

Memorandum 2020-12

**Eminent Domain: Pre-Condemnation Activities
(Draft Revised Tentative Recommendation)**

In 1975, the Legislature enacted a comprehensive recodification of eminent domain law, on the Commission's¹ recommendation.² In this study, the Commission is considering one aspect of that law, the compensation of a property owner for losses caused by a condemnor's actions before an eminent domain action is commenced.

This memorandum presents a staff draft of a revised³ tentative recommendation on that subject, incorporating all decisions the Commission has made in the study to date. Once approved by the Commission, the revised tentative recommendation would be circulated for public comment to assist the Commission in later preparing a final recommendation for submission to the Legislature.

Unless otherwise indicated, all statutory references in this memorandum are to the Code of Civil Procedure.

PROPOSED REFORMS

The attached draft implements all of the Commission decisions in this study to date. Specifically, it proposes that the Eminent Domain Law be amended to make the following improvements to existing law:

- Codify the holding of *Property Reserve Inc. v. Superior Court*,⁴ to make clear that a property owner has a waivable right to a jury

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601 (1974); 1975 Cal. Stat. ch. 1275.

3. An initial tentative recommendation in this study, addressing only a single issue, was circulated for public comment in 2017.

4. *Property Reserve Inc. v. Superior Court*, 1 Cal. 5th 151 (2016).

trial determination of the amount of compensation owed for losses caused by pre-condemnation activity.

- Provide that a property owner who is entitled to compensation under Section 1245.060 for losses due to pre-condemnation activity has the option of instead seeking that compensation as a defendant in an eminent domain action related to that property.
- Codify California case law providing that a property owner may seek compensation for “Klopping damages” as a defendant in an eminent domain action.
- Make clear that a property owner who seeks compensation for either kind of pre-condemnation loss as a defendant in an eminent domain action must plead the claim for that compensation in the owner’s answer.

The attached draft also proposes a number of technical revisions, to conform existing law to the changes described above and to make technical stylistic improvements. Those technical revisions will not be further discussed in this memorandum, but staff is happy to answer any questions about them at the upcoming Commission meeting.

In addition, the draft proposes a more substantive conforming revision to the existing statute. That revision is discussed below.

Separate Assessment of Compensation by Trier of Fact

After drafting language to implement the decisions noted above, the staff reviewed the remainder of the statutory Eminent Domain Law to evaluate whether any other provision in that statute would need to be revised to conform to the proposed reforms.

The staff found one such provision, Section 1260.230. That section requires that the trier of fact in an eminent domain action separately assess distinct types of compensation that are claimed by the property owner.

Because the Commission’s recommendation would add two new types of compensation that could be claimed by the property owner, Section 1260.230 should be revised to also require separate assessment of each of those types of compensation. That would extend the existing policy of requiring separate assessment by the trier of fact, so that it would apply to the new types of compensation that could be claimed in an eminent domain action. The staff sees no policy or practical reason to do otherwise. **Does the Commission agree with that conforming change?**

NEXT STEP

The Commission now needs to decide whether to approve the staff draft, with or without changes, as a revised tentative recommendation to be circulated for public comment.

Respectfully submitted,

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CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

REVISED TENTATIVE RECOMMENDATION

Eminent Domain: Pre-Condemnation Activities

March 2020

The purpose of this revised tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the revised tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS REVISED TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **May 29, 2020.**

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this revised tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF REVISED TENTATIVE RECOMMENDATION

California's statutory Eminent Domain Law includes comprehensive procedures relating to the taking of private property for public use. One part of that law governs a potential condemnor's entry and activity on private property for the purpose of evaluating suitability for public use. That kind of pre-condemnation activity can itself constitute a taking, entitling the property owner to compensation.

California case law has established that a property owner may also be entitled to compensation for losses caused by a condemnor's unreasonable actions before an eminent domain proceeding has commenced. This kind of loss is known colloquially as "Klopping damages."

The Law Revision Commission tentatively recommends that the Eminent Domain Law be revised to make the following improvements related to compensation for pre-condemnation losses:

- Codify the holding of *Property Reserve Inc. v. Superior Court*,¹ to make clear that a property owner has a waivable right to a jury trial determination of the amount of compensation owed for losses caused by pre-condemnation activity.
- Provide that a property owner who is entitled to compensation under Code of Civil Procedure Section 1245.060 for losses due to pre-condemnation activity has the option of instead seeking that compensation as a defendant in an eminent domain action related to that property.
- Codify California case law providing that a property owner may seek compensation for Klopping damages as a defendant in an eminent domain action.
- Make clear that a property owner who seeks compensation for either kind of pre-condemnation loss as a defendant in an eminent domain action must plead the claim for that compensation in the owner's answer.

Other technical or conforming revisions are also proposed.

This tentative recommendation was prepared pursuant to Resolution Chapter 158 of the Statutes of 2018.

1. *Property Reserve Inc. v. Superior Court*, 1 Cal. 5th 151 (2016).

EMINENT DOMAIN: PRE-CONDEMNATION ACTIVITIES

1 INTRODUCTION

2 The “takings clause” of the California Constitution provides that private
3 property shall not be taken for a public purpose without just compensation.²

4 California’s statutory Eminent Domain Law³ establishes a procedure that can be
5 used to take private property for public use.⁴ Consistent with the takings clause,
6 that law requires that the property owner receive just compensation for the
7 property taken.⁵

8 A property owner may also be entitled to compensation for losses suffered as a
9 result of a condemnor’s actions prior to commencing an eminent domain action.
10 This tentative recommendation considers two ways in which that may arise:

11 (1) *Pre-condemnation activity*. Under existing statutory law, a condemnor who
12 is considering taking private property for a public use may petition the court
13 for permission to enter the property and conduct testing to evaluate its
14 suitability.⁶ As a condition of such entry, the condemnor must deposit with
15 the court an amount determined sufficient by the court to compensate the
16 property owner for losses caused by the pre-condemnation activity.⁷ If such
17 losses do occur, the property owner may seek compensation by pursuing a
18 civil action, or by applying to the court for an award from the amount
19 deposited by the condemnor.⁸

20 (2) *“Klopping” damages*. In *Klopping v. City of Whittier*,⁹ the California
21 Supreme Court held that a property owner was entitled to seek
22 compensation for loss caused by a condemnor’s unreasonable delay
23 following an announcement of intent to commence an eminent domain
24 action, or by other unreasonable conduct by the condemnor, prior to
25 commencing the eminent domain action.¹⁰

2. Cal. Const. art. I, § 19(a) (“Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.”).

3. Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure.

4. See Chapter 3 (commencing with Section 1240.010) of Title 7 of Part 3 of the Code of Civil Procedure.

5. See Chapter 9 (commencing with Section 1263.010) of Title 7 of Part 3 of the Code of Civil Procedure.

6. Code Civ. Proc. §§ 1245.010-1245.030.

7. Code Civ. Proc. § 1245.030(c).

8. Code Civ. Proc. §§ 1245.060(a), (c).

9. *Klopping v. City of Whittier*, 8 Cal.3d 39 (1972).

10. *Id.* at 52.

1 The Law Revision Commission tentatively recommends that the Eminent
2 Domain Law be revised to make the following improvements related to
3 compensation for pre-condemnation losses:

- 4 • Codify the holding of *Property Reserve Inc. v. Superior Court*,¹¹ to make
5 clear that a property owner has a waivable right to a jury trial determination
6 of the amount of compensation owed for losses caused by pre-condemnation
7 activity.
- 8 • Provide that a property owner who is entitled to compensation under Code
9 of Civil Procedure Section 1245.060 for losses due to pre-condemnation
10 activity has the option of instead seeking that compensation as a defendant
11 in an eminent domain action related to that property.
- 12 • Codify California case law providing that a property owner may seek
13 compensation for Klogging damages as a defendant in an eminent domain
14 action.
- 15 • Make clear that a property owner who seeks compensation for either kind of
16 pre-condemnation loss as a defendant in an eminent domain action must
17 plead the claim for that compensation in the owner’s answer.

18 RIGHT TO JURY TRIAL

19 In *Property Reserve*,¹² the California Supreme Court considered whether
20 activity authorized by California’s statutory pre-condemnation procedure can
21 constitute a “taking” of an owner’s property for purposes of the “takings clause”
22 of the California Constitution, and if so, whether the procedure is compatible with
23 constitutional requirements.

24 The court first held that pre-condemnation activity authorized by the statute can
25 result in a taking under the California takings clause:

26 [S]ome pre-condemnation entry and testing activities — when they involve
27 operations that will result in actual injury to, or substantial interference with the
28 possession and use of, the entered property — have been viewed as triggering the
29 protections of the California takings clause.¹³

30 The court then considered whether the pre-condemnation activity statute
31 satisfied the requirements of the California takings clause. The court held that it
32 did, with one exception. Specifically, the statute violates the California takings
33 clause because it does not provide for a jury determination, unless waived, of the
34 amount of compensation due the property owner for a pre-condemnation
35 “taking.”¹⁴

11. *Property Reserve Inc. v. Superior Court*, 1 Cal. 5th 151 (2016).

12. *Id.*

13. *Id.* at 192.

14. *Id.* at 208.

1 Rather than invalidate the statute based on that infirmity, the court reformed it:

2 Although we conclude that section 1245.060 as presently written does not
3 afford a property owner the right to have a jury determine the amount of
4 compensation within the precondemnation proceeding itself, and further agree
5 with the Court of Appeal that the statute is constitutionally deficient in this
6 respect, in our view the appropriate remedy for this constitutional flaw is not to
7 invalidate the precondemnation entry and testing statutes as applied to any
8 precondemnation testing activity that rises to the level of a taking or damaging of
9 property for purposes of the state takings clause. Instead, we conclude that the
10 appropriate remedy for this constitutional flaw is to reform the precondemnation
11 entry statutes so as to afford the property owner the option of obtaining a jury trial
12 on damages at the proceeding prescribed by section 1245.060, subdivision (c).¹⁵

13 The court's reformation of the compensation provision cured the constitutional
14 deficiency in the pre-condemnation statute, but could create a serious practical
15 problem. There is now a significant substantive inconsistency between the text of
16 that compensation provision, and its meaning as construed by the California
17 Supreme Court. That could lead to confusion and error.

18 To avoid that problem, the Commission recommends that Code of Civil
19 Procedure Section 1245.060(c) be revised to codify the court's reformation of that
20 provision.

21 COMPENSATION IN EMINENT DOMAIN PROCEEDING

22 **Pre-Condensation Activity**

23 Code of Civil Procedure Section 1245.060 provides two ways in which a
24 property owner can be compensated for losses caused by pre-condemnation
25 activity:

- 26 (1) Bring a civil action against the condemnor.
- 27 (2) Apply to the court for compensation from the amount deposited for that
28 purpose.

29 There may be situations in which it would be more convenient and efficient for
30 the property owner to forego those options, and instead seek compensation for pre-
31 condemnation loss in a subsequent eminent domain action. Such an approach
32 could conserve judicial resources, especially if the property owner intends to
33 exercise the right to have a jury determine the amount of compensation due the
34 owner for losses caused by the pre-condemnation activity.

35 Although Code of Civil Procedure Section 1245.060 is silent on the point, the
36 Commission's Comment to that provision indicates that damages for pre-
37 condemnation activity can be recovered in an eminent domain action.¹⁶ That

15. *Id.*

16. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1742 (1974).

1 approach would also be consistent with the existing treatment of Klopping
2 damages, which may be sought in an eminent domain action commenced after the
3 condemnor's unreasonable conduct.¹⁷

4 The Commission sees no policy reason to preclude the recovery of
5 compensation for losses caused by pre-condemnation activity in the subsequent
6 eminent domain proceeding. Nor does the Commission see any practical problem
7 that would result from that approach.

8 For the reasons discussed above, the Commission recommends that the law be
9 revised to expressly allow a property owner to seek compensation for losses
10 caused by pre-condemnation activity in an eminent domain action commenced by
11 the condemnor.¹⁸ This would be an optional alternative to seeking compensation
12 either in a civil action against the condemnor, or from the amount deposited with
13 the court by the condemnor prior to engaging in the pre-condemnation activity.

14 **Klopping Damages**

15 Courts have consistently held that Klopping damages may be recovered in an
16 eminent domain action.¹⁹

17 The Commission recommends that the Eminent Domain Law be revised to
18 codify that rule.

19 **FORM OF PLEADING**

20 If an owner is authorized to seek compensation for pre-condemnation loss in an
21 eminent domain action, it would be helpful to specify the form of pleading the
22 owner must use to assert that claim. As discussed below, there is likely to be some
23 confusion on this point.

24 In the Comment to Code of Civil Procedure Section 1245.060, the Commission
25 states that compensation for losses caused by pre-condemnation activity may only
26 be sought in a subsequent eminent domain proceeding by means of a cross-
27 complaint.²⁰ As authority for that position, the Commission cites Code of Civil
28 Procedure Section 426.70 and the Comment to that section.

29 Section 426.70 was added on the Commission's recommendation, to make the
30 law on compulsory cross-complaints applicable to eminent domain proceedings.²¹
31 The Comment to Section 426.70 explains the purpose of the addition:

17. See *Klopping v. City of Whittier*, 8 Cal. 3d 39, 58 (1972).

18. See proposed Code Civ. Proc. § 1245.060(a) *infra*.

19. See *Redevelopment Agency v. Contra Costa Theatre, Inc.*, 135 Cal. App. 3d 73 (1982); *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.*, 91 Cal. App.3d 332 (1979); *Richmond Redevelopment Agency v. Western Title Guaranty Co.*, 48 Cal. App. 3d 343 (1975).

20. *The Eminent Domain Law*, 12 Cal. L. Revision Comm'n Reports 1601, 1742 (1974).

21. *Id.* at 1889.

1 Subdivision (a) of Section 426.70 — by making this article applicable to
2 eminent domain proceedings — codifies the principle that a related cause of
3 action must be asserted against the plaintiff in an eminent domain action or it is
4 barred. *Klopping v. City of Whittier*, 8 Cal.3d 39, 58, 500 P.2d 1345, 1360, 104
5 Cal. Rptr. 1, 16 (1972) (damages caused by pre-condemnation announcements).
6 The related cause must be asserted as a cross-complaint. See Section 426.30.²²

7 Despite that guidance, courts have subsequently held that Klopping damages
8 should be pled as part of the property owner’s answer in an eminent domain
9 action.²³ Pleading Klopping damages in a cross-complaint has been specifically
10 considered and rejected.²⁴

11 The Commission sees merit in providing that claims related to pre-
12 condemnation activity be pled in the defendant’s answer. This would minimize the
13 number of pleadings required (by avoiding the need for a cross-complaint and an
14 answer to that cross-complaint).

15 Moreover, it would make sense for the procedure that is used to claim
16 compensation for pre-condemnation activity losses to parallel the existing practice
17 that governs Klopping damages. Both types of claims involve a loss suffered as a
18 result of the condemnor’s actions before commencing an eminent domain action.

19 The Commission recommends that Code of Civil Procedure Section 1250.320
20 be revised to require that a claim by a property owner in an eminent domain action
21 for losses caused by pre-condemnation activity be included in the owner’s answer.
22 Further, to avoid any confusion on the point, the Commission recommends that
23 Section 1250.320 codify existing case law and require Klopping damages to also
24 be pled in the owner’s answer.

25 TECHNICAL AND MINOR SUBSTANTIVE REVISIONS

26 The tentative recommendation also proposes a small number of technical and
27 minor substantive amendments, to follow standard drafting practices and conform
28 to the reforms discussed above.²⁵

29 The most significant conforming revision is to Code of Civil Procedure Section
30 1260.230, a provision that requires the trier of fact in an eminent domain action to
31 separately assess distinct types of compensation that are claimed by the property
32 owner. Because the Commission’s recommendation would add two new types of
33 compensation that could be claimed by the property owner, the recommendation
34 proposes to revise Section 1260.230 to require separate assessment of each of
35 those types of compensation. That would extend the existing policy of requiring

22. *Id.*

23. See *Redevelopment Agency*, 135 Cal. App. 3d at 79, n.2; *People ex rel. Dept. Pub. Wks.*, 91 Cal. App.3d at 352-53; *Richmond Redevelopment Agency*, 48 Cal. App. 3d at 350.

24. *Id.*

25. See proposed Code Civ. Proc. §§ 1245.020, 1245.060(a), 1245.060(d), 1250.320(b), 1260.230(d) and (e), *infra*.

1 separate assessment by the trier of fact, so that it would apply to the new types of
2 compensation that could be claimed in an eminent domain action.

3 **REQUEST FOR PUBLIC COMMENT**

4 The Commission seeks public comment on its tentative recommendation.
5 Comments supporting the proposed approach are just as important as comments
6 suggesting changes to that approach or expressing other views.

PROPOSED LEGISLATION

1 **Code Civ. Proc. § 1245.020 (amended). Entry**

2 SECTION 1. Section 1245.020 of the Code of Civil Procedure is amended to
3 read:

4 1245.020. In any case in which the entry and activities mentioned in Section
5 1245.010 will subject the person having the power of eminent domain to liability
6 under Section 1245.060, before making ~~such~~ entry and undertaking ~~such~~ those
7 activities, the person shall secure at least one of the following:

8 (a) The written consent of the owner to enter upon ~~his~~ the owner's property and
9 to undertake ~~such activities; or those activities.~~

10 (b) An order for entry from the superior court in accordance with Section
11 1245.030.

12 **Comment.** Section 1245.020 is amended to make technical corrections.

13 **Code Civ. Proc. § 1245.060 (amended). Compensation**

14 SEC. _____. Section 1245.060 of the Code of Civil Procedure is amended to read:

15 1245.060. (a) If the entry and activities upon property cause actual damage to or
16 substantial interference with the possession or use of the property, whether or not a
17 claim has been presented in compliance with Part 3 (commencing with Section
18 900) of ~~Division~~ Division 3.6 of Title 1 of the Government Code, the owner may
19 recover for ~~such~~ that damage or interference in a civil action, as a defendant in an
20 eminent domain action affecting the property, or by application to the court under
21 subdivision (c).

22 (b) The prevailing claimant in an action or proceeding under this section shall be
23 awarded ~~his~~ the claimant's costs and, if the court finds that any of the following
24 occurred, ~~his~~ the claimant's litigation expenses incurred in proceedings under this
25 article:

26 (1) The entry was unlawful.

27 (2) The entry was lawful but the activities upon the property were abusive or
28 lacking in due regard for the interests of the owner.

29 (3) There was a failure substantially to comply with the terms of an order made
30 under Section 1245.030 or 1245.040.

31 (c) If funds are on deposit under this article, upon application of the owner, the
32 court shall determine and award the amount the owner is entitled to recover under
33 this section and shall order ~~such~~ that amount paid out of the funds on deposit. If
34 the funds on deposit are insufficient to pay the full amount of the award, the court
35 shall enter judgment for the unpaid portion. In a proceeding under this subdivision,
36 the owner has a right to a jury trial, unless waived, on the amount of compensation
37 for actual damage to or substantial interference with the possession or use of the
38 property.

1 (d) Nothing in this section affects the availability of any other remedy the owner
2 may have for the damaging of ~~his~~ the owner's property.

3 **Comment.** Subdivision (a) of Section 1245.060 is amended to give the property owner the
4 option of seeking compensation otherwise available under this section in a subsequent eminent
5 domain action affecting the same property. See also Section 1250.320(c).

6 Subdivision (c) is amended to codify the judicial reform of that subdivision in Property
7 Reserve Inc. v. Superior Court, 1 Cal. 5th 151 (2016).

8 The section is also amended to make technical corrections.

9 **Code Civ. Proc. § 1250.320 (amended). Answer**

10 SEC. _____. Section 1250.320 of the Code of Civil Procedure is amended to read:

11 (a) The answer shall include a statement of the nature and extent of the interest
12 the defendant claims in the property described in the complaint.

13 (b) Where the defendant seeks compensation provided in Article 6 (commencing
14 with Section 1263.510) (goodwill) of Chapter 9, the answer shall include a
15 statement that the defendant claims compensation under Section 1263.510, but the
16 answer need not specify the amount of ~~such~~ that compensation.

17 (c) Where the defendant seeks compensation provided in Article 1 (commencing
18 with Section 1245.010) of Chapter 4, the answer shall include a statement that the
19 defendant claims compensation under Section 1245.060, but need not specify the
20 amount of that compensation.

21 (d) Where the defendant seeks compensation for loss caused by the plaintiff's
22 unreasonable conduct prior to commencing the eminent domain proceeding, the
23 answer shall include a statement that the defendant claims compensation for that
24 loss, but need not specify the amount of that compensation.

25 **Comment.** Subdivision (c) of Section 1250.320 is added to provide that any claim for losses
26 caused by pre-condemnation activity compensation must be included in the defendant's answer.
27 See also Section 1245.060(a) (compensation for loss caused by pre-condemnation activity may be
28 sought in eminent domain action, as alternative to other remedies provided in that section).

29 Subdivision (d) is added to provide that if any claim for loss caused by the plaintiff's
30 unreasonable conduct prior to commencing the eminent domain proceeding, must be included in
31 the defendant's answer. This subdivision does not establish or affect the scope of the defendant's
32 right to compensation for a plaintiff's unreasonable conduct. That right has been established by
33 case law. See *Klopping v. City of Whittier*, 8 Cal. 3d 39 (1972); *Redevelopment Agency v.*
34 *Contra Costa Theatre, Inc.*, 135 Cal. App. 3d 73 (1982); *People ex rel. Dept. Pub. Wks. v.*
35 *Peninsula Enterprises, Inc.*, 91 Cal. App.3d 332 (1979); *Richmond Redevelopment Agency v.*
36 *Western Title Guaranty Co.*, 48 Cal. App. 3d 343 (1975).

37 Section 1250.320 is also amended to make a technical correction.

38 **Code Civ. Proc. § 1260.230 (amended). Separate assessment of compensation**

39 SEC. _____. Section 1260.230 of the Code of Civil Procedure is amended to read:

40 As far as practicable, the trier of fact shall assess separately each of the
41 following:

42 (a) Compensation for the property taken as required by Article 4 (commencing
43 with Section 1263.310) of Chapter 9.

44 (b) Where the property acquired is part of a larger parcel:

1 (1) The amount of the damage, if any, to the remainder as required by Article 5
2 (commencing with Section 1263.410) of Chapter 9.

3 (2) The amount of the benefit, if any, to the remainder as required by Article 5
4 (commencing with Section 1263.410) of Chapter 9.

5 (c) Compensation for loss of goodwill, if any, as required by Article 6
6 (commencing with Section 1263.510) of Chapter 9.

7 (d) Compensation claimed under subdivision (c) of Section 1250.320.

8 (e) Compensation claimed under subdivision (d) of Section 1250.320.

9 **Comment.** Subdivision (d) of Section 1260.320 is added to require the trier of fact to
10 separately assess compensation for loss caused by the plaintiff's pre-condemnation activity, if
11 that compensation was claimed in the defendant's answer.

12 Subdivision (e) is added to require the trier of fact to separately assess compensation for loss
13 caused by the plaintiff's unreasonable conduct prior to commencing the eminent domain
14 proceeding, if that compensation was claimed in the defendant's answer.