investment in equipment and his business decisions and judgments materially affect his opportunity for profit or loss. In the overall picture, the contractor is not following the usual path of an employee, but that of an independent contractor.

For example: A sheepshearing contractor who operates in the following manner is considered an independent contractor and therefore an agricultural employer in his own right—he operates his own equipment including power supply from his own trucks or trailers, boards his shearing crew and has complete responsibility for their work and compensation, has complete charge of the sheep from the time they enter the shearing pen until they are shorn and turned out, and contracts with the rancher for the complete operation at an agreed rate per head.

(d) Whether or not a labor contractor or crew leader is found to be a bona fide independent contractor, his employees are considered jointly employed by him and the farmer who is using their labor if the farmer has the power to direct, control or supervise the work, or to determine the pay rates or method of payment. (*Hodgson* v. *Okada* (C.A. 10), 20 W.H. Cases 1107; *Hodgson* v. *Griffin & Brand* (C.A. 5) 20 W.H. Cases 1051; *Mitchell* v. *Hertzke*, 234 F. 2d 183, 12 W.H. Cases 877 (C.A. 10).) In a joint employment situation, the man-days of agricultural labor rendered are counted toward the man-days of such labor of each employer. Each employer is considered equally responsible for compliance with the Act. With respect to the recordkeeping regulations in 29 CFR 516.33, the employer who actually pays the employees will be considered primarily responsible for maintaining and preserving the records of hours worked and employees' earnings specified in paragraph (c) of § 516.33 of this chapter.

[37 FR 12084, June 17, 1972, as amended at 38 FR 27521, Oct. 4, 1973]

§ 780.332 Exchange of labor between farmers.

(a) Occasionally a farmer may help his neighbor with the harvest of his crop. For instance, Farmer B helps his neighbor Farmer A harvest his wheat. In return Farmer A helps Farmer B with the harvest at his farm.

(b) In a case where neighboring farmers exchange their own work under an arrangement where the work of one farmer is repaid by the labor of the other farmer and there is no monetary compensation for these services paid or contemplated, the Department of Labor would not assert that either farmer is an employee of the other.

(c) In addition, there may be instances where employees of a farmer also work for neighboring farmers during harvest time. For example, employees of Farmer A may help Farmer B with his harvest, and later, Farmer B's employees may help Farmer A. These employees would be included in the man-day count of the farmer for whom the work is performed on the day in question. Since the Act defines man-day to mean any day during which an employee performs any agricultural labor for not less than 1 hour, there may be days on which these employees work for both Farmer A and Farmer B for a ''man-day.'' In that event they would be included for that day in the man-day count of both Farmer A and Farmer B.

Subpart E—Employment in Agriculture or Irrigation That Is Exempted From the Overtime Pay Requirements Under Section 13(b)(12)

§ 780.400 Statutory provisions.

Section 13(b)(12) of the Fair Labor Standards Act exempts from the overtime provisions of section 7:

Any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agricultural purposes.

§ 780.401 General explanatory statement.

(a) Section 13(b)(12) of the Act contains the same wording as did section 13(a)(6) prior to the 1966 amendments. The effect of this is to provide a complete overtime exemption for any employee employed in ''agriculture'' who does not qualify for exemption under section 13(a)(6) (A), (B), (C), (D), and (E) of the 1966 amendments.

(b) In addition to exempting employees employed in agriculture, section 13(b)(12) also exempts from the overtime provisions of the Act employees employed in specified irrigation activities. Prior to the 1966 amendments these employees were exempt from the minimum wage and overtime pay requirements of the Act.

(c) For exempt employment in ''agriculture,'' see subpart B of this part.

§ 780.402 The general guides for applying the exemption.

(a) Like other exemptions provided by the Act, the section 13(b)(12) exemption is narrowly construed (*Phillips, Inc.* v. *Walling,* 334 U.S. 490; *Bowie* v. *Gonzalez,* 117 F. 2d 11; *Calaf* v. *Gonzalez,* 127 F. 2d 934; *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. 2d 52; *Fleming* v. *Swift & Co.,* 41 F. Supp. 825; *Miller Hatcheries* v. *Boyer,* 131 F. 2d 283; *Walling* v. *Friend,* 156 F. 2d 429; see also § 780.2 of subpart A of this part 780). An employer who claims the exemption has the burden of showing that it applies. (See § 780.2) The section 13(b)(12) exemption for employment in agriculture is intended to cover all agriculture, including ''extraordinary methods'' of agriculture as well as the more conventional ones and large operators as well as small ones. Nevertheless, it was meant to apply only to agriculture. It does not extend to processes that are more akin to manufacturing than to agriculture. Practices performed off the farm by nonfarmers are not within the exemption, except for the irrigation activities specifically described in section 13(b)(12). Practices performed by a farmer do not come within the exemption for agriculture if they are neither a part of farming nor performed by him as an incident to or in conjunction with his own farming operations. These principles have been well established by the courts in such cases as *Mitchell* v. *Budd,* 350 U.S. 473; *Maneja* v. *Waialua,* 349 U.S. 254; *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755; *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607; *Calaf* v. *Gonzalez,* 127 F. 2d 934; *Chapman* v. *Durkin,* 214 F. 2d 363, certiorari denied, 348 U.S. 897; *McComb* v. *Puerto Rico Tobacco Marketing Co-op. Ass'n.* 80 F. Supp. 953, 181 F. 2d 697.

(b) When the Congress, in the 1961 amendments, provided special exemptions for some activities which had been held not to be included in the exemption for agriculture (see subparts F and J of this part 780), it was made very clear that no implication of disagreement with ''the principles and tests governing the application of the present agriculture exemption as enunciated by the courts'' was intended (Statement of the Managers on the part of the House, Conference Report, H. Rept. No. 327, 87th Cong. first sess., p. 18). Accordingly, an employee is considered an exempt agricultural or irrigation employee if, but only if, his work falls clearly within the specific language of section 3(f) or section 13(b)(12).

§ 780.403 Employee basis of exemption under section 13(b)(12).

Section 13(b)(12) exempts ''any employee employed in * * *.'' It is clear from this language that it is the activities of the employee rather than those of his employer which ultimately determine the application of the exemption. Thus the exemption may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities. But the burden of effecting segregation between exempt and nonexempt work as between different groups of employees is upon the employer.

§ 780.404 Activities of the employer considered in some situations.

Although the activities of the individual employee, as distinguished from those of his employer, constitute the ultimate test for applying the exemption, it is necessary in some instances to examine the activities of the employer. For example, in resolving the status of the employees of an irrigation company for purposes of the agriculture exemption, the U.S. Supreme Court, found it necessary to consider the nature of the employer's activities (*Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755).