February 7, 2025

The Honorable Russell Vought
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

To Director Vought,

We write to express deep concern regarding the ongoing challenges Colorado grantees face in accessing obligated grant funding. Grantees who have signed contracts with federal agencies and have initiated projects now struggle to cover outstanding expenses. This disruption threatens local economies and the workforce across the state, particularly in rural communities, where the funding freeze creates widespread ripple effects.

On January 27, 2025, the White House Office of Management and Budget (OMB) issued a memorandum directing all federal agencies to pause activities related to federal financial assistance obligations and disbursements. Although this memo was quickly rescinded—and its implementation blocked by a federal court—the consequences of this funding freeze effort and the ongoing funding blockages through various executive orders continue to harm state and local governments, Tribal Governments, private companies, and the people we serve across the state, raising serious concerns about the future of these funds in Colorado.

We have engaged extensively with agencies responsible for disbursing these funds, and heard directly from the agencies that the Administration's intention is to comply with the court order and dispense federal financial assistance. The Environment Protection Agency (EPA), for instance, has notified us that:

> "[p]ursuant to the recent Court directive in the case of *New York et al. v. Trump* addressing financial assistance, the Court directed that federal financial assistance shall not be paused based on the Office of Management and Budget's direction in the rescinded OMB memorandum or the President's Executive Orders while ongoing litigation proceeds or until otherwise directed by the Court. Consistent with the Order, the EPA's financial system will now enable the obligation of financial assistance. This includes programs within the Infrastructure Investment and Jobs Act and the Inflation Reduction Act, including federal financial assistance in the State and Tribal Assistance Grants, Brownfields, and Superfund. Additionally, the disbursement of funds from EPA's financial assistance programs is continuing."

Nonetheless, companies, local governments, state agencies and nonprofit organizations entitled to funds from a range of programs continue to report that they cannot access their federal grant portals or receive reimbursements due to them under their federal grant contracts despite both the court order and the promises from the agencies. In some cases, grants

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Sierra Club v. OMB, Case No.
25-cv- 05732-LJC
OMB 2025-825

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appear as "suspended" or are missing entirely from their grant system. These funds have already been allocated, contracts have been signed, and work has begun—yet invoices remain unpaid. It remains to be seen how and when the Administration will comply with the court orders to remove the barriers to this funding across all agencies and programs.

In Colorado alone, we are aware that more than $570 million in obligated funding remains inaccessible. The consequences of this continued uncertainty are severe and could have a devastating effect on the programs and people this funding supports. Companies are considering staff furloughs. Employers in rural communities are rescinding job offers. Long-standing Colorado businesses, some with over 40 years of operation, now struggle to pay contractors working on facility expansions.

We want to relay the urgency needed to resolve these funding access issues and ensure grantees receive the resources that were appropriated by Congress and promised by the Administration. Communities, businesses, and families depend on this. To ensure transparency in this ongoing process, we ask that you answer the following questions by Friday, February 14, 2025:

1. Please identify any forms of federal financial assistance for which federal funding disbursements did not promptly resume following the recission of OMB *Memorandum M-25-13*.
2. For all forms of federal financial assistance that did not promptly resume, please describe the steps you have taken or will take to resume the disbursement of funds in compliance with court orders. Also indicate when the disbursement of funds can be expected to resume.
3. For any disbursement of funds that have not been promptly resumed, what is your legal basis for continuing to withhold funds?
4. What steps have you taken to identify and communicate with grant recipients who have been negatively affected by this oversight?
5. What steps will you take to ensure that this issue does not occur again?

We appreciate your prompt attention to this matter.

Sincerely,

John Hickenlooper
United States Senator

Michael F. Bennet
United States Senator

Jared Polis
Governor of Colorado

Impoundment Control Act

Legal Framework

- An impoundment is any action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority.[1]
- The Impoundment Control Act of 1974 (ICA) provides authority for agencies to "impound" or in other words, withhold the obligation of funds in certain circumstances. Pub. L. No. 93–344, title X, 88 Stat. 297, 332 (July 12, 1974), *classified at* 2 U.S.C. §§ 681–688.
- The ICA separates impoundments into two exclusive categories: deferrals and proposed rescissions. The President must send a "special message" to both Houses of Congress.
    - Deferral
        - President wants to temporarily withhold obligation of funds (but not beyond the end of the fiscal year)
        - Permissible only to provide for contingencies, to achieve savings made possible by or through changes in requirements or greater efficiency of operations, or as specifically provided by law, but not for policy reasons
        - Any amount of budget authority deferred must be prudently obligated before the end of the period of availability
    - Rescission
        - President wants to permanently withhold funds from obligation and for Congress to cancel the budget authority
        - Permissible for basically any reason, including policy reasons
        - Any amount of budget authority proposed to be rescinded must be made available for obligation unless Congress, within 45 calendar days of continuous session, completes action on a rescission bill
- The ICA includes this disclaimer: "Nothing contained in this Act, or in any amendments made by this Act, shall be construed as . . . superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder." 2 U.S.C. § 681(4). The Comptroller General and the federal courts have interpreted this disclaimer to mean that the President may not use the ICA to withhold funds for statutorily required spending, like formula grants.[2]

What agency actions would violate the ICA?

- Withholding funds for an authorized reason, like to improve program efficiency, but failing to send a special message. OGC-94-17, Nov. 5, 1993; OGC-91-3, Feb. 5, 1991; B-237297.7, June 28, 1990.
- Refusing to obligate funds for policy reasons, unless the President sends a special message proposing rescission. *Train v. City of New York*, 420 U.S. 35 (1975) (President

[1] GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 61.

[2] OGC-82-9, Mar. 10, 1982 ("[T]he executive branch may not violate specific statutory requirements while it seeks to have Congress change those requirements"); B-205053, Feb. 5, 1982 (agency may not withhold funds allotted for formula grants because the authorizing law is a "mandatory spending statute"); OGC-81-14, July 30, 1981 (agency may not withhold mandatory grants to states pending congressional consideration of rescission proposal); *Maine v. Goldschmidt*, 494 F.Supp. 93 (D. Me. 1980) (lawsuit in response to President Carter's proposal to defer the obligation of grants to states under the Federal-Aid Highway Act).

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Nixon improperly directed EPA to disburse to the States only about half of funds appropriated for water pollution assistance).

- Setting aside funds or intentionally slowing spending in anticipation of proposed cancellations or rescissions of previously appropriated funds. B-329092, Dec. 12, 2017; B-308011, Aug. 4, 2006; B-307122, B-307122.2, Mar. 2, 2006.
- Proposing a deferral but the timing is such that "funds could be expected with reasonable certainty to lapse before they could be obligated, or would have to be obligated imprudently to avoid that consequence." 54 Comp. Gen. 453 (1974) (discussing GAO's reporting responsibilities when a deferral is misclassified). GAO has called these "de facto rescissions."
- Sending a special message late in the fiscal year to propose rescissions and, if Congress takes no action to enact the rescissions, failing to release the funds in sufficient time to allow for prudent obligation prior to their expiration. B-330330, Dec. 10, 2018.

What agency actions would not violate the ICA (and thus require no special message)?

- A *programmatic delay*—that is, programmatic issues leading to delays in obligation. Examples include:
  - Conducting interagency discussions to determine how best to execute a statute conferring substantial discretion on the President. B-331564.2, Mar. 17, 2022.
  - Pause to determine program needs in light of changed circumstances that warranted a change of plans. B-333110, June 15, 2021.
  - Review of funding opportunity announcements to ensure grants aligned with priorities of new administration. GAO-18-278 (2018).
  - Contract awarded at a lower-than-expected cost, leaving the agency insufficient time before expiration to obligate the remaining amount. B-335747, Apr. 22, 2024.
- Reprogramming amounts under a lump-sum appropriation. *Lincoln v. Vigil*, 508 U.S. 182 (1993) (agency use of its lump-sum appropriation is wholly committed to its discretion, notwithstanding indicia in legislative history).
- Delays arising from ineffective or unwise program administration. B-229326, Aug. 29, 1989 (an unlawful impoundment must be accompanied by clear intent to withhold budget authority).
- Improper obligation of funds, although this may violate other statutes. 64 Comp. Gen. 359 (1985) (NIH would violate the *bona fide* needs statute by using fiscal year appropriations for multiyear grants).
- Obligations at a pace that do not indicate any withholding of funds. B-331298, Dec. 23, 2020 (agency obligated amounts at a "robust yet measured pace that gives no indication that the agency withheld amounts from obligation"); *see also* B-335747, Apr. 22, 2024; B-320091, July 23, 2010.
- Small amounts of expired, unobligated balances consistent with sound funds control practices to allow for unanticipated liabilities that may arise in the future. B-333110, June 15, 2021.

What is GAO's role?

- The Comptroller General is required to review each special message and report findings to Congress as soon as practicable. The Comptroller General also ensures that the impoundment is not misclassified, such as a rescission proposal reported as a deferral.

- The Comptroller General must report to Congress any impoundment that the President has failed to report.[3]
- If an agency does not release budget authority for obligation, the Comptroller General may bring a civil action in the U.S. District Court for the District of Columbia to compel such action.[4]
- GAO monitors the status of affected funds and is available to prepare statistical summaries and analyses for Congress. B-330828, July 16, 2020 (rescission statistics from fiscal years 1974 through 2020); GAO-10-320T, Dec. 16, 2009 (use and impact of rescission procedures under the ICA).

[3] Since the enactment of the ICA, GAO's practice has been to review withholdings brought to its attention by concerned Members or Committees of Congress, intended recipients, or auditors. *See, e.g.*, B-320091, July 23, 2010; OGC-92-11, June 3, 1992.

[4] First, the Comptroller General must report the circumstances giving rise to the need to bring a civil action to the Speaker of the House and the President of the Senate. Then, he may not initiate an action until 25 days of continuous session of Congress have passed. The Comptroller General has filed suit on one occasion and filed 25-day reports on several other occasions. *Staats v. Lynn*, No. 75-0551 (D.D.C. 1975); OGC-86-7, Mar. 4, 1986 (25-day report). In each case, the funds were released.