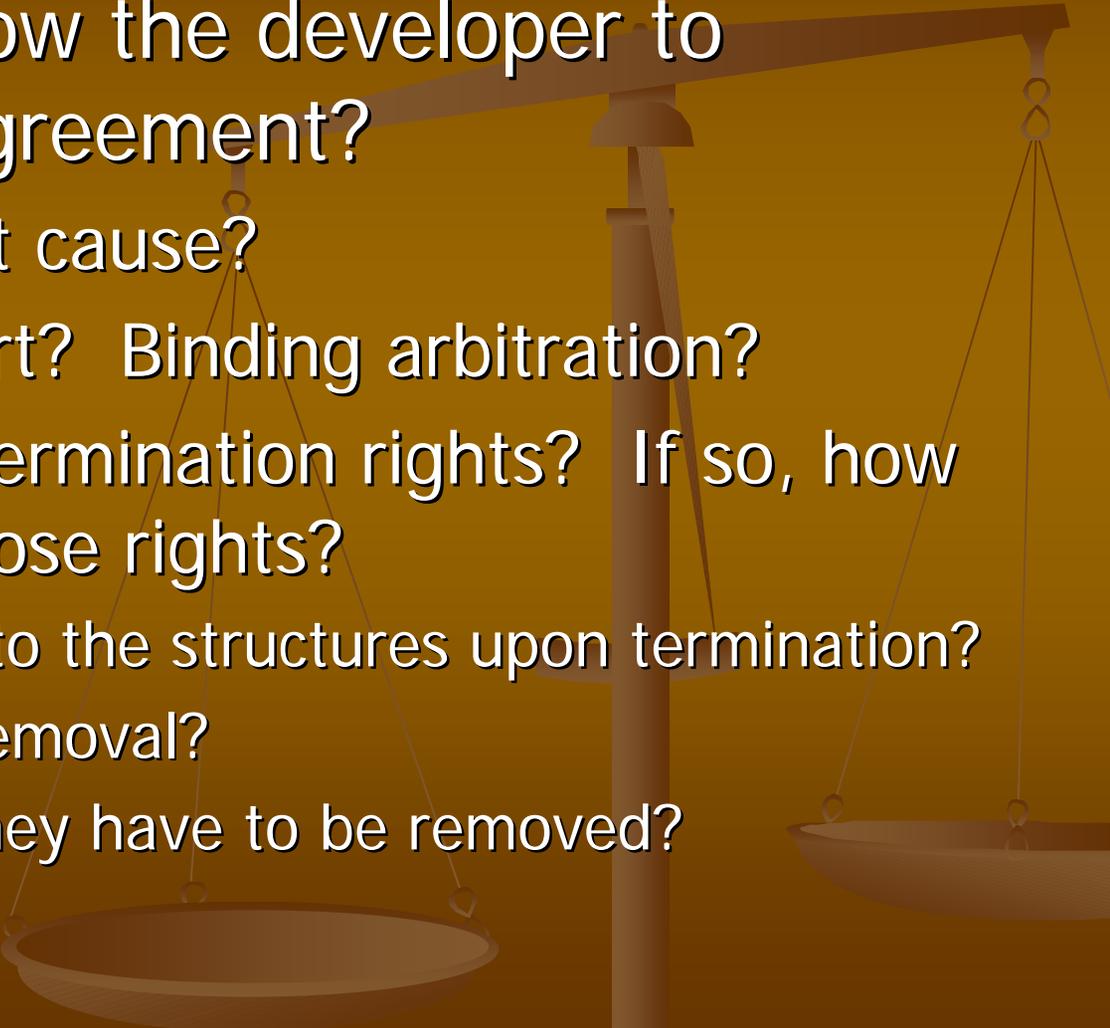
- How much of the land is subject to the agreement?
 - Length of agreement
 - Am I compensated fairly for the property rights I have given up?
 - Understand the economics and mechanics of wind energy production
 - Tax consequences of wind energy payments
 - Is payment based on wind energy production?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



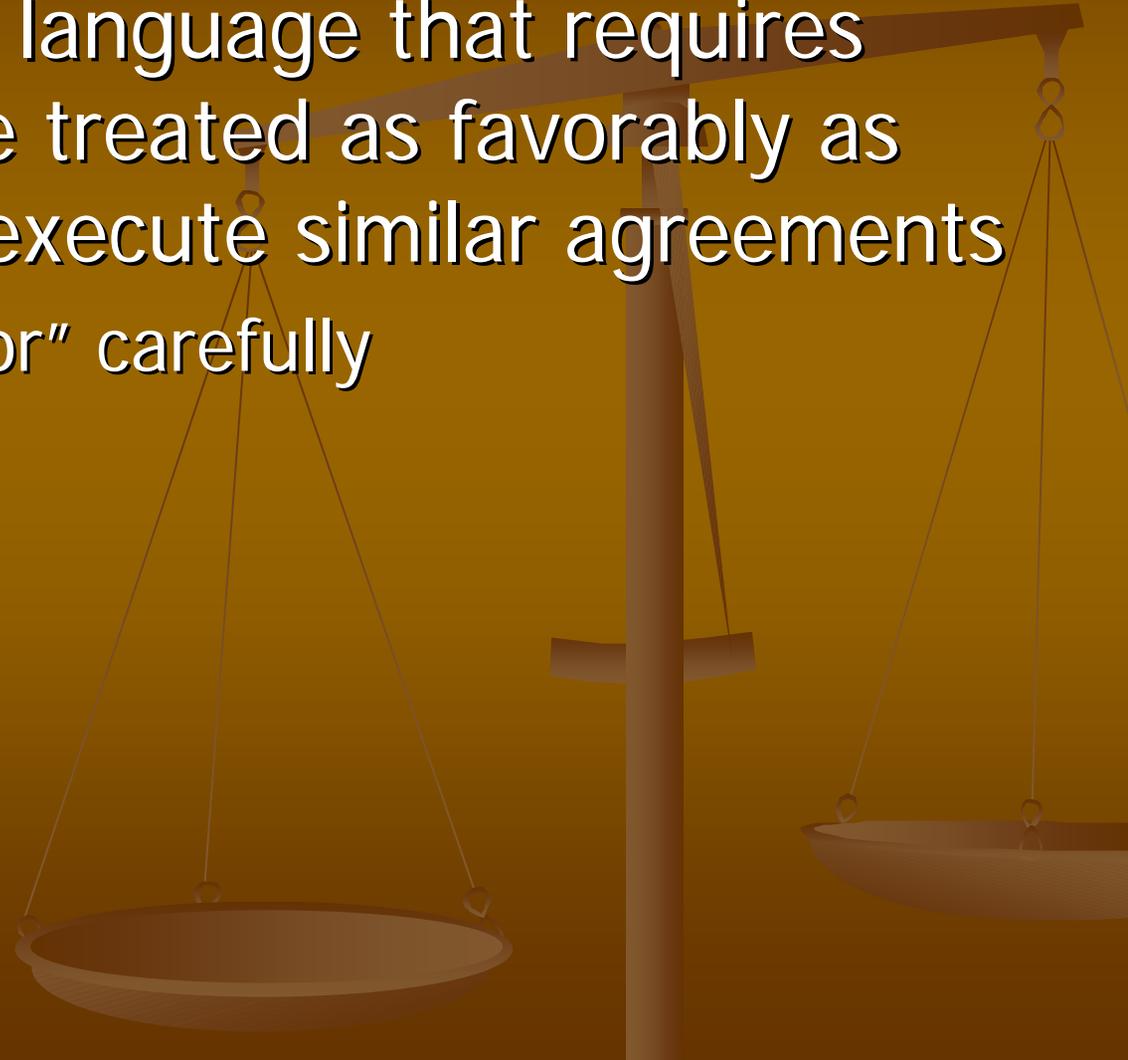
Legal Issues for Landowners



- 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

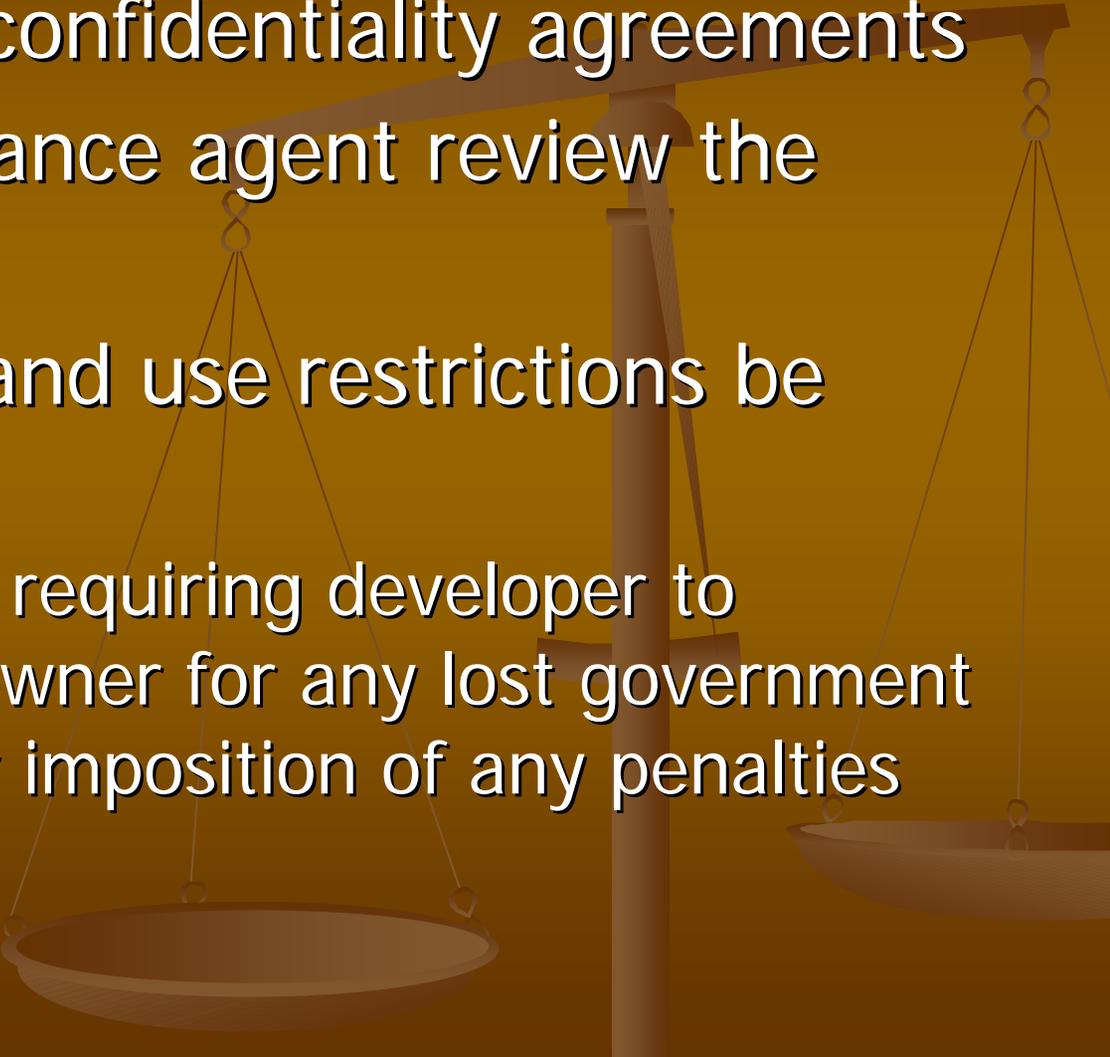
- Consider clause language that requires landowner to be treated as favorably as neighbors that execute similar agreements
 - Define “neighbor” carefully



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.)

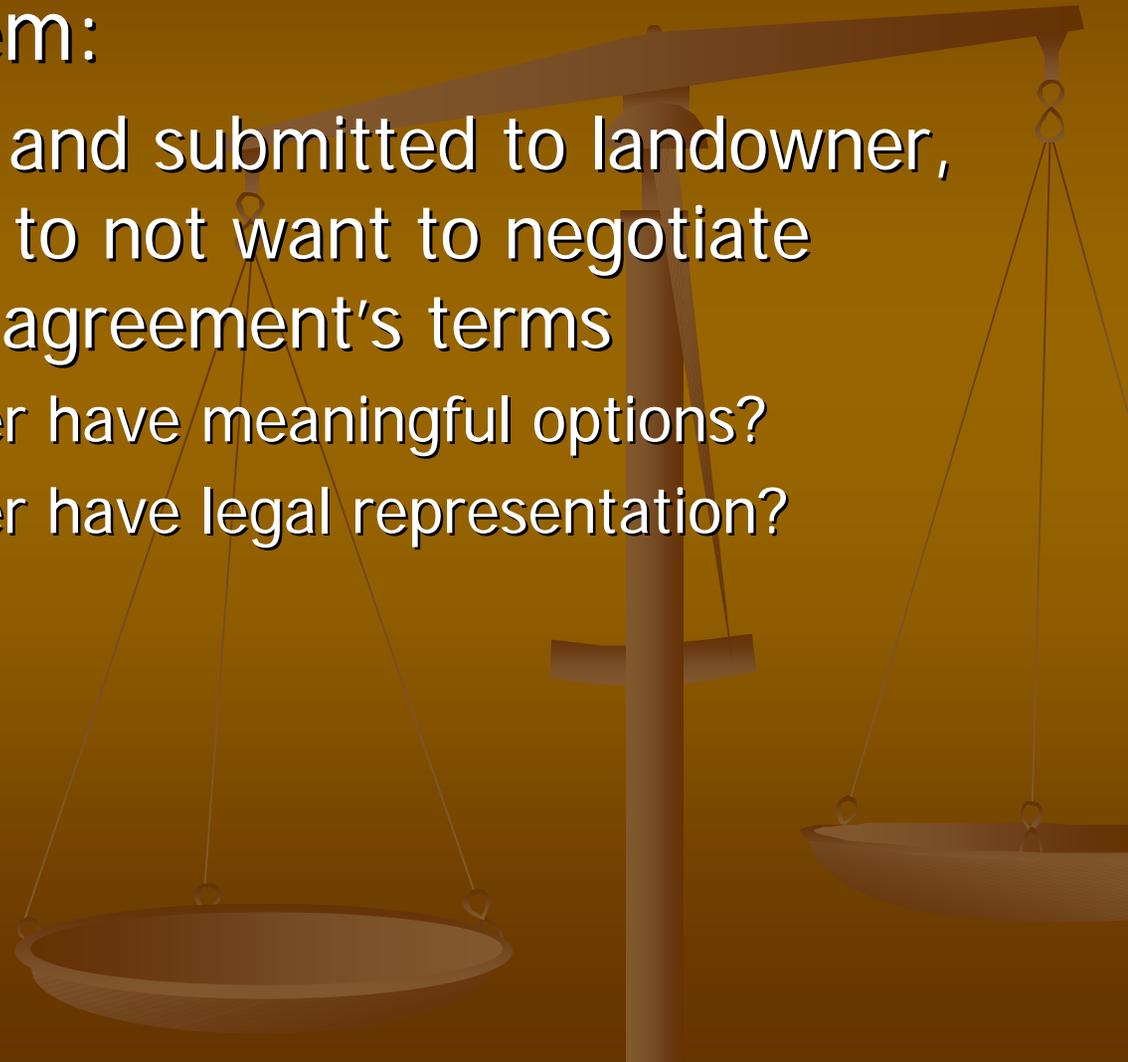
Wind Energy Agreements



- 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

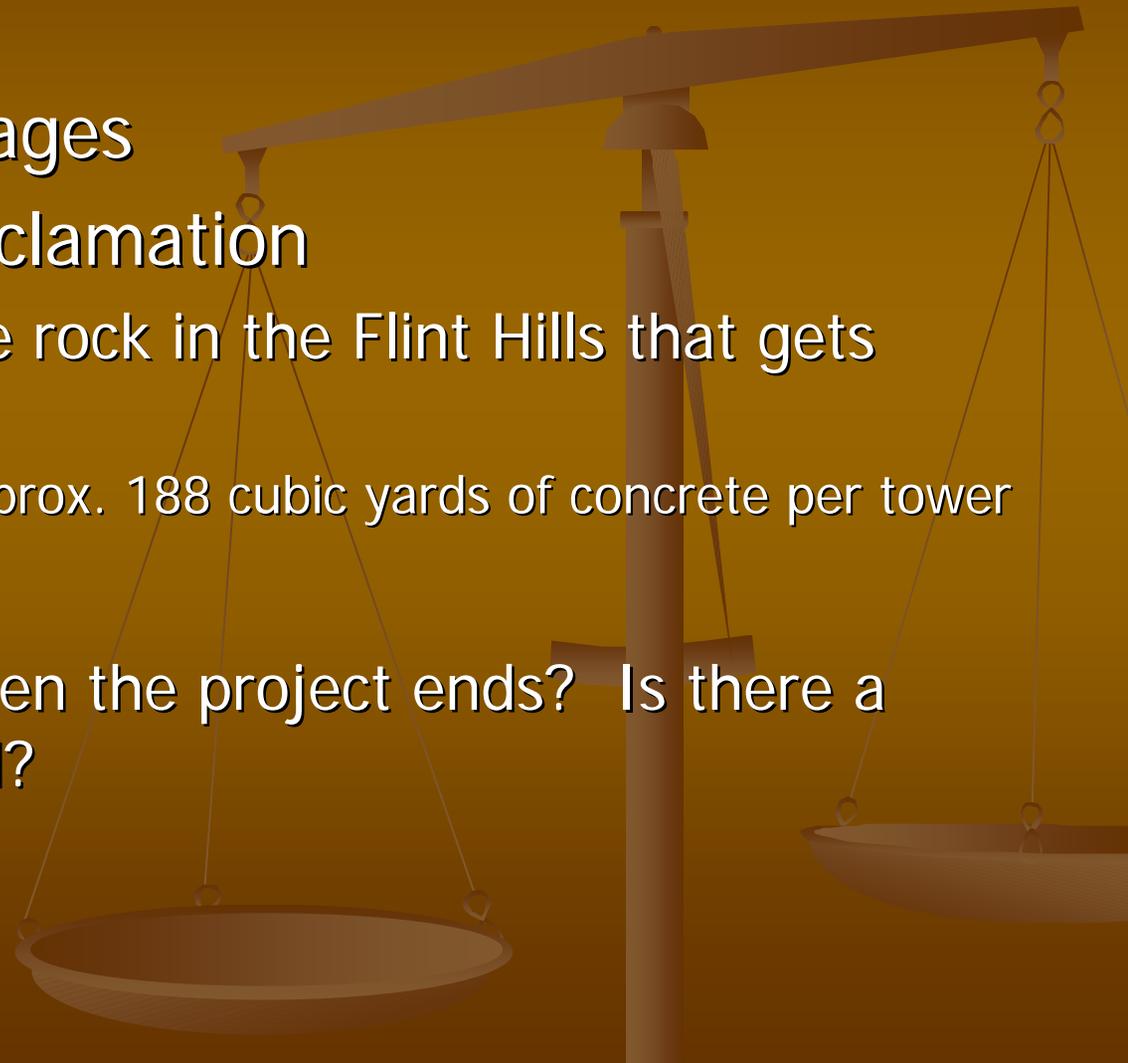
Negotiating a Wind Energy Agreement

- 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?



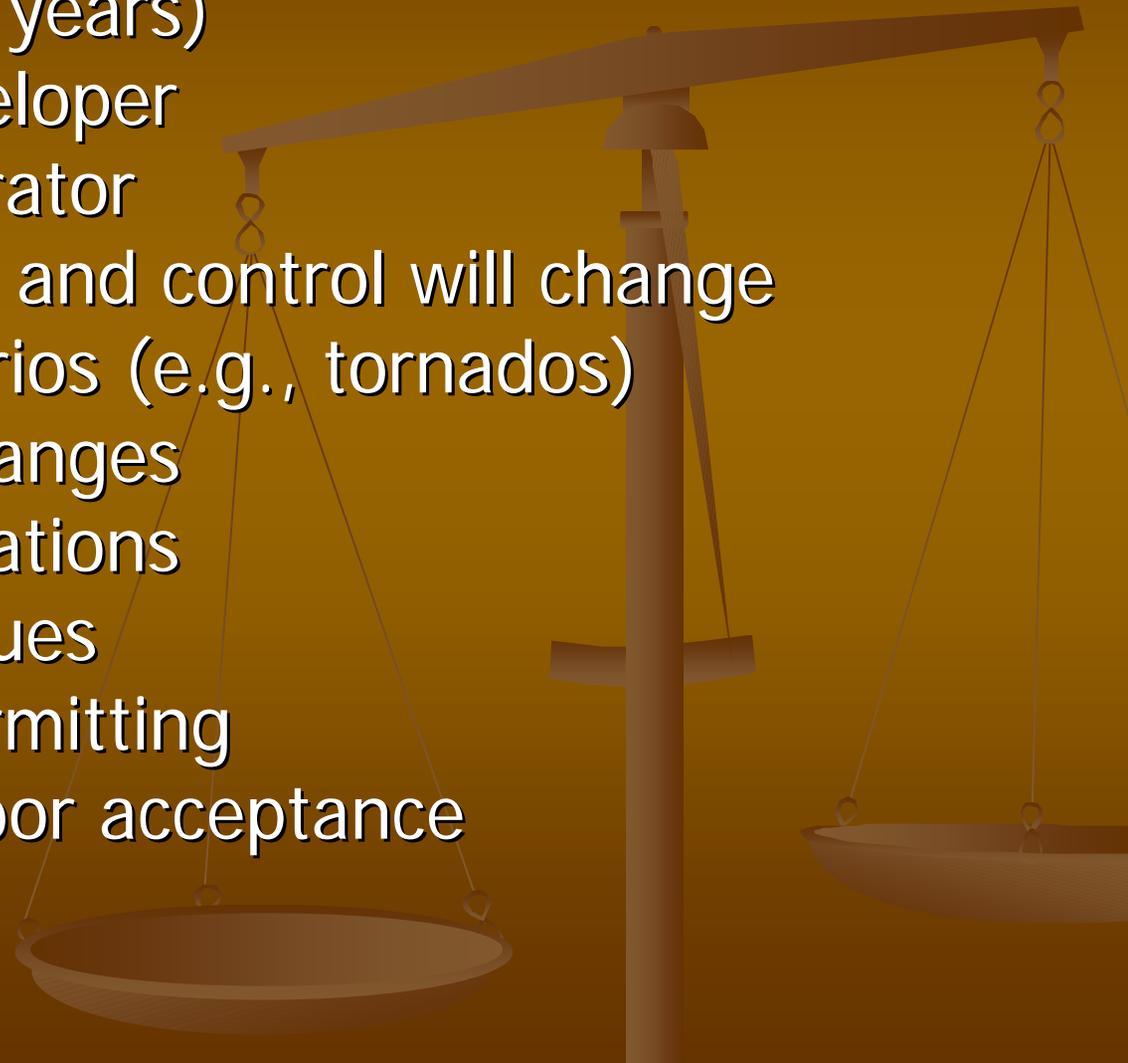
Wind Energy Contract Provisions

- 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?

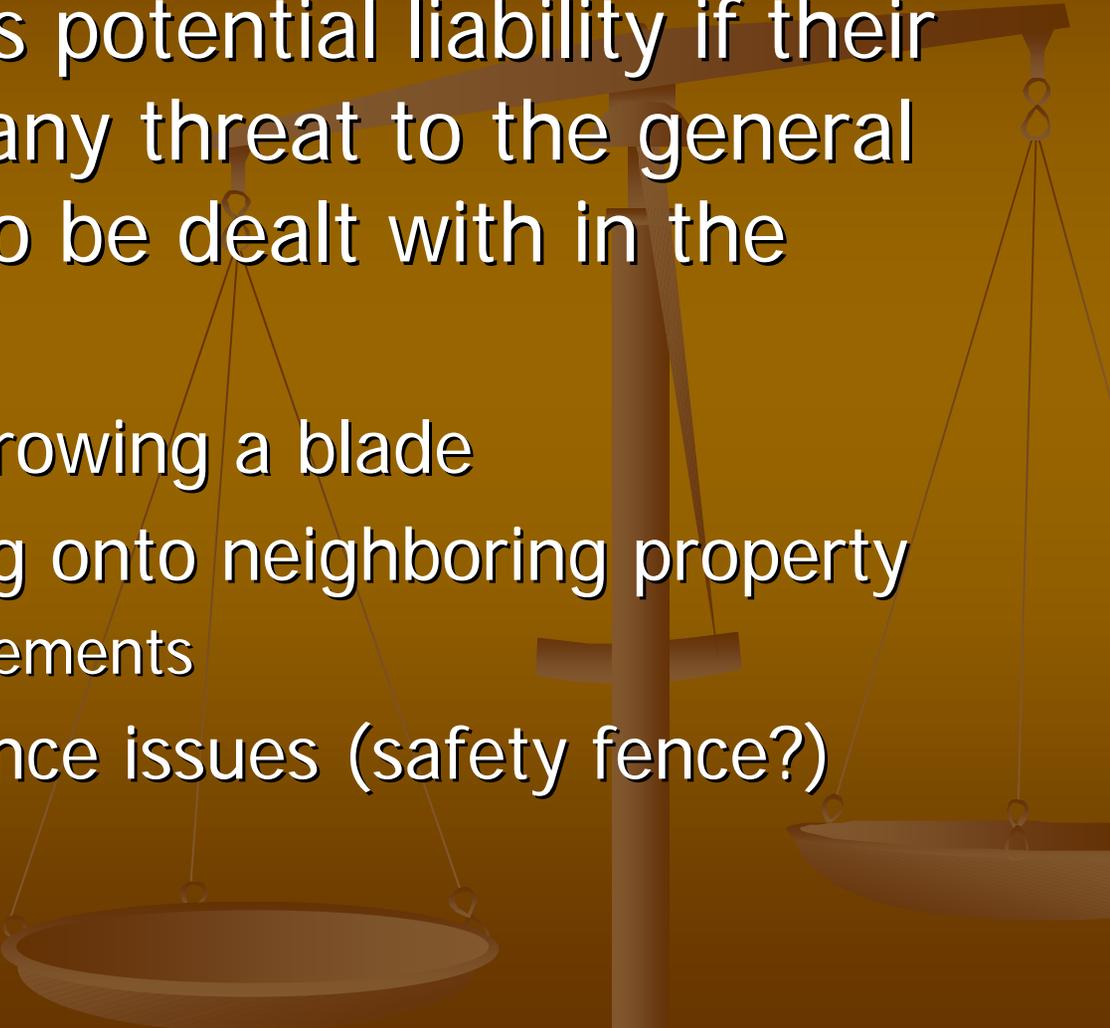


Risk Evaluation for Landowners

- 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

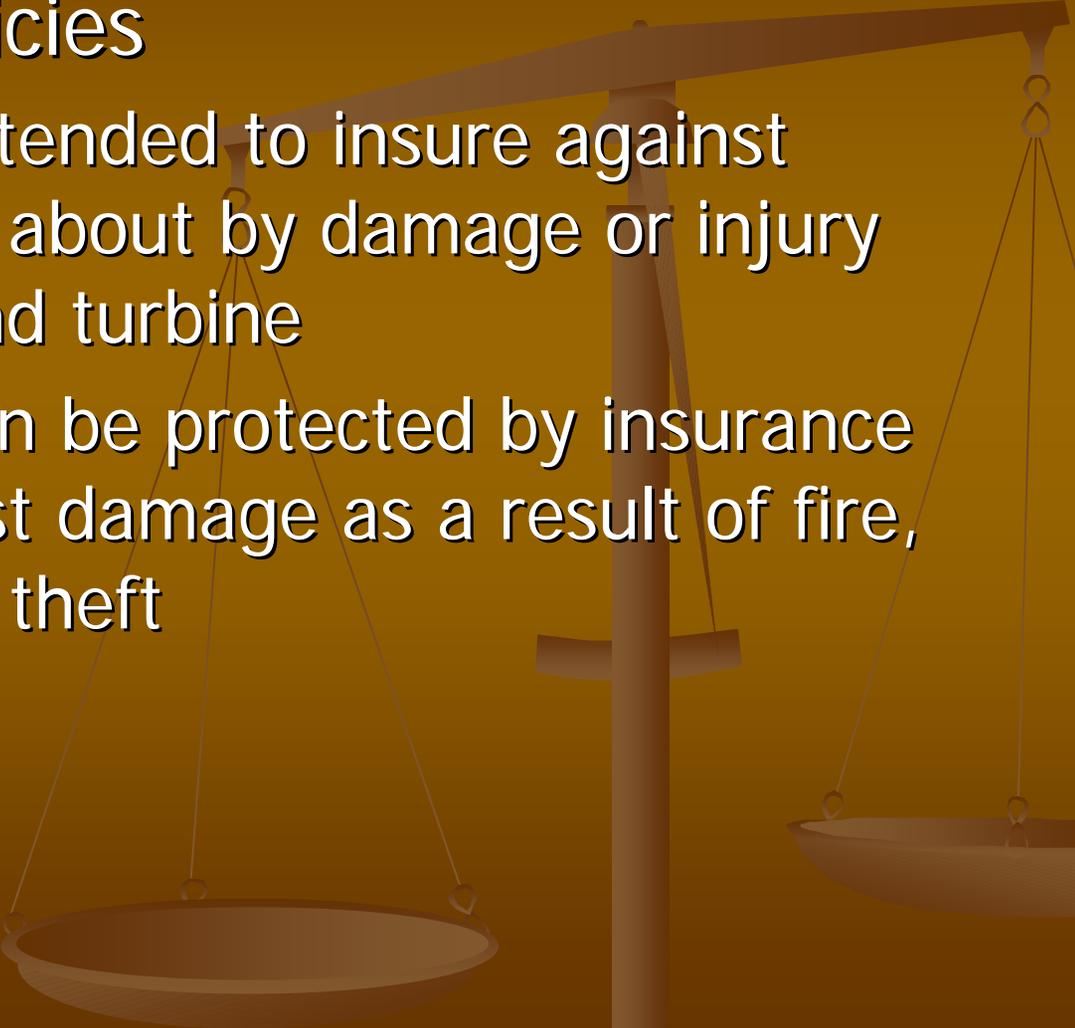


Liability and Insurance



- 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

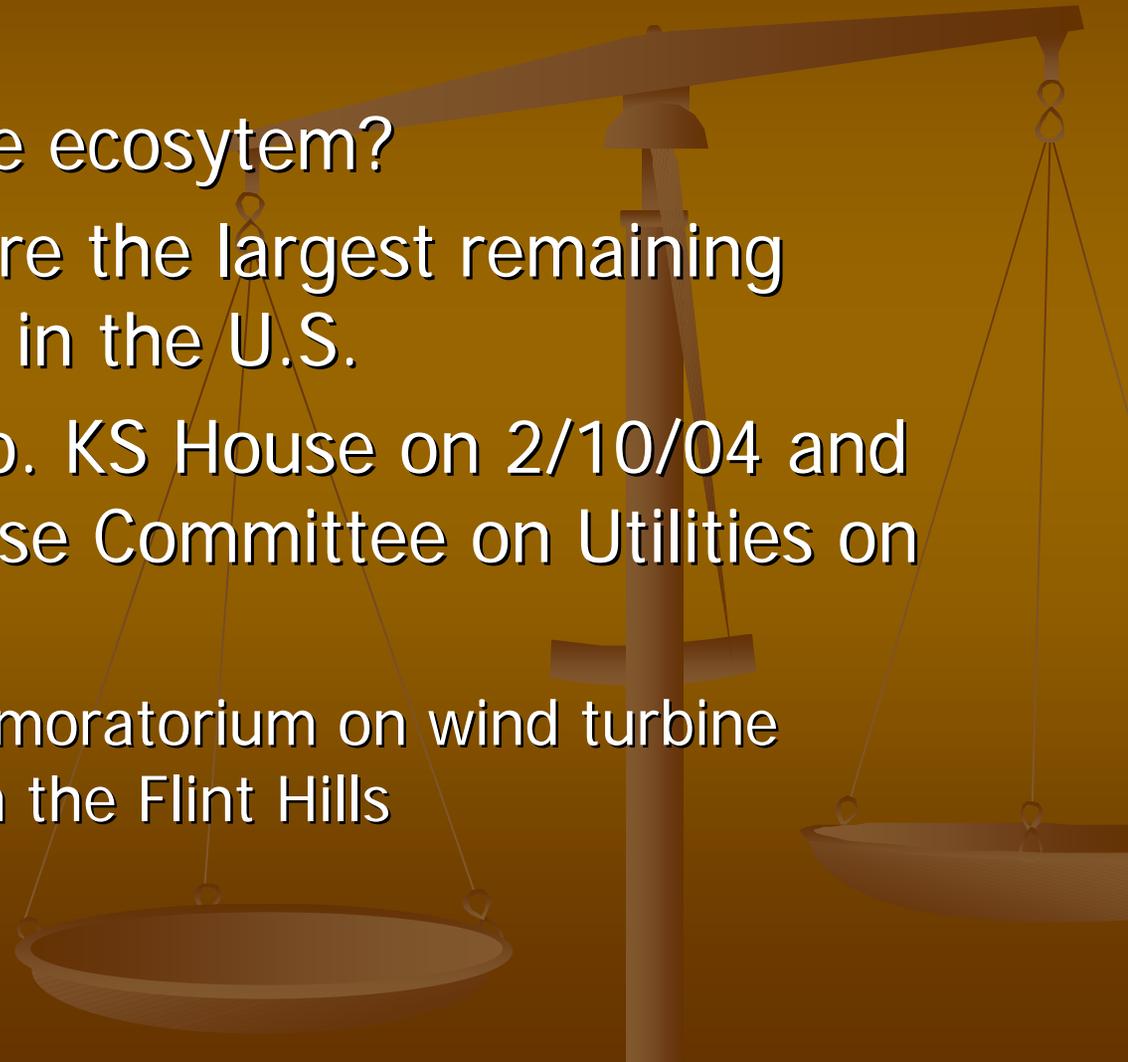


- Homeowner policies
 - Many can be extended to insure against liability brought about by damage or injury caused by a wind turbine
 - Wind turbine can be protected by insurance coverage against damage as a result of fire, lightning, ice or theft

Environmental Concerns

■ Flint Hills

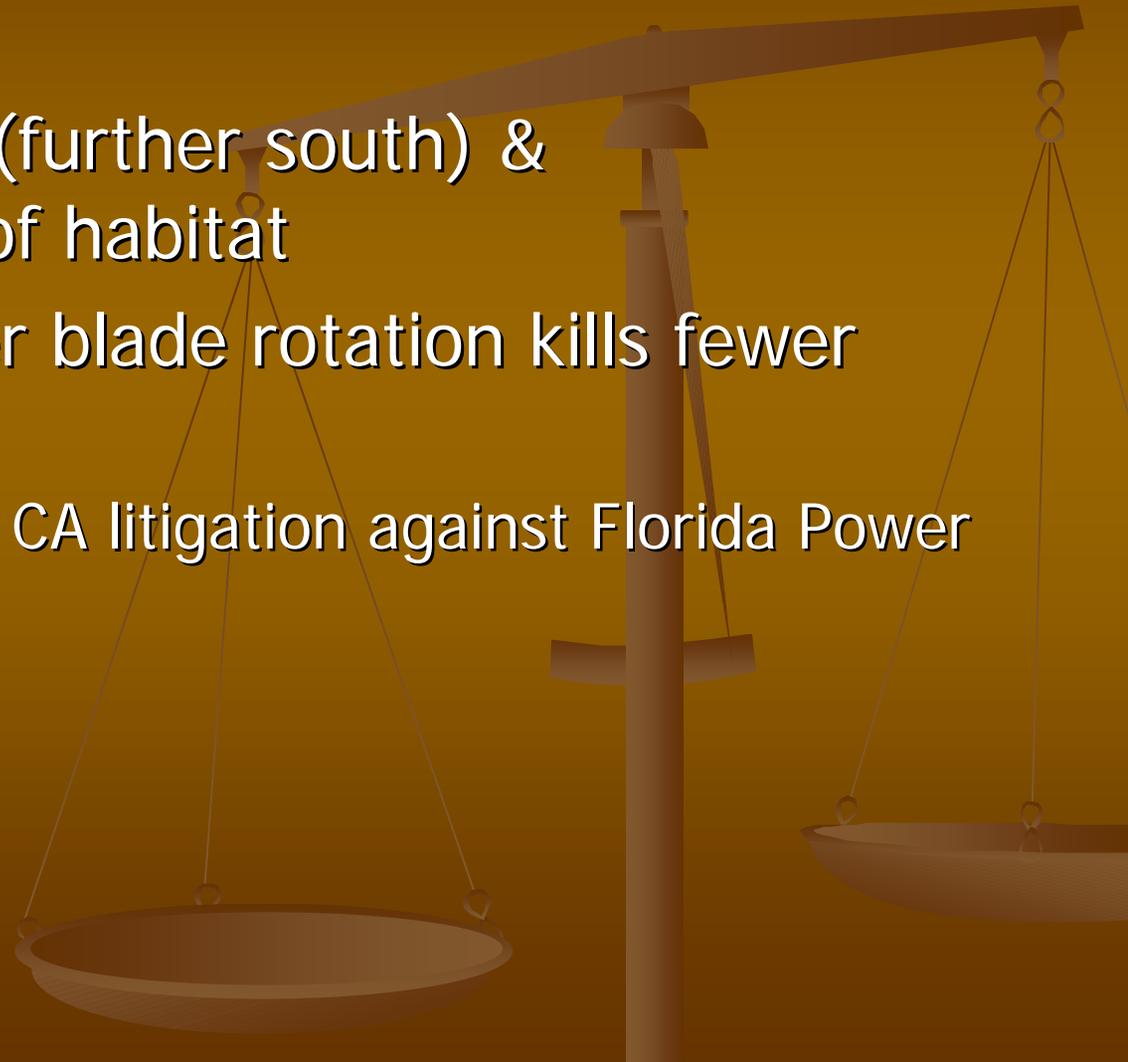
- Threat to prairie ecosystem?
- The Flint Hills are the largest remaining tallgrass prairie in the U.S.
- H.B. 2799 (intro. KS House on 2/10/04 and referred to House Committee on Utilities on 2/11/04
 - Would place a moratorium on wind turbine development in the Flint Hills



Environmental Concerns

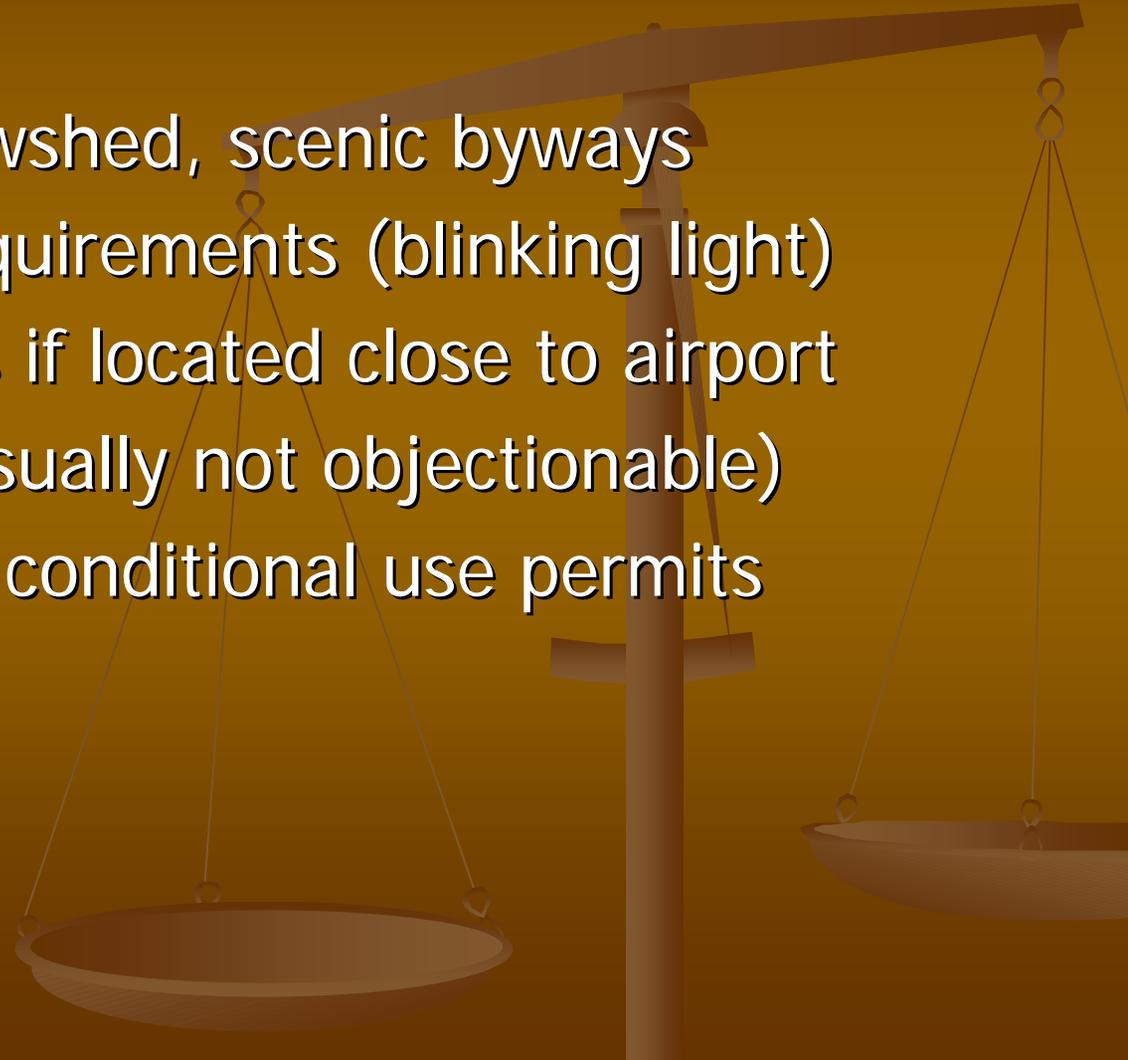
■ Avian issues

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



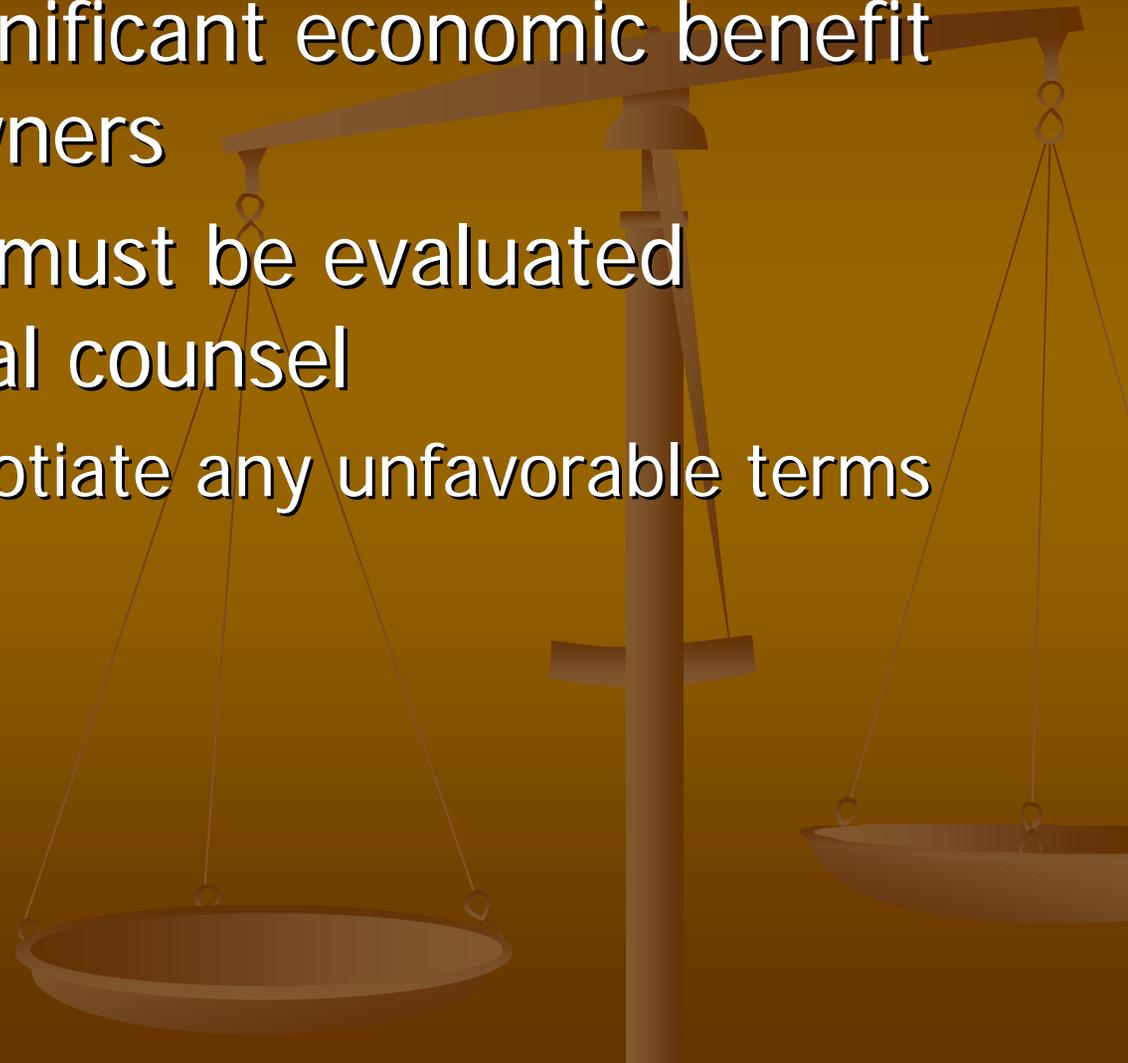
Environmental Concerns

- 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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